IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	:	11.07.2022
DELIVERED ON	:	02.09.2022

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH
THE HON'BLE MR. JUSTICE R. MAHADEVAN
THE HON'BLE MR. JUSTICE M. SUNDAR
THE HON'BLE MR. JUSTICE N. ANAND VENKATESH
AND
THE HON'BLE MR. JUSTICE A.A. NAKKIRAN

A.No.5445 of 2018
in
O.A. Nos.539 and 540 of 2021
in
G.W.O.P. No.599 of 2018

S. Annapoorni — Petitioner

v

K.Vijay — Respondent

G.W.O.P. filed under Sections 3, 7 and 10 read with Section 25 of the Guardians and Wards Act, 1890 and under Order XXI Rules 2,3 and 11 of the Original Side Rules read with Clause 17 of the Letters Patent, 1865.

For petitioner : Ms. B. Poongkhulali
For respondent : Mr. A.R. Palanisaamy
Advocates who assisted the Court
Mr. Arvind P. Datar, Sr. Adv.
for Mr. Rahul Unnikrishnan
Mr.R.Sankaranarayanan,Sr.Adv.
Mrs. Chitra Sampath, Sr. Adv.
: Mr. N. Jothi
Mr. N. Vijayaraghavan

Mr. S. Ramesh
Mrs. Geetha Ramaseshan
Mr. V.R. Kamalanathan
Mr. G. Raja Ganapathy
Mr. Sricharan Rangarajan
Mrs. Sudershana Sundar
Mr. K. Harishankar
Mr. K. Shakespeare
Mr. C.R. Raghavan
Mr. Sharath Chandran
Mr. Srinath Sridevan
Mr. A.K. Sriram
for M/s. Kailasam Associates
Mr. V. P Raman
Mr. P.J Rishikesh
Mr. Abdul Mubeen
Mr. E.V. Chandru
Mrs. Arulmozhi
Mr. Davidson
for Mr. Thomas Jacob
Mr. T.C.S. Raja Chockalingam
Mr. Vineet Subramani
Mr. R.Karthik
Mr. Karthik Ranganathan
for Ms. S. Brinda
Mrs. Kavitha Rameshwar
Mr. Naveen K Murthi
Advocates

ORDER

P.N PRAKASH, J.

To facilitate analysis and for ease of reference, the order has been divided into the following segments:

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2 This Special Bench has been constituted to answer the following questions referred by our learned brother, V. Parthiban, J. by an order dated 28.10.2021:

"(i) Whether the jurisdiction of the High Court, on its Original Side, over matters of child custody and guardianship is ousted, in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984 ? and

(ii) Whether the decision of a Full Bench of this Court in Mary Thomas Vs. Dr. K.E. Thomas (AIR 1990 Madras 100) is still good law?"

I. BACKDROP TO THE REFERENCE

3 The matter has come up before us in the following way:

a. The contesting parties, Annapoorni and Vijay, are the parents of two children, Priyanka and Anamika, aged 12 and 6 respectively. The children were in the custody of their mother at Bangalore. It is alleged that Vijay forcibly removed the elder daughter Priyanka from the custody of Annapoorni on 22.10.2017. The conjugal life between the parties appears to have run into rough weather resulting in the lodging of police complaints and other proceedings under the Protection of Women from Domestic Violence Act, 2005.

b. Vijay filed G.W.O.P.No.20 of 2017 before the District Court, Nilgiris, seeking permanent custody and guardianship of his daughters. He followed it up with a habeas corpus petition in H.C.P.No.976 of 2017. On 30.08.2017, a Division Bench of this Court disposed of the habeas

corpus petition directing the parties to work out their remedies before the District Court, Nilgiris in G.W.O.P.No.20 of 2017. However, on 19.09.2017, Vijay withdrew the aforesaid petition. In the meantime, Annapoorni approached this Court by way of the instant petition under Sections 3,7,10 and 25 of the Guardians and Wards Act, 1890, (for brevity "the G & W Act, 1890") read with Clause 17 of the Letters Patent seeking guardianship and custody of Priyanka.

c. A preliminary objection on the issue of jurisdiction was raised at the instance of Vijay on the footing that the children were born and were ordinarily residents of Coonoor in the Nilgiris District and that they were unilaterally removed to Bangalore at the instance of his wife, and that even assuming that the children were residing at Bangalore, this Court would not have jurisdiction as it was not the appropriate forum. The preliminary objection was overruled by a learned single judge of this Court, *vide* an order dated 08.03.2019 on the strength of two Division Bench judgments of this Court, *viz*., ***the Rajah of Vizianagaram v The Secretary of State for India [(1936) 44 L.W. 904]*** and ***Pamela Williams v Patrick Cyril Martin [AIR 1970 Mad 427]***.

d. Thereafter, the dockets reveal that the matter was heard from time to time, and that Priyanka and her parents were directed by this Court to undergo counselling in NIMHANS at Bangalore. When the matter came up before V. Parthiban, J., the learned judge, by an order dated 28.10.2021, observed that the basis of the custody and guardianship jurisdiction of this Court rested on the decision of a Full Bench of this Court in ***Mary Thomas v K.E. Thomas [AIR 1990 Mad 100]***, wherein, it was held that even after the constitution of the Family Court for the City of Madras, the original jurisdiction of the High Court, in respect of matters set out in the Explanation to Section 7(1) of the Family Courts Act, 1984 (for brevity "the FC Act, 1984") was not ousted by the provisions of that Act.

e. The learned judge also opined that the decision in ***Mary Thomas****, supra,* had not noted the interpretation of Section 2(4) of the Code of Civil Procedure, 1908, by the Supreme Court in ***Raja Soap Factory v S.P.Shantharaj (AIR 1965 SC 1449)***. It was observed that the definition of “District” in Section 2(4) of the Code of Civil Procedure included the High Court, on the original side, with the result that the jurisdictional exclusion contemplated under Section 8 of the FC Act, 1984, applied.

f. The learned judge further noted that the decision in ***Mary Thomas,*** *supra*, was initially followed by a Division Bench of the High Court of Bombay in ***Kanak Vinod Mehta v Vinod Dulerai Mehta (AIR 1991 Bom 337)***. However, this decision was subsequently overruled by a Full Bench of that Court in ***Romila Jaidev Shroff v Jaidev Rajnikant Shroff [AIR 2000 Bom 356 (FB)]***, holding that when the High Court exercises ordinary original civil jurisdiction in relation to the matters under the FC Act, 1984, it would be a District Court as understood therein, and would therefore, lose its jurisdiction. The decision in ***Romila Jaidev Shroff,*** *supra,* was subsequently followed by a Division Bench of the Delhi High Court in ***Amina Bharatram v Sumant Bharatram (AIR 2016 Del 171)***. The learned single judge also noted that the Bombay and Delhi High Courts have expressly cited and dissented from the view expressed by the Full Bench of this Court in ***Mary Thomas****, supra*.

g. The learned judge, at paragraph 34 of the order of reference, has pondered as to whether the general jurisdiction over infants under Clause 17 of the Letters Patent of the Madras High Court would stand excluded by the provisions of the FC Act, 1984. In view of the aforesaid legal position, the learned single judge thought it fit to frame the questions,

referred to in paragraph 2, *supra*, and place the matter before the Hon'ble Chief Justice for appropriate orders.

h. The Hon'ble Chief Justice, *vide* order dated 08.02.2022, constituted a Full Bench (P.N Prakash, M. Sundar, and A.A Nakkiran, JJ.) to consider the questions set out in the order of reference, *supra*. On 08.03.2022, the following order was passed by the said Full Bench:

> *"This Full Bench has been constituted by Hon'ble Chief Justice in and by order dated 08.02.2022 made on the administrative side pursuant to an order dated 28.10.2021 made by an Hon'ble Single Judge in Application No.5445 of 2018 and O.A.Nos.539 and 540 of 2021 in O.P.No.599 of 2018, wherein Hon'ble Single Judge has doubted the jurisdiction of the Original Side to entertain and decide child custody disputes owing to the advent of the Family Courts Act, 1984.*
>
> *2 Suffice to say that a Hon'ble Full Bench of this Court in and by order dated 06.10.1989 made in Mary Thomas Vs. K.E. Thomas reported in AIR 1990 Mad 100 held that jurisdiction of Original Side is not denuded owing to the advent of Family Courts Act, 1984 more particularly Section 7 thereat.*
>
> *3 Hon'ble Single Judge vide aforementioned order dated 28.10.2021 made in Application No.5445 of 2018 and O.A.Nos.539 and 540 of 2021 in O.P.No.599 of 2018 has formulated two questions for consideration by a Larger Bench and they are as follows:*
>
> > *'(i) Whether the jurisdiction of the High Court, on its Original Side, over matters of child custody and guardianship is ousted, in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984? and*

(ii) Whether the decision of a Full Bench of this Court in Mary Thomas Vs. Dr.K.E.Thomas (AIR 1990 Madras 100) is still good law?'

4 In the light of the narrative thus far, we are of the unanimous view that the aforementioned two reference questions pose a problem / difficulty. The difficulty is, Mary Thomas supra judgement has been rendered by another Hon'ble Full Bench, i.e., a Full Bench which is not only of co-equal strength but is also a Coordinate Bench. In this regard, ratio laid down in two case laws are of relevance.

5 The first case law is, Philip Jeyasingh Vs. The Joint Registrar of Co-operative Societies reported in 1992-1-LW 216, where a Full Bench of this Court held that a decision of Full Bench is binding on a subsequent Full Bench until it is overruled by a higher court or a larger Bench. The further ratio in Philip Jeyasingh case is, a decision of a Full Bench can be reconsidered only by a Larger Bench specially constituted by Hon'ble Chief Justice for deciding the question.

6 The second case law is Grasim Industries Limited case being Commissioner of Central Excise, Indore Vs. Grasim Industries Limited reported in (2016) 6 SCC 391, wherein a three Member Bench of Hon'ble Supreme Court had held that when two Coordinate Benches have taken diametrically opposite views, another Coordinate Bench should not venture into the issues raised and even attempt to express any opinion on the merits of either of the views. Hon'ble Supreme Court went on to hold that such a question should receive consideration of a Larger Bench.

7 In Grasim Industries Limited while interpreting Sections 3 and 4 of the Central Excise Act, 1944, two Coordinate three member Benches had taken diametrically opposite views in Union of India Vs. Bombay Tyre International Ltd. reported in (1984) 1 SCC 467 and CCE Vs. Acer India Ltd. reported in (2004) 8 SCC 173. When Grasim Industries Limited was heard by another Three Member Bench, the matter was placed before Hon'ble Chief Justice of India for appropriate directions holding

that the question should receive consideration of a Larger Bench.

8 In the light of the narrative thus far, Registry is directed to place this case file along with this proceedings of this Full Bench before Hon'ble Chief Justice and seek orders inter-alia about constitution of a Larger Bench."

i. Pursuant to the aforesaid order of the Full Bench, the papers were once again placed before the Hon'ble Chief Justice, who, by an administrative order dated 19.04.2022, constituted this Special Bench of five judges to authoritatively decide the questions set out in the order of reference.

4 Having regard to the fact that the reference raised important questions of general public importance touching the jurisdiction of this Court on the original side, we requested the learned members of the bar to assist us in resolving the knotty legal issues raised therein.

5 The wide spectrum of arguments at the bar presented themselves in two well defined camps: those in favour of retaining jurisdiction (the jurisdiction retention camp) captained by Mr. Arvind P. Datar, Senior Advocate and those who argued in support of ouster (the jurisdiction ouster camp) led by Mr. R. Sankaranarayanan, Senior Advocate. I have carefully considered the oral and written submissions that were filed by the learned counsel to assist the Court.

II MAINTAINABILITY OF THE REFERENCE

6 At the outset, it is necessary to clear the issue of maintainability which was raised by Mr. N. Jothi, Mr. Harishankar and Mr. Vineet Subramani, learned counsel. According to them, the learned single judge ought not to have made a reference as the decision in ***Mary Thomas,*** *supra*, had not been doubted by any subsequent decision. Placing reliance on the decisions in ***Philip Jeyasingh v The Joint Registrar of Cooperative Societies, Chidambaranar Region, Tuticorin and others [(1992) 1 LW 216]*** and ***Sundaravalli Ammal v The Government of Tamil Nadu [(2008) 2 CTC 241],*** it was contended that the reference need not be answered as the procedure adopted by the learned single judge was legally unsustainable. I am unable to countenance the aforesaid submission.

7 ***Philip Jeyasingh,*** *supra*, was a case where a Division Bench of this Court, in ***A. Natarajan v Registrar of Co-operative Societies [1991 2 L.W. 420]***, had opined that a Full Bench decision of this Court in ***Tamilarasan v Director of Handlooms and Textiles [1991 2 LW 409: 1991 WLR 828: 1992 (1) MLJ 54]***, was *per incuriam*. When the matter came up before D. Raju, J. (as he then was), the learned judge found himself unable to subscribe to the course of action adopted by the Division Bench. It was in these circumstances that a

Full Bench was constituted in ***Philip Jeyasingh,*** *supra*, which concluded that the Division Bench in ***Natarajan***, *supra*, ought to have made a reference to a Larger Bench if it was unable to agree with the previous Full Bench in ***Tamilarasan,*** *supra*.

8 Similarly, the decision in ***Sundaravalli Ammal,*** *supra,* was a case where the Division Bench had directed the constitution of a Full Bench thereby, bypassing the authority of the Hon'ble Chief Justice as the Master of the Roster. These decisions can have no application to the case on hand because the learned single judge, in all fairness, abided by judicial discipline when he directed the matter to be placed before the Hon'ble Chief Justice for appropriate action. This is clear from paragraph 40 of the order of reference, wherein, it is observed thus:

> *"Following these direct instances, this Court abides by judicial discipline and dignity to make a reference to the learned Chief Justice to consider and decide as deemed fit in the circumstances of the case."*

9 That apart, under Order I Rule 6 of the Appellate Side Rules of the Madras High Court, it is open to the Hon'ble Chief Justice to direct that any application, petition, suit or appeal shall be heard by a Full Bench. As noted and adverted to above, the matter was initially placed before a Full Bench and later, before this Bench, only pursuant to the directions of the Hon'ble Chief

Justice. In these circumstances, it would be completely indecorous for this Bench to throw up its hands and refuse to answer the questions specifically referred to it by the Hon'ble Chief Justice. I am fortified in arriving at this conclusion in the light of a Full Bench decision of this Court in ***Terminated Full-time Temporary Life Insurance Corporation Employees Welfare Association v. Senior Divisional Manager, Life Insurance Corporation of India Ltd. [(1992) 2 LLN 330]***, wherein, it was observed as under:

> *"At any rate, there is no substance in the contention of the petitioners' counsel that the reference is invalid. According to him, the question of law set out in the order of reference does not arise in these cases. That contention is clearly erroneous, inasmuch as the question of law does arise for consideration squarely. Apart from that, it is not necessary for the purpose of reference to a Full Bench that a question of law should arise. Under rule 6 of Order 1 of the Appellate Side Rules of this Court, the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench notwithstanding anything in the earlier rules. In these matters, the Hon'ble the Chief Justice had directed the writ petition to be heard by this Full Bench. It might have been at the instance of a Division Bench on the footing that a question of law had arisen which required to be decided by a Full Bench. <u>But, once the reference is made by the Hon'ble the Chief Justice, the competence of the Full Bench to hear the matter cannot be challenged on the ground that such a question of law does not arise.</u>"*
>
> *(emphasis supplied)*

For the aforesaid reasons, I find no substance in the plea assailing the maintainability of the reference.

III. SUBMISSIONS OF THE JURISDICTION RETENTION CAMP

10 It may now be apposite to set out, very briefly, a gist of the submissions that were made at the bar. Arguments on behalf of the jurisdiction retention camp were led by Mr. Arvind P. Datar, learned Senior Advocate, who contended, *inter alia*, as under:

a. The order of reference placed reliance on paragraph 3 of the decision of the Supreme Court in ***Raja Soap Factory***, *supra*, which was only the submission of the counsel in that case and not the ratio. Consequently, the learned single judge has misconstrued the actual ratio of the decision in ***Raja Soap Factory,*** *supra*. In any event, the decision in ***Raja Soap Factory,*** *supra,* had nothing to do with the Letters Patent as it was a decision from the Mysore High Court which, admittedly, had no original jurisdiction.

b. Section 2(4) CPC does not define the term "District Court". Demonstrating the application of the Waumbaugh test, he contended that the decision of the Supreme Court in ***Sri Jeyaram Educational Trust v A.G. Syed Mohideen [(2010) 2 SCC 513]*** is not an authority for the proposition that Section 2(4) CPC contained a definition of a "District Court". Consequently, the learned single judge was not right in treating Section 2(4) CPC as a definition for a District Court for the purpose of Sections 7 and 8 of the FC Act, 1984.

c. Adverting to the decision of the Constitution Bench of the Supreme Court in ***P.S. Sathappan v Andhra Bank [(2004) 11***

SCC 672], it was contended that the Letters Patent of a High Court has to be expressly excluded which was not the case under the FC Act, 1984. In this regard, Mr. Datar also took us through the decision in ***Vinita M. Khanolkar v Pragna M Pai [(1998) 1 SCC 500]*** and ***Sharda Devi v State of Bihar [(2002) 3 SCC 705]***, to drive home the point that the Letters Patent could not be impliedly excluded.

d. In the alternative, if the Letters Patent was to be impliedly excluded by a special enactment, such a law must be a complete code as was explained by the Supreme Court in ***Fuerst Day Lawson vs. Jindal Exports Ltd. [(2011) 8 SCC 333]***. A self-contained code is one which must necessarily deal with both substantive and procedural aspects of a subject matter. The FC Act, 1984, is merely a procedural law and cannot be construed as a complete code.

e. The jurisdiction of the High Court existing prior to the Constitution of India is preserved by Article 225 of the Constitution. He referred to the decision of the Supreme Court in ***M.V.Elisabeth v Harwan Investment and Trading Private Limited [(1993) Supp. 2 SCC 433]***, wherein, it was observed that the inherent jurisdiction of the Court cannot be atrophied by colonial statutes. It was, therefore, contended that the jurisdiction of this Court could not be curtailed by the FC Act, 1984.

f. The decision of the Bombay High Court in ***Romila Jaidev Shroff,*** *supra,* did not concern Clause 17 of the Letters Patent at all. Similarly, the decision of the Division Bench of the Delhi High Court in ***Amina Bharatram,*** *supra,* was a case under the Delhi High Court Act, 1966, and not under the Letters Patent. Consequently, these decisions are clearly distinguishable, and have no application to the case on hand.

g. Finally, Mr. Datar invoked the principle of *stare decisis* and contended that ***Mary Thomas,*** *supra,* need not be revisited as it has held the field for all these years.

11 Mrs. Chitra Sampath, learned Senior Advocate, contended, *inter alia*, as under:

a. The jurisdiction transferred to the Family Court merely comprised the jurisdiction that was being previously exercised by the District Court under various statutes. The legislature could not divest the power of the High Court which was not being exercised by the District Court.

b. The High Court, on its original side, is not a District Court under Section 2(4) of the CPC. Under the FC Act, 1984, there is no specific ouster of the jurisdiction of the High Court.

c. Clause (g) of the explanation to Section 7(1) of the FC Act, 1984, cannot be read in isolation, and must be treated as a part of one of the proceedings set out in clauses (a-f) of the explanation.

d. The FC Act, 1984, is not a complete code. The decision in ***Fuerst Day Lawson***, *supra*, is not applicable. Consequently, there could be no implied ouster of the jurisdiction under the Letters Patent.

e. The power of the High Court under Clause 17 of the Letters Patent is not confined to the territorial limits of Madras City. The expression "Presidency of Madras" must now be construed as "the State of Tamil Nadu". Consequently, the High Court, exercising power under Clause 17 of the Letters Patent, would have jurisdiction over the entire State. This is the view taken by the Division Bench of this Court in ***Vizianagaram***, *supra.*

12 Mrs. Geetha Ramaseshan, learned counsel who reiterated the aforesaid submissions, contended that the power under Clause 17 of the Letters Patent is traceable to Clause 32 of the Charter of the erstwhile Supreme Court of Madras which exercised jurisdiction over infants, lunatics and idiots in consonance with the Order and Course in England; this jurisdiction was being exercised throughout the State after the decision of this Court in ***Vizianagaram***, *supra*; such powers could not be exercised by a Family Court which was merely a creature of the statute.

13 Mr. N. Jothi, learned counsel, apart from supporting the aforesaid submissions, contended that the jurisdiction of the High Court, on its original side, in respect of matters under the G & W Act, 1890, cannot be taken away by

implication; neither Section 8 nor Section 20 of the FC Act, 1984, takes away the jurisdiction of the High Court under the Letters Patent; as the original side of the High Court is not specifically mentioned in the FC Act, 1984, there is no question of any ouster. Mr. Jothi referred to Section 26 of the General Clauses Act, 1897, and attempted to draw a parallel of plural remedies being available to a party with an option to elect one as per his/her choice.

14 Mr. K. Harishankar, learned counsel, while contending that concurrent jurisdiction must be maintained, referred to the decision of K. Sampath, J. in ***A.V. Arockiam v Arul Mary [AIR 2002 Mad 435]***, wherein, the learned judge, considering the provisions of the Indian Divorce Act, 1869, had held that though the High Court would have concurrent jurisdiction in view of the decision in ***Mary Thomas***, *supra,* the High Court can exercise its discretion to return the petitions to be presented before the District Court invoking the principle enshrined in Section 15 of the CPC.

15 Mrs. B. Poonkhulali, learned counsel, submitted that the High Court cannot be a District Court while exercising jurisdiction under Clause 17 of the Letters Patent; consequently, the bar under Sections 7 and 8 of the FC Act, 1984, read with Section 2(4) of the CPC cannot apply to fetter the jurisdiction of the Court on the original side. The learned counsel referred to

the decisions of this Court in ***Vizianagaram***, *supra,* ***Pamela Williams***, *supra,* and ***Gautam Menon v Sucharita Gautam [1991- 2-LW-478]*** to contend that the jurisdiction under Clause 17 of the Letters Patent has always been exercised across the State of Tamil Nadu. She also invited our attention to the decisions of the High Court of Bombay in ***Re: Ratanji Ramaji [AIR 1941 Bom 397]*** where Beaumont, C.J. had followed the same line of reasoning to hold that the jurisdiction under Clause 17 of the Letters Patent of the Bombay High Court could be exercised throughout the then Bombay Presidency.

16 Mrs. Arulmozhi, learned counsel, invited our attention to the Geneva Convention on the Rights of Child. She submitted that the G & W Act, 1890, is a complete code and a special law governing the rights of the child, and the FC Act, 1984, was merely a procedural law governing the forum of the Court; hence, Section 20 of the FC Act, 1984, cannot override a special law, let alone Clause 17 of the Letters Patent.

17 Mr. Karthik Ranganathan, learned counsel, invited our attention to the decision in ***Dhulabhai v State of Madhya Pradesh [AIR 1969 SC 78]*** which lays down the principles for assessing a plea of ouster *vis-à-vis* the jurisdiction of a civil court. Our attention was also invited to the decision in ***South Delhi Municipal Corporation v Today Homes and Infrastructure***

Private Limited [(2020) 12 SCC 680] which sets out the principles to be applied while testing a plea of ouster of jurisdiction of a civil court.

18 Mr. V.R Kamalanathan, Mr. Davidson, Mr. Raja Ganapathy and Mr.Shakespeare, learned counsel, supported the aforesaid submissions of the learned counsel in the jurisdiction retention camp.

IV. SUBMISSIONS OF THE JURISDICTON OUSTER CAMP

19 Arguments on behalf of the jurisdiction ouster camp were led by Mr. R. Sankaranarayanan, learned Senior Advocate, who contended, *inter alia*, as under:

a. The Letters Patent is specifically made subject to any law made by the competent legislature which is clear from Clause 44 of the said instrument. Thus, the FC Act, 1984, being a "law" within the meaning of Clause 44, it must necessarily follow that the Letters Patent must be read subject to the FC Act, 1984.

b. This, however, does not oust the jurisdiction of the High Court to transfer, in exercise of its extraordinary original civil jurisdiction under Clause 13 of the Letters Patent, any particular case to its file for disposal.

c. The entire issue revolves around the interpretation of Section 2(4) of the CPC, and whether the High Court is a District Court within the meaning of that definition. It is now settled by a series of judgments that Section 2(4), *ibid.,* actually defines a

District Court. Thus, the bar under Section 8 of the FC Act, 1984, would stand attracted, thereby precluding this Court from exercising its jurisdiction insofar as it relates to matters under Clause (g) of the Explanation to Section 7(1) of the FC Act, 1984.

20 Mr. Sharath Chandran, learned counsel, contended, *inter alia*, as under:

a. The decision in ***Mary Thomas***, *supra,* is fundamentally flawed for four reasons: First, the order of reference made by M.Srinivasan, J. (as he then was) actually dealt with two sets of cases *i.e.,* the first set belonging to a case under the Original Matrimonial Suit jurisdiction under Clause 35 of the Letters Patent and the second set belonging to a case under Clause 17, *ibid.* The point of conflict identified by M.Srinivasan,J. (as he then was) *qua* the case under Clause 17, *ibid.,* in the order of reference was that the decision of the Division Bench in ***Re: Patrick Martin [AIR 1989 Mad 231]*** *(for brevity Patrick Martin-II),* was in conflict with the decision of the Division Bench of this Court in ***Vizianagaram***, *supra*. Obviously, such a conflict cannot but be with respect to the scope of Clause 17 of the Letters Patent since ***Vizianagaram***, *supra,* which was decided in 1936, could not have dealt with the FC Act, which was enacted in 1984. However, the Full Bench in ***Mary Thomas***, *supra*, simply side-stepped this crucial issue and did not decide this specific conflict identified by M. Srinivasan, J.

(as he then was). Secondly, on the interpretation of Section 2(4) CPC, it was contended that ***Mary Thomas***, *supra,* had erroneously placed reliance on a decision of Rankin, C.J. in ***Hyat Mahomed v Shaikh Mannu [AIR 1927 Cal 290]*** without noticing that this decision was doubted by another Division Bench of the same Court in ***Maheshwar Swain v M/s. Bidyut Probha Art Press and another [AIR 1971 Cal 455]***. Thirdly, it was contended that ***Mary Thomas***, *supra,* had misconstrued the decision of a Division Bench of this Court in ***The Daily Calendar Supplying Bureau v The United Concern [AIR 1967 Mad 381],*** wherein, it was held that the High Court, on its original side, was performing the functions of a District Court under Section 2(4) of the CPC. This decision has been consistently followed for the past 55 years in interpreting various other statutes like the Arbitration and Conciliation Act, 1996. ***Mary Thomas***, *supra*, on the other hand, chose to confine the ratio of ***Daily Calendar Supplying Bureau***, *supra,* to the facts of that case which is clearly not borne out by cases decided before and after ***Mary Thomas,*** *supra*.

b. Fourthly, our attention was drawn to the decision in ***SBS Jayam v Krishnamoorthi***, ***[1977 (1) MLJ 286]***, which was approved in ***Mary Thomas,*** *supra,* but was subsequently overruled by another Full Bench of this Court in ***Duro Flex Private Limited v Duroflex Sittings System [AIR 2015 Mad 30]***.

c. Turning to the decision of the Supreme Court in ***Sathappan***, *supra,* it was contended, by referring to paragraph 30, that the rule in that decision is that what is expressly saved could only by expressly ousted. Since the Letters Patent was expressly saved by Section 4 CPC, it was under these circumstances that the Supreme Court had held that an express ouster was necessary. The FC Act, 1984, did not save the Letters Patent. Hence, the principle in ***Sathappan,*** *supra,* cannot be applied dehors the context in this case. The subsequent application of ***Sathappan,*** *supra,* in ***Fuerst Day Lawson****, supra,* demonstrates that an implied ouster of the Letters Patent is clearly possible.

d. Turning to ***Vizianagaram****, supra*, Mr. Sharath Chandran drew our attention to a passage from the book "The Constitution and Jurisdiction of Courts of Civil Justice in British India" by Sir Ernest John Trevelyan, a former judge of the Calcutta High Court, which sets out the legal position under Clause 17 of the Letters Patent to state that the power under the said clause was exercised outside the limits of a Presidency Town only as regards a European British subject, and was exercised as regards both Indians and Europeans within the limits of the Presidency Towns of Madras, Calcutta and Bombay. It was submitted that there is no precedent between 1862 and 1936 (when ***Vizinagaram****, supra,* was decided) where power under Clause 17, *ibid.,* was exercised as regards an Indian outside the limits of a Presidency Town.

e. On ***Vizianagaram***, *supra,* it was contended that this decision rested on what the learned counsel termed as "three pillars" of reasoning. The first pillar of reasoning rested on the Division Bench judgment of this Court in ***Annie Besant v Narayaniah [AIR 1915 Mad 157]*** which was copiously relied on by the judges in ***Vizianagaram***, *supra,* to interpret Clause 17, *ibid.,* without realising that this decision was subsequently reversed by the Privy Council in ***ILR Vol XXXVIII Mad 807***. The second and third pillar of reasoning was the analogy drawn by the learned judges in ***Vizianagaram***, *supra,* to the decisions made on the writ side of this Court, more particularly, the decision of Sadasiva Aiyar, J. in ***Re: Nataraja Iyer [(1912) 23 MLJ 393]*** and a Full Bench of this Court in ***Re: Govindan Nair [1922 ILR 45 Mad 922 (FB)]***. These decisions were quoted by the learned judges in ***Vizianagaram***, *supra,* to conclude, by an analogy, that as the High Court had the prerogative power on the writ side to issue a writ of certiorari to a native in the mofussil, such a power could be exercised by the High Court on its original side under Clause 17, *ibid.* The learned judges in ***Vizianagaram***, *supra,* concluded that after the assumption of reins of power by the Crown in 1858, all Indians became British subjects and were, therefore, entitled to invoke the jurisdiction of the High Court even outside the Presidency Town.

f. It was brought to our notice that the decision of the Full Bench in ***Re: Govindan Nair***, *supra,* was subsequently overruled by a Special Bench of five judges of this Court in ***Re: Mammen Mapillai [ILR 1939 Mad 708]***. The decision of Sadasiva Aiyar, J. in ***Re: Nataraja,*** *supra*, was dissented from by the Privy Council in ***the Ryots of Garabandho v Zamindar of Parlakimedi [AIR 1943 PC 164]***. The Privy Council expressly held that the Government of India Act, 1858, did not have the effect of enlarging the jurisdiction of the Supreme Court of Madras (as it then existed) to include Indians outside the Presidency Towns.

g. In view of the decision of the Privy Council in ***Parlakimedi***, *supra,* it is clear that even after the assumption of the sovereignty by the Crown in 1858, as a matter of law, native Indians were not treated on par with British subjects. ***Vizianagaram***, *supra*, was, however decided on the erroneous footing that native Indians became British subjects after the assumption of sovereignty by the Crown in 1858.

h. Nevertheless, according to learned counsel, it is possible to reconcile the legal position post 26.01.1950 by reading the term "British subjects" in the 1800 Charter as "Citizen of India" as was done in several legislations by the Adaptation Order, 1950.

i. Our attention was also invited to the Lok Sabha Debates and a Report of the Status of Women in India, 1974, of the Government of India to show that the Family Courts were

envisaged as a Court of exclusive jurisdiction which was, *ex facie*, incompatible with the concurrent jurisdiction argument propounded by the other side. The exclusion, if any, would, however, be limited to the subjects enumerated in clause (g) of Section 7(1) of the FC Act, 1984, and nothing more.

21 Mr. V.P. Raman, learned counsel, submitted as under:

a. Our attention was invited to the decision of Fletcher, J. in ***Kedarnath Mondal v Gonesh Chandra Adak*** **(1907-08)** [***12 CWN 446]***, and the ***Daily Calendar Supplying Bureau***, *supra*, which were erroneously distinguished by the Full Bench in ***Mary Thomas,*** *supra,* when the ratio of these cases actually applied on all fours. Reading of ouster in ***Mary Thomas***, *supra*, is clearly incorrect in the light of the decision of the Constitution Bench of the Supreme Court in ***Sathappan****, supra*.

b. The decision in ***SBS Jayam***, *supra*, which was relied on by the Full Bench in ***Mary Thomas,*** *supra,* does not support the conclusion that the expression "District Court" excluded the High Court in the exercise of its ordinary original civil jurisdiction. Our attention was invited to the decisions in ***Bakshi Lochan Singh and Others v Jathedar Santokh Singh and Others [AIR 1971 Del 277]*** and ***G.A.Kuppuswami Nayagar v K. Kesava Nayagar [AIR 1930 Mad 779].***

c. The historical limitation on Clause 17 of the Letters Patent to Europeans outside the Presidency of Madras was based on the analogy of the writ jurisdiction of this Court. As the power of

this Court to issue writs presently runs to the extent of its appellate jurisdiction across the State by virtue of Article 226 of the Constitution of India, the earlier limitations on Clause 17 of the Letters Patent cannot apply. The power under Clause 17, *ibid.,* cannot be applicable to Madras City, where the High Court is a District Court, but would apply to other areas of the State where the High Court is not a District Court.

22 Mr. Srinath Sridevan, learned counsel, contended as under:

a. There was an express bar, by virtue of a reading of Section 2(e) and 8 of the FC Act, 1984, read with Section 2(4) of the CPC. Inviting our attention to the Code of Civil Procedure, 1882, it was contended that the expression "*Principal Civil Court of Original Jurisdiction*" referred to the High Court and not the Small Causes Court. Thus, within the Presidency Town, the High Court was the District Court for the purpose of Section 2(4) CPC. Reliance was placed on the decisions in ***State of Maharashtra v Atlanta Ltd. [(2014) 11 SCC 619]***, ***Tamil Nadu Non-Gazetted Government Officers Union v Registrar of Trademarks [AIR 1959 Mad 55]*** and ***Re: Cauvery Spinning and Weaving Mills [AIR 1960 Mad 79]***.

b. The decision of Justice Fletcher dated 18.02.1907, interpreting the definition of "District" in the 1882 Code in ***Kedarnath Mondal***, *supra,* would apply to Section 2(4) of the definition of "District" in the 1908 Code which came into force from

01.01.1909. Our attention was drawn to the decision in ***Ex Parte Campbell (LR Vol 5 Ch 703)*** and the decision of Viscount Buckmaster in ***Barras v Aberdeen Steam Trawling & Fishing Co. Ltd. [1933 A.C. 402]*** which has been approved by the Supreme Court in ***Bangalore Club v Commissioner of Wealth Tax [(2020) 9 SCC 599]*** to emphasize that where an Act of Parliament has received judicial construction and the same provision is subsequently repeated in a subsequent statute without any alteration, the legislature must have taken to have used them in the same sense according to which a Court of competent jurisdiction has given them.

23 Mr. P.J. Rishikesh, learned counsel, would contend as under:

a. The FC Act, 1984, is a special enactment with a particular purpose which would be evident from the general scheme of the Act.

b. Reiterating the ratio of ***Fuerst Day Lawson***, *supra*, it was contended that the use of the words "Letters Patent" was not necessary to infer an ouster. To the same effect is the decision of the Supreme Court in ***Kandla Export Corporation and Another v OCI Corporation and another [(2018) 14 SCC 715]***. In view of these decisions, the ouster of the Letters Patent can be inferred if one keeps in mind the general scheme and purpose of the Act, more particularly, Section 20 of the FC Act, 1984.

24 Mr. Naveen Kumar Murthi, learned counsel, contended that clauses (a) to (g) in the Explanation to Section 7(1) of the FC Act, 1984, must be read purposively, and if so read, it would be apparent that the jurisdiction over guardianship matters must be exclusively vested with the Family Courts. It was contended that the jurisdiction of the High Court under Clause 17 of the Letters Patent, sans the jurisdiction vested with the Family Court under clause (g) of Section 7(1) of the FC Act, 1984, would remain intact.

25 Mr. Abdul Mubeen, Mrs. Sudershana Sunder and Mr.E.V.Chandru, learned counsel, also made their respective submissions supporting the ouster of jurisdiction.

26 I have anxiously considered the aforesaid submissions. It is not very often that momentous issues such as these come up for consideration before this Court. To answer the issues raised in the order of reference and the various submissions that were made at the bar, I must first examine whether the decision in ***Mary Thomas*****,** *supra*, must be revisited, for, an examination of the other legal issues arises only if there is an affirmative answer to this question.

V. DOES MARY THOMAS REQUIRE RECONSIDERATION?

27 To examine this issue, it is first necessary to set out the circumstances under which the matters had come up before the Full Bench in

Mary Thomas, *supra.* I called for the original records and pored over them and what I find is that one Patrick Martin and his wife Regina Martin, who were foreign nationals, filed a petition in this Court under Clause 17 of the Letters Patent and Section 7 of the G & W Act, 1890, for appointing themselves as a guardian of the minor Rekha, and for consequently, adopting her and taking her to France in accordance with French Law. This petition (O.P. Diary No.18070 of 1988) was presented before this Court on 03.10.1988 *i.e.,* one day after the FC Act, 1984, came into effect in the State of Tamil Nadu on 02.10.1988 *vide* G.O. Ms.No.2063, Home (Courts VII) Department, dated 21.09.1988 issued by the State Government under Section 3 of the said Act. Placing reliance on the said Government Order, the Registry returned O.P.Diary No.18070 of 1988 on the ground that the matter would have to be decided only by the Family Court.

28 Around the same time, one R. Manivannan filed O.M.S.No.26 of 1987 (original matrimonial suit) against his wife Agnes Mythili Manivannan under Section 10 of the Divorce Act, 1869. When the suit was at the stage of trial, Agnes Mythili Manivannan took out Application No.5607 of 1988 on 26.10.1988 to transfer the suit to the Family Court citing G.O.Ms.No.2063, *supra*. The ground raised therein was that the jurisdiction to hear the suit vested exclusively with the Family Court by virtue of Clause (a) in the explanation to

Section 7(1) of the FC Act, 1984 and consequently, the bar under Section 8, *ibid.,* would apply.

29 O.P.Diary No.18070 of 1988 filed by Patrick Martin and his wife Regina Martin was, thereafter, posted for maintainability before Abdul Hadi, J. Application No.5607 of 1988 filed by Agnes Mythili Manivannan in O.M.S. No.26 of 1987 was also tagged with the case of Patrick Martin. By a common order dated 09.11.1988 (reported in (1989) 1 LW 241 - for brevity "Patrick Martin-I"), Abdul Hadi, J. held that the O.P. filed by Patrick Martin, and the O.M.S. filed by Manivannan should have to be transferred to the Family Court as the jurisdiction of the High Court was ousted by Sections 7, 8 and 2(e) of the FC Act, 1984. The learned judge opined that Sections 7 and 8 of the FC Act, 1984, used the expression “District Court” which expression was not defined in the Act; however, Section 2(e) of the FC Act, 1984, declared that all words and expressions not defined in the Act would have the same meaning contained in the definitions in the CPC. On this basis, Abdul Hadi, J. traced the definition of "District Court" to Section 2(4) of the CPC which included the ordinary original civil jurisdiction of the High Court. Placing reliance on ***Daily Calendar Supplying Bureau***, *supra*, and ***Raja Soap Factory***, *supra*, the learned

judge concluded that Sections 7 and 8 of the FC Act, 1984, constituted a case of express ouster.

30 It appears that Manivannan, did not assail the transfer of his O.M.S. to the Family Court. On the other hand, Patrick Martin and his wife Regina Martin filed O.S.A.No.186 of 1988 challenging the transfer of their petition to the Family Court, Madras, which came up before a Division Bench of David Annoussamy and Janarthanam, JJ. By an order dated 24.02.1989 in ***Re: Patrick Martin-II,*** *supra,* the Division Bench held that the power of this Court under Clause 17 of the 1865 Charter was traceable to Clause 16 of the 1862 Charter which was again traceable to Clause 32 of the 1800 Charter which stated that the guardianship jurisdiction was to be in conformity with the Order and Course observed in England. On a commonsensical reading of Clause 32 of the Letters Patent, the Division Bench observed:

> *"The phrase 'according to the Order and Course observed in that Part of Great Britain called England' shows that the jurisdiction vested in the Supreme Court by the above said Clause does not relate to natives, but only to Europeans. Obviously, Appointment of guardians in respect of Hindus or Muslims could not be according to the 'Order and Course observed in England'."*

The Division Bench referred to Clause 21 of the Letters Patent of 1800 which defined the jurisdiction of the Supreme Court of Madras and opined that the general jurisdiction of the Supreme Court was confined to those persons who

came within the appellation of British subjects under that clause, which, in 1800, did not include Indians. Consequently, the Division Bench concluded that Clause 17 was meant for British subjects alone and had no application to Indians. On this basis, the Division Bench concluded:

> *"Similarly, in this case, India having become independent, there cannot be a special forum for the Britishers in the matter of adoption. They have to subject themselves to the law of the land and* ***therefore Cl. 17 of the Letters Patent dated 28-12-1865 has no application whatsoever and has become a dead letter.****"*
>
> *(emphasis supplied)*

31 In the alternative, even if it were to be presumed that Clause 17 existed, the Division Bench applied the principle of Section 15 CPC and held that the petition would have to be presented before the Family Court which was the Court of the lowest grade competent to determine the case. On this basis, the appeal of Patrick Martin was dismissed upholding the order of Abdul Hadi, J., though on different grounds.

32 At this juncture, let us turn to the case of ***Mary Thomas,*** *supra*. Mary Thomas filed a suit against her husband Dr. K.E.Thomas for a decree of perpetual injunction restraining him from disturbing her possession over a property at Adyar; for rendition of accounts; return of documents, *etc.* From a reading of the plaint, it appears that this elderly couple, who were married in 1938, had an unfortunate fall out in the evening of their lives resulting in the

filing of the suit. To be noted, the suit was not one for divorce, but was a suit filed on the ordinary original civil jurisdiction of this Court under the Letters Patent and the Original Side Rules for the reliefs stated above.

33 From a perusal of the records, it appears that this suit was presented on the original side of this Court on 17.11.1989 and was assigned Diary No.20871 of 1988. The Registry entertained a doubt about its maintainability, and the papers were put up before Abdul Hadi, J. After transferring the cases of Patrick Martin and Manivannan to the Family Court by an order dated 24.11.1989 **[*Re: Patrick Martin-I*]**, *supra,* Abdul Hadi J. passed a separate order on the very same day in the suit filed by Mary Thomas, adverting to his earlier order in ***Re: Patrick Martin-I****, supra*. Abdul Hadi, J. opined that it was doubtful whether the suit fell within the expression "matters matrimonial" under Clause 35 of the Letters Patent. Unfortunately, the attention of the learned judge was, perhaps, not drawn to the fact that the suit was filed invoking Section 9 CPC and was not a divorce proceeding under Clause 35 at all. Nevertheless, the learned judge opined that the prayers sought in the suit came within the scope of Section 7(1) read with Explanation (c) therein of the FC Act, 1984. Consequently, the plaint was ordered to be returned for

presentation before the Family Court. Mary Thomas assailed this order in an intra-court appeal in O.S.A.No.21 of 1989.

34 When matters stood thus, history repeated itself. One T.K.Chandrasekhar had filed a suit in O.M.S.No.4 of 1988 before this Court under Section 10 of the Divorce Act, 1988, against his wife Margaret Chandrasekhar for dissolution of the marriage between themselves. This suit was presented before the original side of this Court on 31.06.1987. When the suit was pending, Application No.2464 of 1988 was taken out by T.K Chandrasekhar, to transfer O.M.S.No.4 of 1988 to the file of the Family Court on the basis of the order of Abdul Hadi, J. in ***Re: Patrick Martin-I,*** *supra.*

35 At the same time, Margaret Chandrasekhar filed O.M.S. No. 16 of 1988 against her husband T.K. Chandrasekhar under Section 22 of the Divorce Act, 1869, seeking a decree of judicial separation. In that suit, Application No.2463 of 1988 was taken out by T.K.Chandrasekhar, to transfer O.M.S.No.16 of 1988 to the Family Court on the basis of the aforesaid order of Abdul Hadi, J.

36 Margaret Chandrasekhar also filed O.P.No.29 of 1988 against T.K Chandrasekhar under Sections 3 and 7-10 of the G & W Act, 1890, before this Court seeking to be appointed as guardian of their minor son Anto Sathish

who was studying in a school in T. Nagar, Madras. This petition was presented before this Court on 28.01.1988. When the matter was pending, T.K.Chandrasekhar filed Application No.2466 of 1989 to transfer O.P.No.29 of 1988 to the Family Court placing reliance on the decision of Abdul Hadi, J. in ***Re: Patrick Martin-I,*** *supra.*

37 The aforesaid applications filed by T.K Chandrasekhar against his wife Margaret Chandrasekhar *i.e.*, in O.M.S. No.4 of 1988, O.M.S. No.16 of 1988 and O.P.No. 29 of 1988 came up before M. Srinivasan, J. (as he then was) on 19.06.1988 (reported in 1989 2 LW 344). Adverting to the transfer petitions in the O.M.S., the learned judge opined that the matrimonial jurisdiction for Christians under Clause 35 of the Letters Patent was not exercised by the High Court under its ordinary original civil jurisdiction. The crux of the reasoning given by Srinivasan, J. (as he then was) is as under:

> *"If at all the High Court can be said to be covered by the expression 'District Court' only when it functions as Principal Civil Court of ordinary Original jurisdiction. In so far as Matrimonial jurisdiction is a special jurisdiction exercised by the High Court under Cl. 35 of the Letters Patent, it cannot be said that the High Court is functioning as principal Civil Court of Ordinary Original jurisdiction."*

Stating as above, the learned judge differed from the view expressed by Abdul Hadi, J. in ***Re: Patrick Martin / Manivannan*** *(Patrick Martin-I, supra)* and referred the Original Matrimonial Suits to a Division Bench.

38 Turning to O.P. No.29 of 1988, M.Srinivasan, J. (as he then was) noted that the decision of Abdul Hadi, J. in ***Re: Patrick Martin-I,*** *supra,* had been confirmed by a Division Bench of Annoussamy and Janarthanam, JJ. in ***Patrick Martin-II***, *supra*, as under:

> *"7. This is an application to transfer the petition under the Guardian and Wards Act to the Family Court. The application is taken out on the basis of the judgment of Abdul Hadi, J. in Diary No. 18070 of 1988 confirmed by the Division Bench in O.S.A. 186 of 1988.*
>
> *8. I am of the opinion that the decision of the Division Bench requires to be reconsidered in as much as it is in conflict with the earlier Bench judgment of this court in Raja of Vizianagaram v. Secretary to State."*

Accordingly, M. Srinivasan, J. (as he then was) directed the papers to be placed before the Officiating Chief Justice to constitute a Full Bench. It is not clear from the order of M. Srinivasan, J. (as he then was) as to what was the precise conflict between the decision of David Annoussamy and Janarthanam, JJ. ***(Re: Patrick Martin-II,*** *supra*) and the decision of the Division Bench of this Court in ***Vizianagaram****, supra*. ***Vizianagaram****, supra,* was a matter under Clause 17 of the Letters Patent concerning minors who were outside the city of Madras. In

contrast, Margaret Chandrasekhar's petition in O.P.No.29 of 1988 was a petition under the G & W Act, 1890, concerning a minor residing in Madras city. Nevertheless, I have noted that paragraph 8 of the order of reference specifically identifies the aforesaid conflict between the two Division Benches, referred to above, as the specific question to be placed before the Full Bench for decision.

39 The aforesaid matters (O.M.S.Nos. 4 and 16 of 1988 and O.P.No. 29 of 1988) were eventually tagged along with O.S.A.No.21 of 1989 filed by Mary Thomas and were listed before a Full Bench of S. Mohan O.C.J. (as the learned judge then was), S. Ramalingam and Bhaktavatsalam, JJ. It will now be apparent that the cases before the Full Bench fell into three distinct categories, **the first category** concerned the O.M.S. jurisdiction of the High Court under Clause 35 of the Letters Patent and the Divorce Act, 1869, *vis-à-vis* the FC Act, 1984, which emanated from the cross-suits filed by T.K.Chandrasekhar and Margaret; **the second category** concerned the Guardians and Wards O.P. filed by Margaret Chandrasekar where the question referred by M. Srinivasan, J. (as he then was) was the conflict between the decisions of two Division Benches in ***Re: Patrick Martin-II,*** *supra*, and ***Vizianagaram****, supra*, and the **third category** was the civil suit filed by Mary

Thomas invoking the ordinary original civil jurisdiction of this Court under Clause 12 of the Letters Patent.

40 Examining the order of the Full Bench in ***Mary Thomas***, *supra,* what I find is this: paragraphs 1 and 2 set out the facts in ***Mary Thomas***, *supra,* and paragraph 3 sets out the facts in **Re: *Patrick Martin-I***, *supra,* alone. In paragraph 4, the Full Bench sets out the following question for its consideration:

> *"Whether 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 (sic) under the Explanation to S. 7 of the Act is ousted or not?"*

After adverting to the various clauses of the Letters Patent of 1865, the Full Bench in ***Mary Thomas***, *supra,* observes :

> *"The ouster of jurisdiction exercised by the High Court on its Original Side under the provisions of the Letters Patent cannot be readily inferred unless there is express provision in any enacted law taking away such jurisdiction. Under Art. 225 of the Constitution of India the pre-existing jurisdiction of the High Court is preserved subject, of course, to the provisions of any valid law that may be made. Does the Act contain any provision militating against the exercise of jurisdiction on the Original Side of this High Court in respect of matters falling under the Explanation to S. 7 of the Act and does the Act contain any express provision taking away such jurisdiction vested in the High Court?"* *(emphasis supplied)*

What is evident from the aforesaid is the fact that the specific question that was identified and referred to the Full Bench by M. Srinivasan, J. (as he then was),

viz., the conflict between ***Re: Patrick Martin-II****, supra,* and ***Vizianagaram****, supra,* does not figure anywhere in the issues framed for consideration by the Full Bench. There is no discussion about Clause 17 of the Letters Patent at all nor is there any reference about ***Vizianagaram****, supra.*

41 The Full Bench went on to summarise the arguments of counsel in paragraphs 4-9, and observed, at paragraph 10:

> *"In the light of these submissions, it is necessary to consider in what context and in what circumstances some of the decisions cited already, held that the High Court, when it exercises jurisdiction on the Original Side, could be equated to or could be called a district court."*

Thus, the only question that appears to have really engaged the attention of the Full Bench in ***Mary Thomas***, *supra,* was whether the High Court was a District Court under Section 2(4) of the CPC when it exercised jurisdiction on its original side. The decision of Fletcher, J. in ***Kedarnath Mondal***, *supra*, was then considered and distinguished by placing reliance on ***Hyat Mahomed***, *supra*. The decision of the Division Bench of this Court in ***G.Kuppuswami Nayagar***, *supra*, was noticed in paragraph 12 without any comment. In paragraphs 13 and 14, the Full Bench adverts to the decision of the Division Bench in ***Daily Calendar Supplying Bureau,*** *supra,* and simply concludes :

> *"This case, therefore, can hardly be an authority for the general proposition that the High Court, when it exercises its original jurisdiction over its local area, should be equated to a District Court.*

The law laid down in The Daily Calendar Supplying Bureau's case supra, should be confined to the facts of that case."

In paragraph 15, the Full Bench in ***Mary Thomas***, *supra,* approved the decision of N.S. Ramaswami, J. in ***SBS Jayam and Co.***, *supra*, stating that the learned judge "*has laid down the law correctly by stating that the term "District Court" would not include the High Court and the fact that the local limits of the ordinary original jurisdiction of this Court is a district would not mean that this Court becomes a District Court*."

42 On the above basis, the Full Bench, in ***Mary Thomas***, *supra,* reached the following conclusion at paragraph 16:

> *"On considering 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 and confirmed by the Division Bench in O.S.A. No. 186 of 1988 and reported in Patrick Martin Mr., etc.—Appellants is no longer good law."*
>
> *(emphasis supplied)*

43 I am surprised to find that the decision of David Annoussamy and Janarthanam, JJ. in ***Re: Patrick Martin-II,*** *supra,* was overruled not by answering the specific question referred by M.Srinivasan, J., (as he then was)

but, rather on a point that was never raised and referred to the Full Bench in that case at all. The Full Bench in ***Mary Thomas***, *supra,* appears to have completely overlooked the fact that the petition in O.P.No.29 of 1988 was filed under the G & W Act, 1890 and Section 4(4) of that Act specifically defines a "District Court" to mean as under:

> *"District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction."*
>
> *(emphasis supplied)*

44 Thus, if the question in O.P.No.29 of 1988 was whether the High Court was a District Court under the G & W Act, 1890, it is Section 4(4) of that Act that furnishes a straight answer and not Section 2(e) of the FC Act, 1984, read with Section 2(4) of the CPC. Section 4(4) the G & W Act, 1890, was, however, not noticed by the Full Bench in ***Mary Thomas****, supra.* Similarly, the question in O.M.S. Nos. 4 and 16 of 1988 was whether the jurisdiction under Clause 35 of the Letters Patent was a part of the ordinary original civil jurisdiction of the Court (as held by Abdul Hadi, J.) or was an independent jurisdiction [as held by M. Srinivasan, J. (as he then was)]. The Full Bench, it appears, had clubbed all three cases in one basket under the umbrella term "Original Side" and had tested the issue of jurisdiction *vis-à-vis* the FC Act, 1984, without noticing that the order of reference made by M. Srinivasan, J. (as

he then was) was a composite one raising two very different grounds as regards the OMS and the petition under the G & W Act, 1890. The OMS jurisdiction under Clause 35 of the Letters Patent was being exercised in consonance with the Indian Divorce Act, 1869. Under Section 10 of that Act, the High Court as well as the District Court had concurrent jurisdiction to entertain a petition for divorce. This position underwent a sea change by the Indian Divorce (Amendment) Act, 2001, wherein, the jurisdiction is now exclusively vested with the District Court. Unlike Section 4(4) of the G & W Act, 1890. Section 3 of the Indian Divorce Act, 1869, expressly defined the terms "High Court", "District Judge", "District Court" and "Court". Naturally, resort to Section 2(4) CPC by the Full Bench in ***Mary Thomas****, supra,* was not necessary as the respective substantive enactments contained a definition of the term "District Court".

45 Consequently, the question formulated by the Full Bench in ***Mary Thomas***, *supra,* was answered, at paragraph 17, 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 of 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".*

46 A long time ago, in ***Prosonno Coomar Paul Chowdhry v. Koylash Chunder Paul Chowdhry [1867 SCC OnLine Cal 34]***, Sir Barnes Peacock, C.J., explained the object and purpose behind constituting Full Benches as under:

> *"The object of referring cases to a Full Bench is to prevent conflicting decisions between Division Benches, so that one Bench shall not be deciding a question one way on one day, a second Bench deciding the same question another way on another day, and a third Bench probably deciding it differently from the other two on a third day; and that when a Court finds two conflicting decisions, or a decision conflicting with its own view of the case, instead of overruling the decision of a Bench having concurrent jurisdiction, it should refer the matter to a Full Bench, so that the public should not be subject to have conflicting decisions issued from the High Court. In carrying out that rule, I have always endeavoured, as far as it has been in my power, to assist the Division Benches by which questions have been referred, by examining the authorities bearing upon the point and by explaining the law upon the subject to the best of my ability and giving reasons for my opinions so as to settle the point as far as possible for cases in which it might arise in future."* *(emphasis supplied)*

47 Though not cited at the bar, I find a useful summation of the legal position of a Full Bench not answering questions referred to it in ***Kumaran Rama Panicker v Variathu Ouseph [AIR 1952 Ker 77]***, where, it is observed:

> *"52. When specific questions of law are referred to a Full Bench for decision, the Full Bench is bound to give its verdict on those questions, irrespective of any consideration as to whether the questions are separately and independently referred or whether the questions are referred along with the case which gave rise to the order of Reference. Where the case is also referred, the Full Bench will have to decide the case in the light of the answers to the questions referred and on a consideration of the evidence on record. Even if the questions of law referred to the Full Bench for decision do not strictly arise from the facts*

of the case, the decision of the Full Bench on those questions can never be relegated to the position of "obiter dicta". On the other hand, the decision will have to be accepted as the authoritative ruling of the Full Bench on the questions which it was expressly called upon to decide. The Full Bench will be failing in its duty if it refuses or declines to exercise the jurisdiction conferred on it in respect of that matter by the relevant statutes"

48 To summarise, the Full Bench in ***Mary Thomas***, *supra*, has not adverted to the actual conflict that was referred to it by M. Srinivasan, J. (as he then was) between ***Re: Patrick Martin-II***, *supra,* and ***Vizianagaram***, *supra,* as stated above; it has not examined the provisions of the G & W Act, 1890, nor has it examined the object and purpose behind the FC Act, 1984, or the scope and effect of Sections 7 and 8 of the said Act. More importantly, there is absolutely no discussion about Clause 17 of the Letters Patent at all. The Full Bench, in ***Mary Thomas***, *supra,* has confined itself to the issue as to whether the High Court was a District Court under the FC Act, 1984, *vis-à-vis,* the definition contained in Section 2(4) of the CPC. Our attention was invited by both sides to cases spanning over several decades where the definition in Section 2(4) of the CPC was treated as defining the "District Court" which were not brought to the notice of the Full Bench. I have discussed these cases, *infra*. For all the aforesaid reasons, I am of the considered view that the decision in ***Mary Thomas*****,** *supra*, requires reconsideration.

VI. THE DELHI AND BOMBAY VIEWS

49 It was contended at the bar that the decision in ***Mary Thomas,*** *supra,* has not been doubted thus far. In ***Arockiam***, *supra*, an interesting issue arose before K. Sampath, J. as to whether the High Court would have jurisdiction to entertain matrimonial matters irrespective of whether the husband and wife resided at Madras. The learned judge struck a discordant note when he observed that the intention of the legislature was never to confer concurrent jurisdiction as was held in ***Mary Thomas,*** *supra*. The learned judge observes:

> *"36. It does not appear that either before Srinivasan, J. or before the Full Bench, the unreported decisions of Sadasivam, R., J. and Fakkir Mohamed, J. and the reported decisions of V. Sethuraman, J. and R. Sengottuvelan, J. were cited. The speech by the Hon'ble Mr. Maine in the Legislative Council on 26th March, 1869 was also not referred to. Apparently, the various provisions of the Indian Divorce Act, the proviso to Clause 35 of Letters Patent and S. 15 of the Code of Civil Procedure were not brought to the notice of the Full Bench. The Full Bench merely stopped saying that the Original Jurisdiction of the High Court in respect of matters that might fall under the Explanation of S. 7 of the Family Courts Act was not ousted and the High Court continued to exercise its jurisdiction notwithstanding the coming into force of the said Act."* *(emphasis supplied)*

Finding himself to be bound by ***Mary Thomas***, *supra,* the learned judge, ostensibly out of a sense of helplessness, concluded as under:

> *"Though, in view of the judgment of the Full Bench in Mary Thomas v. Dr. K.E. Thomas (1989) 104 Mad LW 344 the High Court*

may be said to have concurrent jurisdiction, the petitions have to be filed only before the District Courts concerned in view of S. 15 of the Code of Civil Procedure."

It is not in dispute that the High Court has ceased to exercise original jurisdiction under Clause 35 of the Letters Patent after the amendments to the Divorce Act, 1869, *vide* the Indian Divorce (Amendment) Act, 2001. The petitions under the Divorce Act are now exclusively heard and decided by the respective Family Courts or the District Courts, where there are no Family Courts in existence.

50 Our attention was also invited to the Division Bench judgment of the Bombay High Court in ***Kanak Vinod Mehta***, *supra*. The facts in that case run parallel to those in ***Mary Thomas***, *supra*. The wife had filed a suit against her husband for declaratory reliefs in respect of their matrimonial home, for maintenance and other reliefs. It appears that the primary reason that weighed with the Division Bench of the Bombay High Court in accepting the view in ***Mary Thomas***, *supra,* was as under:

> *"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 suit and proceedings of the nature referred to in the Explanation to sub-section (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." *(emphasis supplied)*

51 This decision was, however, overruled by the Full Bench judgment of the Bombay High Court in ***Romila Jaidev Shroff***, *supra*, holding that the jurisdiction of the High Court under its ordinary original civil jurisdiction stood ousted by the FC Act, 1984, in respect of matters enumerated under Section 7 of that Act. Like ***Mary Thomas***, *supra*, the matter arose out of a civil suit filed by the wife against her husband invoking the ordinary original civil jurisdiction of the Bombay High Court. The Full Bench, after adverting to ***Mary Thomas***, *supra*, observed:

> *"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.*
>
> *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 Full 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 trapping 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."

52 The aforesaid decision of the Full Bench of the Bombay High Court in ***Romila Jaidev Shroff***, *supra,* makes a compelling argument: could the legislature have intended that a particular set of cases should be exclusively tried under the FC Act, 1984, under a separate inquisitorial set up (Section 14 of the FC Act, 1984) side by side with the jurisdiction under the Original Side with all the usual trappings and rigours of the Evidence Act, the Code of Civil Procedure and the High Court's Original Side Rules?

53 Our attention was also drawn to the Division Bench judgment of the Delhi High Court in ***Amina Bharatram***, *supra,* where the issue was whether the High Court, exercising ordinary original civil jurisdiction, would be a District Court within the meaning of Sections 2(4) of the CPC. The suit

was filed by Amina Bharatram against her husband under the provisions of Sections 18,20 and 23 of the Hindu Adoption and Maintenance Act, 1956, for maintenance and other ancillary reliefs. Following the decision in ***Romila Jaidev Shroff***, *supra*, the Delhi High Court held that the High Court came within the expression "District Court" under Section 2(4) of the CPC when it exercised its ordinary original civil jurisdiction; consequently, its ordinary original civil jurisdiction, insofar as it related to matters under Section 7 of the FC Act, 1984, was clearly ousted.

54 An interesting argument that was made before the Division Bench in ***Amina Bharatram***, *supra,* was that the High Court of Delhi did not stand on the same footing as the other Chartered High Courts. This argument was repelled by observing as under:

> *"33. The distinction made out by the Plaintiff between the Delhi High Court's ordinary original jurisdiction and that of High Courts of Bombay, Madras and Calcutta is inconsequential. The Plaintiff contends that the Delhi High Court has eleven District Courts subordinate to it, which are the principal civil courts of original jurisdiction for the concerned districts, whereas the High Courts of Bombay, Madras and Calcutta are principal civil courts of original jurisdiction for a defined territory. However, this Court does not have to address itself to the issue whether this Court, exercising its jurisdiction under Section 5(2) of the Delhi High Court Act, acts as the principal civil court of original jurisdiction. Indeed, given the phraseology of Section 5(2) ("the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in every suit the value of which exceeds rupees two crores"), it cannot be disputed that this Court exercises 'ordinary original civil jurisdiction'. Section 2(4) of the CPC, while defining a*

'district' and also 'District Court', only requires the High Court to be exercising 'ordinary original civil jurisdiction' for it to be included in the definition of 'district' and 'District Court', and does not impose any additional condition for the High Court to be acting as the 'principal civil court of original jurisdiction'...."

55 Specifically adverting to ***Mary Thomas***, *supra*, the Division Bench, in ***Amina Bharatram***, *supra,* observed:

"37. This Court does not agree with the decision of the Full Bench of Madras High Court in Mary Thomas (supra) in light of the reasons given by us for the interpretation of 'District Court' in Sections 7 and 8 of the Act. Additionally, it appears that the Madras High Court's decision was based on the apprehension (if we may term it so) that a High Court exercising its ordinary original civil jurisdiction cannot be equated with a District Court....."

56 It was, however, contended by the jurisdiction retention camp that the decisions in ***Romila Jaidev Shroff***, *supra* and ***Amina Bharatram***, *supra,* were not cases concerning guardianship and consequently, would have no application to the case on hand. I am unable to countenance this submission. As a matter of fact, the High Court of Bombay has unequivocally held that the decision in ***Romila Jaidev Shroff***, *supra*, would apply to a case under the G & W Act, 1890, as well [See ***Girish J. Bobade v. Ajay Thakur (2006) 2 Mah LJ 702***]. This position was reiterated as recently as 2021 in ***Ashu Khurna Dutt v Aneesha Ashu Dutt [(2021) 6 Bom CR 533]***, wherein, it was observed as under:

"3. In the first place, the main prayer in the petition, prayer clause (a), which is for appointment of guardian of the person of the minors, is not maintainable before this court. Section 7 read with Section 8 of the Family Courts Act reserves exclusive jurisdiction to entertain a suit or proceeding in relation to guardianship of the person of any minor unto Family Courts by virtue of Clause (f) of the Explanation to Sub-section (1) of Section 7. A Full Bench of this court, in the case of Romila Jaidev Shroff v. Jaidev Rajnikant Shroff, has held so. The Full Bench has observed that in view of the provisions of the Family Courts Act, the court exercising its ordinary original civil jurisdiction relating to matters under the Family Courts Act would lose its jurisdiction to the Family Court, since the former would be a district court and under Section 17 of the Family Courts Act that Act would have an overriding effect. In view of the Full Bench decision of this court, which was referred to, and the proposition of law set out wherein was reiterated, by a learned Single Judge of this court in the case of Girish J. Bobade v. Ajay Thakur, the matter does not admit of any controversy. An application for guardianship of the minor's person can lie only before the Family Court."

57 In Delhi, it appears that the High Court has issued a practice direction dated 23.12.2016 which reads as follows:

"Hon'ble the Chief Justice, on the recommendations of the Hon'ble Judges of the Original Side, has been pleased to issue following practice directions for information and compliance by all concerned.

In view of the judgment dated 19.07.2016 passed by the Hon'ble Division Bench of this Court on reference in C.S. (OS) No.411/2010 & I.A. No.12186/2010 titled "Amina Bharatram v. Sumant Bharatram", all matters enumerated in Explanation to sub-section (i) of Section7 and Section 8 of the Family Courts Act, 1984, shall be exlcusively triable by the Family Courts and the jurisdiction of the High Court to the extent it exercises Ordinary Original Civil Jurisdiction in respect of such matters stands excluded by virtue of Section 8(c)(ii) of the said Act. Such matters

listed before this Court shall be transferred to the Family Courts by passing the necessary orders in this respect on their dates of listing.

The Registry, henceforth, is directed not to accept such matters as enumerated in Explanation to sub-section (i) of Section 7 and Section 8 of the Family Courts Act, 1984.

These Practice Directions shall come into force with immediate effect.

By Order
Sd/-
(GIRISH KATHPALIA)
Registrar General"

58 In addition, if a direct authority is necessary, reference may be had to the decision of Justice Manmohan in ***Jasmeet Kaur v Navtej Singh [(2018) 251 DLT 233]***, wherein, a suit for guardianship and custody of two minor children was ordered to be transferred to the Family Court in the light of the decision in ***Amina Bharatram***, *supra.*

59 While interpreting the provisions of a Central enactment like the FC Act, 1984, this Court cannot remain an island of statutory interpretation. This would mean that a guardianship petition in Mumbai and Delhi would go before a Family Court and be governed by a separate procedure for trial and appeals under the FC Act, 1984, whereas, similar petitions in Chennai would be governed by the Original Side Rules and the Letters Patent. This is not to say that the decisions of the Bombay and Delhi High Courts are binding on this Court. I am fully aware that these judgments are of persuasive value only. Nevertheless, a Central statute having a pan India application cannot and

should not be interpreted in a manner that is calculated to produce different results in different States. This is another factor that has weighed in my mind for concluding that the decision in ***Mary Thomas***, *supra,* warrants reconsideration.

VII. SCOPE OF CLAUSE 17 OF THE LETTERS PATENT

60 The arguments at the bar by both camps were primarily focussed on whether the jurisdiction of the High Court under Clause 17 of the Letters Patent could be taken away by the FC Act, 1984, in respect of matters concerning guardianship, custody or access to a minor (Explanation (g) to Section 7(1) of the 1984 Act). I am, however, of the considered opinion that this line of argument is over-simplistic and overlooks a vital distinction between two very different types of jurisdictions, *viz*., the statutory jurisdiction exercised by the High Court under the G & W Act, 1890, and the jurisdiction of the High Court under Clause 17 of the Letters Patent.

61 To determine the scope of Clause 17 of the Letters Patent, I must delve into the clauses of the earliest Charters from which this Court derived its power and authority. The High Court of Madras is the successor of the erstwhile Supreme Court of Madras which was abolished by the Indian High Courts Act, 1861. The Supreme Court of Madras was established *vide* a Letters

Patent dated 26.12.1800 as a successor to the Recorder's Court at Madras which was established in 1798.

62 In his remarkably clear and erudite Hamlyn lecture on the "*Common Law in India*", Mr. Motilal Setalvad, the first Attorney General of India, pointed out:

> *"The year 1726 can be said to mark the end of the first period of the exercise of British power in India. It marked the rise of the factories at Bombay, Madras and Calcutta which in course of time grew into the three Presidency Towns. The Company gradually increased the area of its supervision and control over places surrounding these growing factories. The surrounding areas were called the mofussil in contradistinction to the Presidency Towns. These Presidency Towns played the leading role in the introduction of the common law into India"*

A "Presidency Town" is defined in Section 3(44) of the General Clauses Act, 1897, to mean "*the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Calcutta, Madras or Bombay."* Thus, the definition of a Presidency Town was inextricably linked to the ordinary original civil jurisdiction of the three Chartered High Courts in the cities of Calcutta, Madras and Bombay.

63 In India, it is often said that Courts came first and the law came later. The establishment of Courts and the import of the common law into this country commenced with the establishment of the Mayor's Court by a Letters

Patent granted by the Crown in 1726 in the three Presidency Towns. Through these Courts, manned by English judges, the principles of the common law were slowly, but, surely injected into the fertile, yet, undoubtedly indigenous fabric of the Indian legal system. Setalvad, quoting Sir George Rankin, observes:

> *"and it has long been generally accepted doctrine that this charter introduced into the Presidency Towns the law of England—both common and statute law— as it stood in 1726.*
>
> *Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them. This view as to the date of the introduction of English law into India appears to have been uniformally accepted by courts in India."*

64 By 1753, the strict application of English law had led to certain anomalous results prompting the Crown to issue a fresh Letters Patent for the Mayor's Courts at Calcutta, Madras and Bombay. The most important feature of this Letters Patent was that it completely excepted Indians from the jurisdiction of the Court unless otherwise jurisdiction was conferred on it by consent. Setalvad observes:

> "*The effect of the amended Letters Patent was to limit the civil jurisdiction of the mayors' courts to suits between persons who were not Indians resident in the several towns to which the courts' jurisdiction extended. Suits between Indians resident in those towns could be entertained by these courts only with the consent of the parties."*

Setalvad goes on to add:

> *"These courts and the law administered by them appear to have commanded the confidence of the Indian residents who continued to resort to these courts to much the same extent as before. Indian litigation had in fact constituted the bulk of the work of these courts from their start and it continued to be so notwithstanding the requirement of the consent of Indians to the court exercising jurisdiction over them."*

65 Yet another watershed in the history of the East India Company was the victory in the Battle of Buxar in 1764. The immediate fallout was that large swathes of territory in Bengal and Awadh came into the hands of the Company. With the Treaty of Allahabad in 1765, the fate of Bengal was sealed as the Mughal Emperor formally surrendered the sovereignty of Bengal to the British. In the ships of the East India Company that flocked the shores of this country came not only company officials, but also, adventurers, imposters, burglars, loafers, missionaries, escaped convicts, absconding soldiers, seamen, *et al*., who opened shops in various parts of India.

66 After Warren Hastings became the Governor General, he established the Company Courts called Sudder Adawlut and Foujdary Adawlut in the areas outside the Presidency Towns manned by Company servants. The Company Courts were not able to reign in the terror unleashed by the European interlopers on the native Indians in the mofussil, because, they questioned the

very authority of the Company Courts. Elizabeth Kolsky points out in her book "*Colonial Justice in British India: White Violence and the Rule of Law*" (Cambridge University Press Publication) that there existed an official record titled "*European misconduct in India, 1766-1824*" comprising 25 large handwritten volumes that ran into nearly 20,000 pages. She states:

> *"Even after India's borders were open to free traders, the Company's legal control over the Britons in the interior in criminal matters remained narrowly circumscribed. Local Magistrates could try European subjects in cases of assault and trespass, but those charged with felonies and gross misdemeanors had to be committed for trial at the Supreme Court in the Presidencies."*

67 In this background came the Regulating Act, 1773, which abolished the Mayor's Court and replaced it with the Supreme Court of Calcutta in 1774. The Court's first Chief Justice was Sir Elijah Impey and its last in 1861 was Sir Barnes Peacock. Clause IV of the Calcutta Charter constituted the Court as a Court of Record. The succeeding clauses of the Charter conferred various jurisdictions, and for the purpose of this case, Clause XXV is relevant as it conferred on the Supreme Court, the power to appoint guardians of infants, idiots and lunatics.

68 Thus, there existed two streams of justice dispensation, one in the Presidency Town and the other in the mofussil where the Company Courts like the Sudder Adawlut and Foujdary Adawlut held sway. The conflicts and

contrasts resulting from differing systems of law being worked in the Presidency Town and the mofussil were thus described by Sir Elijah Impey as under:

> *"The state of the inhabitants of Calcutta was, in every particular, different. They were, as compared to the inhabitants of the provinces, a very inconsiderable number, inhabiting a narrow district, and that district an English town and settlement; not governed by their own laws, but by those of England, long since there established; where there were no courts of Criminal Justice, but those of the King of England, which administered his laws to the extent and in the form and manner, in which they were administered in England. The inhabitants had resorted to the English flag, and enjoyed the protection of the English law; they chose those laws in preference to their own—they were become accustomed to them. The town was part of the dominion of the Crown by unequivocal right—originally by cession, founded on compact, afterwards by capture and conquest. Their submission was voluntary and if they disliked the laws, they had only to cross a ditch, and were no longer subject to them. The state of an inhabitant in the provinces at large, was that of a man inhabiting his own country, subject to its own laws. The state of an Hindoo, a native of the provinces, inhabiting Calcutta, which in effect was an English town to all intents and purposes, did not differ from that of any other foreigner from whatsoever country he might have migrated; he partook of the protection of the laws, and in return owed them obedience."*
>
> *(emphasis supplied)*

69 In Madras, the Mayor's Court appears to have lasted a little longer till 1798, when it was abolished and replaced by the Recorder's Court at Madras which was established under a Letters Patent dated 20.02.1798. It is a matter of some historical interest that the first Recorder of the Court was Sir Thomas Strange whose imposing and remarkably well preserved portrait adorns

the Court of the Hon'ble Chief Justice even today. The Letters Patent of the Recorder's Court, while declaring that the Recorder had all powers of the Court of the King's Bench in England, nevertheless, maintained the distinction between British subjects and native Indians. It was, thus, declared that the jurisdiction, authority and power of the Court shall extend to all British subjects which, in 1798, did not include Indians. As regards native Hindus and Muslims, the disputes were to be settled by applying their customary law. For this purpose, it would suffice to note that there is an express clause in the Letters Patent which reads thus:

> "*And We do hereby authorize the said Court of the Recorder of Madras to appoint Guardians and Keepers for Infants, and their Estates, according to the Order and Course observed in that Part of Great-Britain called England; and also Guardians and Keepers of the Persons and Estates of natural Fools, and of such as are or shall be deprived of their Understanding or Reason, by the Act of God, so as to be unable to govern themselves and their Estates, which we hereby authorize and empower the said Court of the Recorder of Madras to enquire, hear and determine, by Inspection of the Person, or by such other Ways and Means, by which the Truth may be best discovered and known.*"

I notice that the Court of the Recorder was expressly authorised to exercise power to appoint guardians "*according to the Order and Course observed in that Part of Great Britain called England*". This was because there was no substantive law as regards this class of persons that existed in India in 1798. Therefore, the Court had to invoke its inherent jurisdiction and draw upon the

common law principles to exercise its jurisdiction. Even so, this could be applied only as regards British subjects, for, it would be illogical to assume that the appointment of a guardian for a Hindu or Muslim could be according to the Order and Course observed in England, as was rightly pointed out by the Division Bench in ***Re: Patrick Martin-II****, supra.*

70 In the common law, English Courts exercised an inherent *parens patriae* jurisdiction over infants and lunatics which is clear from the following passage from the celebrated case of ***Hope v Hope [1854 43 ER 534]***, where, the Lord Chancellor, Lord Cranworth explained the jurisdiction as under:

> *"The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated: and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects."*

What I wish to emphasize is that, from the earliest Charters of this Court, the jurisdiction and power over infants and other persons suffering from legal disabilities, were traceable not to any statutory power, but to its inherent *parens patriae* jurisdiction flowing from the common law as a Court exercising power and jurisdiction equivalent to that of the King's Bench in England.

71 The next significant change occurred in 1800 when the Court of the Recorder was abolished and replaced by the Supreme Court at Madras. Clause 21 of the Letters Patent defined the general jurisdiction and the whole of the clause, insofar as it is material reads thus:

> *"And we do further direct, ordain, and appoint, That the Jurisdiction, Powers, and Authorities of the said Supreme Court of Judicature at Madras, shall extend to all such Persons as have been heretofore described and distinguished in Our Charters of Justice for Madras by the Appellation of British Subjects, who shall reside within any of the Factories subject to, or dependent upon, the Government of Madras,……."*
>
> *(emphasis supplied)*

The succeeding Clause 22, *ibid.,* followed the pattern of the 1798 Charter and declared that disputes amongst native Hindus and Muslims were to be settled by applying their customary law. Thus, the wedge between those who came within the appellation of British subjects (which did not include Indians) and native Indians was maintained in the Charter of 1800.

72 Clause 32 of the Letters Patent of 1800 is a verbatim reproduction of an identical clause in the 1798 Charter authorising the Court to exercise power and authority over infants, natural fools, *et al.*, and the same reads as under:

> *"And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for Infants, and their Estates, according to the* ***Order and Course observed in that***

> ***Part of Great Britain called England****; and also Guardians and Keepers of the Persons and Estates of natural Fools, and of such as are or shall be deprived of their Understanding or Reason, by the Act of God, so as to be unable to govern themselves and their Estates, which we hereby authorize and empower the Supreme Court of Judicature at Madras to enquire, hear, and determine, by inspection of the Person, or by such other Ways and Means, by which the Truth may be best discovered and known."* *(emphasis supplied)*

73 The dual system of the Supreme Court in the Presidency Town and the Sudder Adawluts in the mofussil continued till the passing of the Indian High Courts Act, 1861. Section 8 of that Act declared that upon the establishment of the High Court, the Supreme Court and the Court of the Sudder Adawlut and Foujdary Adawlut in the Madras Presidency shall be abolished. Section 9 is an important provision setting out the jurisdiction and powers of the High Court and it runs thus:

> *"Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such Powers and Authority for and in relation to the Administration of Justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject however, to such Directions and Limitations as to the Exercise of original Civil and Criminal Jurisdictions beyond the limits of the Presidency Towns as maybe prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without Prejudice of the Governor General of India in Council, the High Court to be established in each Presidency shall have and exercise all Jurisdiction and every power and Authority whatsoever in any manner vested in any of the courts in the same presidency abolished under this Act at the time of the Abolition of such last-mentioned Courts."*
>
> *(emphasis supplied)*

Thus, by virtue of Section 9 of the aforesaid Act, the High Court succeeded to all the jurisdiction and powers exercised by the erstwhile Supreme Court at the time of its abolition.

74 In exercise of powers under Section 1 of the Indian High Courts Act, 1861, the Queen issued a Letters Patent dated 26.06.1862 establishing the High Court of Judicature at Madras. The successor of Clause 32 of the Letters Patent of 1800 is Clause 16 of the Charter of 1862 which reads as follows:

> *"And we do further ordain that the said High Court of Judicature at Madras, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras."*
> *(emphasis supplied)*

It would, therefore, be evident from Clause 16 that the High Court of Madras inherited the jurisdiction of the erstwhile Supreme Court as regards its jurisdiction over infants, idiots and lunatics. The words "*within and without the Presidency of Madras*" mirrors the principle laid down in the case cited before us in ***Re: Willoughby [(LR) 1885 30 Ch. D. 324]***, wherein, it was laid down thus:

> *"Now, in my opinion, this Court has jurisdiction to appoint guardians in a proper case of any infant who is a British subject, wherever that infant may be residing, and whoever may have the custody of that infant abroad."*

Thus, under the 1862 Charter, the Madras High Court could exercise jurisdiction over any infant, idiot or lunatic who was a British subject within and without the Presidency of Madras. In other words, the power of this Court over a minor, idiot or lunatic who was a British subject extended beyond the limits of the Madras Presidency as well.

75 The Charter of 1862 was, however, annulled and replaced by the Letters Patent of 1865. Clause 17 of the 1865 Letters Patent which is the successor of Clause 16 of the 1862 Letters Patent underwent a small, yet, significant change when the words "within and without the Presidency of Madras" occurring in the 1862 Letters Patent were replaced with the words "within the Presidency of Madras" in the 1865 Letter Patent. Thus, the jurisdiction of the High Court over infants, lunatics and idiots was curtailed and did not extend beyond the limits of the Presidency of Madras in the 1865 Letters Patent.

76 Clause 17 of the Letters Patent of 1865, which is presently in vogue, is located in a Chapter titled "Civil Jurisdiction" and it reads as follows:

> *"**17. Jurisdiction as to infants and lunatics:** - And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the presidency of Madras, as that which is now vested in the said High ('ours immediately before the publication of these presents."*

77 Placing reliance on a decision of the Privy Council in ***Navivahoo v Turner [1889 L.R 156]***, it was contended that the power under Clause 17 of the Letters Patent is a part of the ordinary original civil jurisdiction of this Court. No doubt, Clause 17, *ibid.,* is situated in a chapter titled "civil jurisdiction" and is original in character. Clauses 19, 20 and 21 of the Letters Patent make it clear that on the civil side, the High Court exercises three types of jurisdictions (i) ordinary original civil jurisdiction, (ii) extra-ordinary original civil jurisdiction and (iii) appellate jurisdiction. Clause 20 which relates to extraordinary original civil jurisdiction is referable to Clause 13, whereas, Clause 21 which deals with appellate jurisdiction is referable to Clauses 15 and 16. Therefore, logically speaking, the rest of the clauses, *viz*., Clauses 11,12,14, 17 and 18 must fall with the ambit of Clause 19 which deals with the ordinary original civil jurisdiction of the Court.

78 In ***Navivahoo***, *supra*, the Privy Council was concerned with the issue of whether an order passed by the Bombay High Court, in its insolvency jurisdiction, was in exercise of its ordinary original civil jurisdiction for the purpose of Article 180 of the Limitation Act, 1877. The test to determine

whether the power was in exercise of ordinary original civil jurisdiction was formulated by Lord Hobhouse as under:

> *"But it was strongly contended at the bar that this jurisdiction, though civil and original, was not ordinary; and Mr. Rigby argued that the passages of the charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction which the Court may assume at its discretion upon special occasions and by special orders. They are confirmed in this view by observing that in the next group of clauses, which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate."*

79 It is no doubt true that judged by the aforesaid test, the jurisdiction under Clause 17 of the Letters Patent would fall within the net of the expression "*ordinary original civil jurisdiction*", for, it is a jurisdiction exercised in the ordinary course of the law without there being any special step to assume it. However, the decree in question in ***Navivahoo,*** *supra,* was passed under Clause 18, *ibid.,* which is not in exercise of any inherent jurisdiction, but, in consonance with the statutory laws in India. This is clear from the following observation of the Privy Council:

> *"Sect. 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the*

High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India."
(emphasis supplied)

I am, therefore, disposed to think that the test in ***Navivahoo,*** *supra***,** has no application to a case concerning the exercise of inherent *parens patriae* jurisdiction by the High Court. Having regard to the history of Clause 17, *ibid.,* I am of the considered view that the jurisdiction of this Court as a *parens patriae* in respect of infants, mentally retarded (idiots) and mentally ill persons (lunatics) in the State of Tamil Nadu is a facet of its inherent jurisdiction inherited from the erstwhile Supreme Court of Madras. The question whether such a *parens patriae* jurisdiction could be exercised on native Indians will be discussed *infra*.

VIII. THE G & W ACT, 1890

80 It is necessary to emphasize that the substantive law relating to guardianship of minors was virtually non-existent when the Letters Patent of 1865 came into force on 28.12.1865. Appendix 2 of the 83rd Report of the Law Commission of India, 1980, contains a lucid survey of the historical backdrop to the G & W Act, 1890.

81 What I find is that the dual system of legal administration that existed prior to 1862 : one by the Chartered High Courts and the other by the

mofussil courts, existed in matters of guardianship as well. The Court of Wards established under Madras Regulation V of 1804 was under the Board of Revenue, and was an extended arm of the executive. By Regulation X of 1841, the Zillah judges in the mofussil were given the power to appoint guardians to the minor heirs of property. In 1855, the Legislative Council of India passed Act XXI of 1855 which was titled *"an act for making better provision for the education of male minors and the marriage of male and female minors subject to the superintendence of the Court of Wards in the Presidency of Fort St. George*". The power of superintendence was vested with the Collector of Revenue where the estate of the minor was situated. Then came the Madras Minors Act, 1858. Section 1 of this Act vested general superintendence and control with the Judge of the Zillah Court for the education of every male minor for whom a guardian has been or shall be appointed. Section 2 of the Act authorized the Zillah judge to exercise the powers of the Collector of Revenue under Act XXI of 1858. This was followed by Act IX of 1861 which was passed by the Legislative Council of India empowering the principal civil Court of Original jurisdiction in the district to entertain a petition for the custody or guardianship or any minor. The whole of the Act runs into just two sections and there is no indication of the procedure or law to be applied by the Courts

hearing these cases. This was the position in the Madras Presidency when the Letters Patent came into force in 1865. To complete the picture, I also notice the European British Minors Act, 1874, which was, however, applicable only to European minors in Punjab, Oudh, the Central Provinces, British Burma, Coorg, Ajmer, Marwara and Assam.

82 In this backdrop, the G & W Act, 1890, came into force on 01.07.1890. The first feature I notice is that the G & W Act, 1890, is a consolidating and amending Act repealing all or most of the provisions set out above, and replacing it in the form of a uniform statutory Code. It is a secular law applicable to persons of all religions. Section 4 of the Hindu Minority and Guardianship Act, 1956, also expressly states that it is in addition to and not in derogation of the 1890 Act, unless expressly indicated.

83 The 83rd Report of the Law Commission of India, 1980, makes an interesting reference to a minute of the then Chief Justice of Madras on the Guardians and Wards Bill, 1886, wherein, it was stated as under:

> *"I think there can be little doubt that the present is a most favourable opportunity for dealing with the question of the 'care of the persons and property of minors in India'. The flaws and defects pointed out by the Bombay High Court in Act 20 of 1864 exist in a great measure in Act 40 of 1858, and probably they are also to be found in Madras Regn. 5 of 1804. The advantages of effecting a general improvement in all these laws by passing one general consolidated Act applicable to the whole of India are so self-evident as not to need much discussion. The principle of codification has been adopted by the*

Government of India, and is being carried out. The present proposal is one step more in the same direction. Thus the passing of one general Act will not only be in accordance with this principle, but it will enable the legislature to remedy the defects that are now found to exist. The Bengal Act was passed a quarter of a century ago. It was inevitable that defects and omissions should come to the light in this interval. These require to be remedied, and the rulings passed in this time by the High Courts require to be engrafted in the positive enactment. I am therefore of opinion that a sufficient case has been made out to warrant the matter being taken in hand for the purposes of further legislation. It may be pointed out that there are at present the Majority Act, Act 9 of 1861, the Court of Wards Act and others, all relating to the different branches of the same subject. If the law is to be codified, all these Acts might be taken up, and one general Act passed on the subject applicable to the whole Empire, thus forming an additional chapter to the Indian Statutes Book on the Law of Guardian and Ward."

(emphasis supplied)

84 The G & W Act, 1890, consists of four chapters. Chapter I deals with definitions and jurisdiction of Chartered High Courts, Court of Wards, *etc.;* Chapter II sets out the process for appointment and declaration of guardians; Chapter III declares the duties, rights and liabilities of guardians, both of person and property, as also the circumstances under which guardianship can be terminated; and Chapter IV consists of supplemental provisions dealing with penalties and appeals, *etc.*

85 Under normal circumstances, a consolidating and amending Act forms a complete code on the subject and is exhaustive of the matters dealt with therein (See ***Innoventive Industries Limited v ICICI Bank [(2018) 1 SCC 407]***. Thus, the procedure for appointment set out in Chapter II would have

been regarded as exhaustive, preventing the High Court from exercising its inherent jurisdiction even in cases not covered by the statute. The legislature was obviously aware of this situation and for this purpose, a specific provision in Section 3 was inserted which reads as follows:

> *"3. Saving of jurisdiction of Courts of Wards and Chartered High Courts.— This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [any competent legislature, authority or person in [any State to which this Act extends]], and nothing in this Act shall be construed to affect, or in any way derogate from the jurisdiction or authority of any Court of Wards, or to take away any power possessed by [any High Court]."*

Section 3 makes it clear that the legislature was fully aware that the Chartered High Courts possessed inherent jurisdiction under their respective Letters Patents to appoint guardians for infants in appropriate cases. However, at the same time, the legislature was aware that codification was a pan India experiment which could not succeed if different sets of laws were to apply to Presidency Towns and mofussil which was, in fact, the very evil that the legislature was attempting to remedy through the process of codification. Thus, while saving the inherent jurisdiction of the Chartered High Courts under Section 3, the Act also conferred a statutory jurisdiction on the High Court to entertain and decide petitions under the Act.

86 This is evident from Section 9 of the G & W Act, 1890, which states that a petition for appointment of a guardian for the person or property of

a minor shall be made to a "District Court" having jurisdiction in the place where the minor ordinarily resides. Section 4(4), *ibid.,* expressly defines the District Court to mean as under:

> "*District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882),* ***and includes a High Court in the exercise of its ordinary original civil jurisdiction"***
>
> *(emphasis supplied)*

From a bare reading of Section 4(4), *ibid.,* it is clear as the day that a High Court, while exercising jurisdiction in respect of a petition under the G & W Act, 1890, would be a District Court within the meaning of the Act. In other words, while exercising its statutory powers under the Act, the High Court exercising its ordinary original civil jurisdiction for the City of Madras, discharges the functions as a District Court under the G & W Act, 1890, and not under its inherent jurisdiction under Clause 17 of the Letters Patent.

87 I also note that under Section 2 of the Code of Civil Procedure, 1882, the expressions "District" and "District Court" were set out under one heading and the same is as under:

> *"2. In this Act, unless there be something repugnant in the subject or context.--*
>
> *"District":*
>
> *"District Court": "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local*

limits of the ordinary original civil jurisdiction of the High Court"

88 This definition has been carried forward in Section 2(4) in the 1908 Code under the term "district", which reads as follows:

> *"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court."*

89 As stated above, Section 4(4) of the G & W Act, 1890, reads as follows:

> *"District Court" has the meaning assigned to that expression in the Code of Civil Procedure, 1882 (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction."*

90 Section 158 of the Civil Procedure Code reads as follows:

> *"158 Reference to Code of Civil Procedure and other repealed enactments.-- In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its correspondent Part, Order section or rule."*

91 Thus, in view of the above, even on a demurrer, it is clear that the expression "District Court" referred to in Section 4(4) of the G & W Act, 1890, would have the meaning assigned to it under the Civil Procedure Code, 1882, which, by virtue of Section 158 of the Civil Procedure Code, 1908, will now

have to be construed with reference to Section 2(4) of the Civil Procedure Code, 1908.

92 The distinction between the aforesaid two jurisdictions *qua* appointment of guardians is fully borne out from the concurring opinion of Kania, J. (as the learned Chief Justice then was) in the Full Bench decision of the Bombay High Court in ***Re: Ratanji Ramaji,*** *supra.* The learned judge observes:

> *"In dealing with the first point, the question of jurisdiction has to be considered under the Guardians and Wards Act, 1890,* ***or*** *the general jurisdiction of the High Court founded on the Charter establishing the same. It is clear that the application being for the appointment of a guardian of a minor's interest in immoveable property, when there is a joint Hindu family, no application could be made under the Guardians and Wards Act." (emphasis supplied)*

This decision is, therefore, a direct authority for the proposition that there existed two distinct streams of jurisdictions: *viz.,* a statutory jurisdiction under the G & W Act, 1890, and a general *parens patriae* jurisdiction under Clause 17 of the Letters Patent.

93 It was, however, contended at the bar that Guardianship petitions under the G & W Act, 1890, were also heard and decided in exercise of power under Clause 17 of the Letters Patent. I am unable to subscribe to this argument. If the jurisdiction of the High Court under the G & W Act, 1890, was to be routed through Clause 17 of the Letters Patent, there was no necessity for

the legislature to specifically include the High Court as a District Court within the meaning of Section 4(4) of the G & W Act, 1890. The very fact that the High Court functions as a District Court under the Act when it entertains a petition under Section 9 is indicative of a statutory jurisdiction exercised through the medium of its ordinary original civil jurisdiction as opposed to the inherent jurisdiction under Clause 17. I am also fortified in arriving at this conclusion having regard to Order XXI of the Original Side Rules. Rule 1 of Order XXI, *ibid.* states that *"all proceedings under the Guardians and Wards Act, 1890"* shall be entitled "*in the matter of the mino*r" as in Form No.27. These rules have been framed in exercise of power under Section 50 of the G & W Act, 1890, to regulate the exercise of statutory power by the High Court under that Act.

94 If I now apply ***Navivahoo,*** *supra,* it is clear that the statutory jurisdiction under Section 9 of the G & W Act, 1890, is in exercise of ordinary original civil jurisdiction as it is exercised by the High Court in the ordinary course of law without any special step; the jurisdiction is original as the High Court is the Court of first instance and lastly, the jurisdiction is civil as the rights in question are civil in character as distinguished from criminal liability.

IX. INHERENT JURISDICTION *VIS-À-VIS G & W ACT*, 1890

95 I have already concluded that the jurisdiction under Clause 17 of the Letters Patent is a facet of the inherent *parens patriae* jurisdiction of this Court. It now remains to be seen as to in what cases this power could be resorted to. It is a well settled principle, both on the civil as well as criminal side, that the inherent jurisdiction of the High Court, will not be invoked *ex debito justitiae* where there is an express statutory provision/remedy available.

96 In ***Pampapathy v State of Mysore*** **[*AIR 1967 SC 286]***, the purpose of recognizing the concept of inherent powers was explained by the Supreme Court as under:

> *"No legislative enactment dealing with procedure can provide for all cases that can possibly arise and it is an established principle that the courts should have inherent powers, apart from the express provision of law, which are necessary to their existence and for the proper discharge of the duties imposed upon them by law."*

97 In ***Ram Prakash Agarwal v Gopi Krishan*** **[*(2013) 11 SCC 296]***, the Supreme Court, in the context of the inherent power recognised under Section 151 of the Code, observed:

> *"Inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law."*

98 Inherent jurisdiction is residual in character and is intended to cover cases which are not expressly covered by any statutory provision. I also notice the contemporary developments in the United Kingdom which, after all, is the origin for the inherent *parens patriae* jurisdiction over infants, lunatics, *etc*. under the Letters Patent. In ***A v A (Health Authority*) *[(2002) 3 WLR 24]***, the Queen's Bench adverted to the position of its inherent *parens patriae* powers under the Crown and held:

> "*the court's inherent jurisdiction is now supplemented, and in terms of normal day-to-day practice to a very large extent superseded, by the Children Act 1989, a near-comprehensive codification of the law relating to children".*

99 In another English case titled ***Re: K (A Child) [2017 4 WLR 112]***, Hayden, J. struck a similar note in respect of the guardianship jurisdiction of the High Court of England and Wales. The learned judge observed:

> *"It is necessary to consider the evolution of the inherent jurisdiction and wardship (which is a facet of the inherent jurisdiction). Though it is difficult to be definitive as to the nature of the inherent jurisdiction or to prescribe its parameters it can perhaps most conveniently be defined as the route by which the court may make orders in relation to specific individuals and their affairs that are not governed by individual statute."*
>
> *(emphasis supplied)*

100 Similarly, in ***Redbridge London Borough Council v A [(2015) Fam 335],*** Hayden, J. made the following observations :

> *"The concept of the 'inherent jurisdiction' is by its nature illusive to definition. Certainly it is 'amorphous' and, to the extent that the High Court has repeatedly been able to utilise it to make provision for children and vulnerable adults* ***not otherwise protected by statute****, can, I suppose be described as 'pervasive'. But it is not 'ubiquitous' in the sense that it's reach is all-pervasive or unlimited."*
>
> *(emphasis supplied)*

101 In ***Re: Ratanji Ramaji****, supra*, the issue before the Bombay High Court was whether the karta of a joint family property could be appointed guardian and whether the High Court could sanction the sale of the share of the minor in and over such property. Beaumont, C.J. held that in view of the decision of the Privy Council in ***Gharib-ul-lah v Khalak Singh]*****(1902-03) 30 IA 165*****[***, a petition invoking the statutory jurisdiction under the G & W Act, 1890, was not maintainable for the following reason:

> *"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion, those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore, a guardian, if appointed, would have nothing to do with the family property."*

Though statutory jurisdiction under the G & W Act, 1890, was unavailable, the Court resorted to its inherent powers under Clause 17 of the Letters Patent to appoint a guardian and sanction the sale of the properties of the minor. This case, therefore, strengthens the proposition that the resort to the inherent

jurisdiction under Clause 17, *ibid.,* is permissible only in cases not expressly covered by the statute.

102 A similar view was taken by N.H. Bhagwati, J. (as he then was) in ***Shamrao G. Rane v Sashikant R Rane [(1947) 49 BOM LR 498]***. It was observed as under:

> *"In cases which are governed by the Guardians and Wards Act, the Court has got the power under Section 7 of the Act, if satisfied that it is for the welfare of the minor that the order should be made, to make an order appointing a guardian of his person or property, or both, or declaring a person to be such guardian. In cases which are outside the purview of this Act and where the Court has, as in this case, inherent or general jurisdiction to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where his property is an undivided share in the family property, the sole purpose of the appointment of the guardian is to do away with this disability or incapacity of the minor to deal with his interest in the property and to appoint a person who would act in the matter of the transaction in a manner in which the minor himself would have acted but for his disability."* *(emphasis supplied)*

103 I may also cite two other decisions to illustrate the aforesaid principle. In ***Deepa Asani [2021 SCC Online Cal 2148]***, a petition was filed under Clause 17 of the Letters Patent of the Calcutta High Court to declare one Deepa C. Asani as a mentally ill person. Section 53 of the Mental Health Act, 1987, provided that a petition for appointment of a guardian in respect of a mentally ill person can be made to the District Court. However, the Mental Health Act, 1987, was repealed and replaced by the Mental Healthcare Act,

2017, which did not contain any similar provision like Section 53 of the 1987 Act. There being a definite statutory vacuum, the Calcutta High Court invoked its inherent jurisdiction under Clause 17 of the Letters Patent to entertain the petition and order an inquisition into the condition of the mentally ill person.

104 In ***Re: C. Raghuraman [2022 2 MLJ 217]*** which was cited before us, a petition was filed invoking Clause 17 of the Letters Patent of this Court with a prayer to appoint the petitioner as the guardian of a mentally retarded person. Though there existed a statute titled *"The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999",* the power to appoint a guardian was vested with a Local Level Committee headed by the Collector and there was no provision in the Act to approach any Court for appointment of a guardian in respect of the person and property of a mentally retarded person. A learned single judge (Abdul Quddhose, J.) held that the inherent jurisdiction of the Court under Clause 17 was available in such cases to appoint a guardian for the person and property of a mentally retarded person.

105 I am in agreement with the decisions in ***Deepa Asani****, supra,* and ***Re: C. Raghuraman****, supra,* which serve to illustrate the general principle that recourse to a remedy by invoking the inherent jurisdiction of this Court under

Clause 17 of the Letters Patent is permissible in cases not expressly covered by any statute. This view is also in consonance with the decision of the Supreme Court in ***M.V. Elisabeth***, *supra,* which was cited by Mr. Datar, learned Senior Counsel, where the plaintiff's claim was resisted on the ground of lack of admiralty jurisdiction of any Court in Andhra Pradesh or any other State in India to proceed *in rem* against the ship on the alleged cause of action concerning carriage of goods from an Indian port to a foreign port. The plea, if upheld, would have resulted in no Court in India having jurisdiction over the subject matter of the suit. In that context, the Supreme Court observed that the High Courts in India possessed inherent jurisdiction to entertain petitions for vindication of substantive rights. I see this decision as affirming the principle of inherent jurisdiction *vis-à-vis* another general principle "*ubi jus ibi remedium*" i.e., where there is a right, there ought to be a remedy. Thus, where there was no other forum for redress, the inherent and plenary jurisdiction of the High Court would be available to be exercised *ex debito justitiae,* unless it is shown to be barred by any law. Clause 17 of the Letters Patent is, thus, a remedy in common law available for cases not covered by any statute and cannot be resorted to bypass the remedies that are independently available to the Court under any statute.

X. IMPACT OF THE FC ACT, 1984

106 Having noted the scope of the jurisdictions under Clause 17 of the Letters Patent and the G & W Act, 1890, it is now necessary to examine the impact of these provisions by the enactment of the FC Act, 1984. The necessity of setting up Family Courts to deal exclusively with family disputes appears to have engaged the attention of law makers for quite some time. Way back in September 1971, the Ministry of Education and Social Welfare, Government of India, constituted a Committee on the "*Status of Women*" to study various issues concerning the general welfare of women in the country. The Committee submitted its Report to the Government of India in December 1974. Amongst the various measures and proposals that were mooted, the Committee expressly recommended the establishment of Family Courts. The rationale for this is spelt out in paragraph 4.227 of the report which reads as under:

> *"The statutory law in all matrimonial matters follows the adversary principle for giving relief ie, the petitioner seeking relief alleges certain facts and the respondent in his own interest refutes them. In addition to this, as we have already noticed, most of the grounds in these statutes are based on the 'fault principle' instead of the breakdown theory. The combined result of these two factors is that strong advocacy is often the determining factor in these cases. This is particularly unfortunate in the field of custody and guardianship where the welfare of the child is often relegated to the background and the decision arrived at is based on the well-argued points of the lawyer. In the present system, the judge has no option but to give his decision on the points raised and argued. If he were to base his decision on social*

needs or in the interest of one of the parties, it may be considered as biased and hence reversed in the appellate court."

The Committee proceeded to strongly recommend that the established adversary system for settlement of family problems be abandoned and Family Courts be established adopting conciliatory methods and informal procedure.

107 It was only a decade later that this recommendation finally saw the light of the day. Tabling the Family Courts Bill, 1984, on the Floor of the Lok Sabha on 27th August, 1984, the then Minister for Law, Justice and Company Affairs observed:

> *"The immediate background to the need for legislation for setting up of Family Courts is the mounting pressures from several associations of women, other welfare organisations and individuals for establishment of Family Courts with a view to providing quicker settlement to the family disputes where emphasis should be laid on conciliation and achieving socially desirable results. The House is fully aware that a good deal of time of the civil courts is taken by small family disputes which could be more expeditiously and at much lesser cost can be settled by Family Courts which should adopt an entirely new approach by avoiding rigid rules of procedure and evidence. Sir, the Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the courts ought to take 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, since it was felt that even the Code of Civil Procedure which was amended in 1976 could also not bring about any appreciable change in the proceedings relating to matters concerning the family.*
>
> *The objective of the legislation is to provide for a radical new procedure for speedy settlement of family disputes.*

Briefly, the important provisions of the Bill are as follows:

a) To provide for establishment of Family Courts by the State Government;

b) To make it obligatory on the State Government to set up a Family Court in every city or town with a population exceeding one million;

c) To enable the State Government to set up such courts in areas other than those specified in (b) above;

d) To exclusively provide within the jurisdiction of the Family Courts the matter relating to:

i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to validity of a 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) ……
(f) …….
(g) ……
(h) ……..
(i) …….” *(emphasis supplied)*

108 It is limpid from the aforesaid that the legislative intent envisaged the Family Court as a Court of exclusive jurisdiction in respect of certain matters concerning the family, including guardianship and custody of children.

109 It is now necessary to briefly survey the provisions of the legislation. The whole of the FC Act, 1984, runs to 23 sections set out in six chapters. Section 3 provides for establishment of Family Courts, followed by Section 4 which deals with appointment of judges to such Courts. Section 5 recognises social welfare agencies, *etc.*, to work with the Family Courts, while Section 6 deals with Counsellors, officers and other employees of the Family Court.

110 Chapter III sets out the jurisdiction of the Family Court and contains two important provisions, *viz*., Sections 7 and 8 which run 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. ***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 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."

The other provisions of Chapter III of the FC Act, 1984, set out the procedure to be followed by the Family Court which is markedly different from those before the ordinary civil courts. Section 9, *ibid.,* imposes a statutory duty on the Family Court to attempt in arriving at amicable settlements in matters before it. Section 10 sets out the general procedure and contains a provision [Section 10(3)], authorizing the Family Court to devise its own procedure with a view to arrive at a settlement or to arrive at the truth of the facts presented before it. Sections 11 and 12, *ibid.,* are enabling provisions authorising the use of *in camera* proceedings, and assistance of medical and welfare experts. Section 13 is an inversion of the normal rule of representation through counsel.

Right to legal representation is now expressly made subject to the discretion of the Court. Section 14 is an important provision that authorizes the Court to receive and appreciate evidence dehors the restrictions imposed under the Evidence Act. Sections 15-18 deal with the record of evidence, form of judgment and execution of decrees and orders of the Court. Chapter V contains one provision *viz*., Section 19, which provides a right of appeal from every judgment or order, not being an interlocutory order, to a Division Bench of the High Court on facts and on law. This right of appeal is circumscribed by a special period of limitation under Section 19(3) of the Limitation Act deviating from the normal 90 days which is available under Article 116 of the Limitation Act, 1963. A remedy of revision is also available under Section 19(4) of the Act. Chapter VI incorporates a non-obstante clause (Section 20) and authorises the High Court, Central and State Government to make rules (Sections 21-23) under the Act.

111 From the aforesaid, it is clear that the FC Act, 1984, envisages a scheme very different from those followed by the Civil Court. It is like a Special Court constituted to hear certain types of cases following a specially devised procedure and whose orders are made subject to appeal under a special provision with a special period of limitation. I am fortified in taking this view

in the light of the judgment of the Supreme Court in ***S.D. Joshi v High Court of Bombay [(2011) 1 SCC 252]*** which, though not cited before us, contains the following observations :

> *"These Family Courts are to exercise special jurisdiction which is limited to the subject-matters spelt out under Sections 7(1)(a) and (b) of the Act. Family Courts have been vested with all jurisdiction exercisable by any District Court or any subordinate civil court under the law, for the time being in force, in respect of suits and proceedings of the nature referred to in the Explanation to sub-section (1) of Section 7. Such courts will 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."*

The Supreme Court also observed that though the Family Court was a "Court" in the generic sense of the term, it was, nevertheless, a Court of limited jurisdiction. It was observed:

> *"Thus, we have no hesitation in coming to the conclusion that the Family Court constituted under Section 3 of the Act has all the trappings of a court and, thus, is a court and the Presiding Officer, that is, the Judge of the Family Court is a "Judge" though of limited jurisdiction."*

112 The arguments before us were primarily centered around whether the High Court is a "District Court" for the purpose of Sections 7 and 8 & 2(e) of the FC Act, 1984, read with Section 2(4) of the CPC. It is important to note that Section 7(1) of the FC Act, 1984, invests the Family Court with all the jurisdiction exercisable by any District Court under any law for the time being in force in respect of suits or proceedings of the nature set out in the

explanation. The explanation contains seven classes of cases which are to be heard by the Family Court. More specifically Clause (g) of the Explanation, when read with Section 7(1), *ibid.,* makes it clear that it invests the Family Court with jurisdiction over a suit or proceeding in relation to the guardianship of the person, or the custody of, or access to, any minor which jurisdiction was being exercised by a District Court under any law for the time being in force.

113 I have already noted that a High Court, within the limits of its ordinary original civil jurisdiction, is a District Court under the G & W Act, 1890, by virtue of Section 4(4) of that Act. Thus, the guardianship and custody jurisdiction statutorily vested with the High Court under the G & W Act, 1890, in its capacity as a District Court, can now be exercised only by the Family Court by virtue of Section 7 of the FC Act, 1984. Obviously, Section 7, *ibid.,* does not and cannot take away the inherent jurisdiction of the High Court under the Letters Patent.

114 In this view of the matter, I find it unnecessary to advert to the submissions made at the bar regarding the applicability of the decision in ***Sathappan***, *supra*, on the ouster of the jurisdiction under the Letters Patent. Having carefully perused the decision, I find that the decision concerned a conflict between the Code of Civil Procedure, 1908, and the Letters Patent of

the Madras High Court on a question touching upon the appellate jurisdiction of the Court. As Section 4 and Section 104 of the CPC saved the jurisdiction of the High Court under the Letters Patent, it was held that the jurisdiction under the Letters Patent which was expressly saved must be ousted only by an express provision. The majority decision observes:

> *"But where there is an express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "order will be final" are not sufficient. In such cases i.e. where there is an express saving, there must be an express exclusion."*

115 It was contended at the bar on the strength of the decision in ***Mary Thomas****, supra,* that the High Court enjoys concurrent jurisdiction along with the Family Court to decide guardianship and custody cases for the City of Madras. As I have observed above, Section 7(1) of the FC Act, 1984, involves a process of vesting jurisdiction with the Family Court constituted under Section 3 with the jurisdiction exercised by the District Court under any law for the time being in force in respect of matters set out in the explanation to Section 7(1), *ibid*. It cannot be disputed that the G & W Act, 1890, is a law in force relating to guardianship and custody and that statutory jurisdiction under that law is vested with a "District Court", which, by virtue of Section 4(4) of that

Act, would include the High Court in exercise of its ordinary original civil jurisdiction. Section 8(a) of the FC Act, 1984, reads as under:

> *"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;"*

A combined reading of Section 7(1) read with Explanation (g) and Section 8(a) of the FC Act, 1984, leads to this inescapable conclusion: the jurisdiction exercised by any District Court in respect of matters of custody or guardianship under the G & W Act, 1890 [which by virtue of Section 4(4) includes the High Court on its original side], will be exercised by the Family Court and that no District Court [which by virtue of Section 4(4) includes the High Court on its original side] shall have or exercise such jurisdiction. Consequently, there is no doubt in my mind that the statutory jurisdiction formerly exercised by the High Court under the G & W Act, 1890, has now been transferred to the Family Court by the FC Act, 1984.

116 If it is held that the Family Court and the High Court exercise concurrent jurisdiction, an anomalous result would follow. Section 7(1) of the FC Act, 1984, invests the Court with jurisdiction which was formerly exercised

by a District Court or a subordinate civil court under any law for the time being in force. Thus, the effect of the FC Act, 1984, and in particular, Section 7(1), *ibid.,* is that District Courts (including a High Court on the original side) and subordinate civil courts are divested of their statutory jurisdiction, under the G & W Act, 1890, and the same is invested with the Family Court to be exercised in consonance with the scheme of the FC Act, 1984. If the District Court (including the High Court on its original side) is divested of its statutory jurisdiction, it is inconceivable as to how it can exercise that jurisdiction concurrently with the Family Court. There is no provision either in the FC Act, 1984, or the G & W Act, 1890, contemplating any concurrent jurisdiction. Where concurrent statutory jurisdiction is contemplated, the legislature has expressly said so. For example, Section 10 of the Divorce Act, 1869, as it stood prior to amendment, vested jurisdiction concurrently with the High Court and the District Court. Unlike Section 4(4) of the G & W Act, 1890, the words "High Court" and "District Court" were separately defined. I find no such classification in the G & W Act, 1890 or the FC Act, 1984. Consequently, it is impossible to accede to the proposition that a concurrent statutory jurisdiction under the G & W Act, 1890, exists in the High Court with the Family Court after the coming into force of the FC Act, 1984.

117 In this view of the matter, it is unnecessary for me to dwell into the precise import of Section 2(4) of the CPC which telescopes the definition of "district" into the FC Act, 1984, and the impact of the judgment of the Supreme Court in ***Raja Soap Factory***, *supra*, since the High Court, in its ordinary original civil jurisdiction, is undoubtedly a District Court under Section 4(4) for the purpose of the G & W Act, 1890.

118 Though it was vehemently argued that the definition contained in Section 2(4) CPC defines a District and not a District Court, I need only say that the weight of judicial authority appears to be otherwise (See ***Jeyaram Educational Trust****, supra,* ***The Daily Calendar Supplying Bureau***, *supra*, ***Penguin Books Limited v India Book Distributors [AIR 1985 Del 29]***, ***Brooke Bond India Ltd v Balaji Tea (India) Limited [1989 2 LW 551 (Mad)]*** & ***[1993 2 LW 291 (DB)]*** and ***Griesheim v Goyal MG Gases*** **Pvt. Ltd.** ***[2022 SCC Online 97]***.

119 It was then contended that the High Court is not a District Court for the City of Chennai and that the expression "District Court" cannot refer to the High Court. This submission flies in the face of Section 4(4) of the G & W Act, 1890, which expressly states that the High Court, in exercise of its

ordinary original civil jurisdiction, is a District Court for the purpose of exercising jurisdiction under the Act. I also find this submission to be illogical for the simple reason that if I were to hold that the High Court does not function as the District Court for the City of Madras, then, a piquant situation would arise, where, there would be no District Court for the City of Chennai. This is because the City Civil Court at Madras constituted under the Madras City Civil Court Act, 1892, is only an additional civil court for the City of Madras and is not the principal court of original civil jurisdiction for the city. This is clear from the preamble to the Act as also from the decision of a Division Bench of this Court in ***Sundaram Finance Limited v M.K.Kurian [2006 (1) CTC 433].*** The preamble of the Madras City Civil Court Act, 1892, reads as follows:

> "An Act to establish an additional Civil Court for the City of Madras.
>
> WHEREAS it is expedient to establish an additional Civil Court for the City of Madras; It is hereby enacted as follows.--
>
> **1. Title and commencement.--** (1) This Act may be called the Madras City Civil Court Act, 1892;"
>
> ("Madras" has since been renamed as "Chennai")

120 Realising this difficulty, it was contended at the bar that the jurisdiction should be traced to Clause 17 of the Letters Patent. However, I have already held that the jurisdiction under Clause 17, *ibid.,* is a facet of

inherent jurisdiction which cannot be exercised where specific remedies exist under a statute. The High Court was not exercising its power under Clause 17, *ibid.,* when it exercised its statutory powers under the G & W Act, 1890. Furthermore, to say that the inherent jurisdiction of the Court can be routinely invoked will destroy its very character as a residual provision to cater to extraordinary cases, *ex debito justitiae*, where there is no express provision in the statute to grant relief.

121 There is another reason which persuades me to hold that inherent jurisdiction cannot be exercised parallelly with the Family Court. I have already noted that the intention of the Parliament was to set up the Family Court as a Court of exclusive jurisdiction. Exclusive jurisdiction can exist only when one Court has jurisdiction over a subject matter. Where there are more Courts having jurisdiction over the same subject matter, they are Courts of available or natural jurisdiction. The decision of the Supreme Court in ***Modi Entertainment Network v W.S.G. Cricket Pte. Limited [(2003) 4 SCC 341]*** clearly establishes this rather obvious proposition. Furthermore, in ***Balram Yadav v Fulmaniya Yadav [(2016) 13 SCC 308]***, the Supreme Court has held:

> *"Under Section 7(1) Explanation (b), a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is* ***within the exclusive jurisdiction of the Family Court****, since under Section 8, all those jurisdictions covered under Section 7 are*

excluded from the purview of the jurisdiction of the civil courts."
(emphasis supplied)

122 In my considered view, I would be defeating the clear and express intention of the Parliament if I am to hold that notwithstanding the clear intent of the legislature to constitute the Family Court as a Court of exclusive jurisdiction, the High Court should still exercise its inherent jurisdiction to concurrently exercise powers to decide custody cases. I draw inspiration from the following passage in the speech of Lord Diplock in ***Duport Steels Ltd.* v *Sirs [(1980) 1 WLR 142 (HL)]***, which was quoted by the Supreme Court in ***Petroleum & Natural Gas Regulatory Board v Indraprastha Gas Ltd. [(2015) 9 SCC 209]:***

> *'... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."*

123 For all of the aforesaid reasons, I am of the considered view that the High Court cannot exercise its statutory or inherent jurisdiction concurrently with the Family Court while deciding matters of custody and guardianship under the G & W Act, 1890. I cannot help observing that when ***Mary Thomas****, supra,* was decided in October 1989, the Family Courts in

Madras were at a nascent stage. Even the rules to regulate their proceedings had not been framed and were brought into force only 7 years later in 1996. The position now is vastly different. Family Courts have been established all over the State. The City of Chennai alone has seven Family Courts functioning within the precincts of the High Court campus. The reservations and apprehensions that naturally occur when new Courts are established cannot possibly remain today.

124 Section 7(1) read with Explanation (g) of the FC Act, 1984, gives the impression that it takes within its fold only a suit or proceeding in relation to the guardianship of the person, or the custody or access to any minor, and does not cover cases relating to appointment of guardians to the property of the minor. In my considered opinion, such a construction would clearly frustrate the very object of the enactment. Section 7 of the G & W Act, 1890, vests the power with the District Court to appoint a guardian for the person or property of the minor or, in appropriate cases for both person and the property of the minor. A literal construction of Explanation (g) to Section 7(1) of the FC Act, 1984, would mean that in a given case where there is a necessity to appoint a guardian for the person and property of a minor, the Family Court would have power to appoint a guardian of the person, but would be powerless to appoint a

guardian for the property of the minor. Surely, such a construction cannot be said to be in consonance with the object of the legislation. Where two views are possible, the Court must lean in favour of a construction that furthers the object of the legislation rather than taking a view that obfuscates it.

125 The aforesaid conclusion is strengthened by the decision of the Supreme Court in ***K.A. Abdul Jaleel v T.A. Shahida [(2003) 4 SCC 166]***, wherein, it was contended that the expression "a suit or proceeding between the parties to a marriage" in Explanation 7(c) to Section 7(1) of the FC Act, 1984, ought to mean "parties to a subsisting marriage". Rejecting this argument, the Court held as under:

> *"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."*

Keeping in mind the aforesaid principle, it is clear that Explanation (g) to Section 7(1) of the FC Act, 1984, must be construed liberally to further the object of the legislation, and when so construed, it is clear that Explanation (g) to Section 7(1) *ibid.,* would take within its fold, application for appointment of a guardian for the person and property of the minor as well.

126 In view of the aforesaid conclusion, I hold that the Family Courts at Chennai would have exclusive jurisdiction to hear and decide cases of custody and guardianship arising under the G & W Act, 1890, in the City of Chennai. Consequently, I am of the considered view that ***Mary Thomas,*** *supra,* was incorrectly decided by the Full Bench and will, therefore, stand overruled.

XI. EXTRA-TERRITORIAL JURISDICTION OF THE HIGH COURT UNDER CLAUSE 17 OF THE LETTERS PATENT

127 On the basis of the decision in ***Vizianagaram***, *supra,* elaborate submissions were made at the bar on the jurisdiction of this Court under Clause 17 of the Letters Patent throughout the State of Tamil Nadu. It was contended on the basis of the aforesaid decision and on the basis of the decisions in ***Pamela Williams***, *supra*, ***Gautam Menon***, *supra* and ***Re: Ratanji Ramaji,*** *supra,* that the jurisdiction of this Court under the G & W Act, 1890, would extend throughout the State of Tamil Nadu in view of Clause 17 of the Letters Patent.

128 On the other hand, it was contended by the jurisdiction ouster camp that the very basis of the decision in ***Vizianagaram****, supra,* has crumbled as the decisions it has relied in support of its conclusions have all been either reversed or overruled.

129 I am of the considered opinion that given the route I have taken to hold that ***Mary Thomas***, *supra*, is no longer a good law, it may not be necessary to advert to the arguments and counter arguments that were elaborately made at the bar on ***Vizianagaram***, *supra.*

130 The decision in ***Vizianagaram,*** *supra*, arose on certain very peculiar and unusual facts. The then local Government made a declaration under Section 15 of the Court of Wards Act, 1902, disqualifying the Rajah to be the guardian of his minor children and directing the Court of Wards to assume superintendence over their person and property. Accordingly, the Court of Wards took custody of the children and decided to send them to England for higher studies. The Rajah challenged the said order in the Subordinate Court, Vizagapatnam (then a part of Madras Presidency) and also sought an order of injunction restraining the Court of Wards from removing his children out of India.

131 Since the application for injunction was moved a few days before the summer recess of the Court, the Subordinate Judge passed a provisional order directing that the Court of Wards should give 15 days' notice to the Rajah before removing the children from India. The Rajah, upon being notified by the Court of Wards during the summer recess, moved the High Court by way of a

suit to restrain the Court of Wards from removing the minor children from India. A learned single judge of this Court dismissed the application observing *inter alia* that the suit itself was *prima facie* incompetent. The Rajah filed an intra-Court appeal together with a formal petition invoking the jurisdiction under Clause 17 of the Letters Patent.

132 On facts, ***Vizianagaram***, *supra,* did not arise under the G & W Act, 1890. The dispute between the Court of Wards and the Rajah was outside the scope of the G & W Act, 1890, and therefore, the decision in ***Vizianagaram*****,** *supra,* is not an authority for the proposition that the High Court could exercise jurisdiction under Clause 17 of the Letters Patent parallelly with its jurisdiction under the G & W Act, 1890.

133 In ***Vizianagaram***, *supra*, Clause 17 of the Letters Patent was invoked on a native Indian on the premise that after the taking over of the sovereignty by the Crown in 1858, the native Indians became British subjects in the light of the law laid down in ***Re: Nataraja Iyer***, *supra.* However, ***Re: Nataraja Iyer***, *supra,* came to be disapproved subsequently by the Privy Council in ***Parlakimedi****, supra*. That apart, were the native Indians treated on par with British subjects in law by the Crown after 1858? The answer to the above question is an emphatic "No". In the days of the British Raj, native

Indians were never treated on par with the Citizens of the United Kingdom. For instance, a British Citizen was entitled to a British passport issued under the seal of the Crown. Though India was a colony under the British Empire, Indians were not "citizens" and were entitled only to a "British Indian Passport" issued under the seal of the Viceroy/Governor General of India in terms of the regulations issued under the Indian Passports Act, 1920. This position can be contrasted with Pondicherry, where, the native inhabitants were treated on par with French citizens and were entitled to French passports. These persons were also eligible to vote in the national elections in France.

134 The dichotomy between Europeans on the one hand, and native Indians on the other, was maintained in the administration of justice as well. Thus, for instance, there existed a separate Chapter in the Code of Criminal Procedure, 1898 (Chapter XXXIII) which provided that a European, accused of an offence, could only be tried by a European jury. Even in matters of guardianship, European minors were treated differently by virtue of Section 5 of the Guardians and Wards Act, 1890, which was repealed only in 1951 *vide* Central Act 3 of 1951.

135 Has Clause 17 of the Letters Patent become a dead letter outside the town of Madras as there is no class of Europeans called “British subjects”

post the Constitution? As stated *supra*, the distinction between British subjects and native Indians goes back to Clauses 21 and 22 of the Charter of 1800. It is this power which has ebbed and flowed till the eve of 26.01.1950. The seminal issue now is how should the expression "British subjects" used in the 1800 Charter, be construed in post-independent India.

136 One possible view which was taken by the Division Bench in ***Re: Patrick Martin-II,*** *supra,* is by declaring that European British subjects, as a class, ceased to exist, with the result that Clause 17 of the Letters Patent, has become a dead letter. I cannot approve of this interpretation because Clause 17, *ibid.,* would apply to everyone, irrespective of his race, who was residing within the ordinary original civil jurisdiction of Madras city even prior to 26.01.1950 *(See "The Constitution and Jurisdiction of Courts of Civil Justice in British India by Sir Ernest John Trevelyan).* Thus, the assumption made by the Division Bench in ***Re: Patrick Martin-II***, *supra*, that Clause 17, *ibid.,* applied exclusively to Europeans alone is fundamentally flawed.

137 Naturally, the express words of Clause 17, *ibid.,* do not use the words British subjects. Nevertheless, Clause 17, *ibid.,* does not confer any new power, but it merely continues the power enjoyed by the High Court under the 1862 Charter which, in turn, goes back to Clauses 21 and 32 of the 1800

Charter. In the changed circumstances in post independent India, must the wholesome power under Clause 17 of the Letters Patent be rendered a dead letter on account of our colonial past? I think not.

138 When the Constitution came into force in 1950, there were several laws which contained the expression "British subjects". Our attention was invited by Mr. Sharath Chandran, learned counsel, to the Adaptation of Laws Order, 1950, which was issued by the President, in exercise of powers under Article 372(2) of the Constitution. Under the said order, a Province was to be construed as a State. Consequently, the Province of Madras which existed between 15.08.1947 and 26.01.1950 was thenceforward to be called Madras State, which later became the State of Tamil Nadu *vide* the Tamil Nadu Adaptation of Laws Order, 1970, which came into effect from 14.01.1969. Clause 3 of the Adaptation of Laws Order,1950, stated that the laws that were in force were to be construed, subject to the adaptations and modifications directed in the Schedule which contains a list of several enactments. Our attention was drawn to Section 3 of the Registration of Ships Act, 1841, where the expression "British subjects" was directed to be construed as "Citizens of India". Similarly, in Section 4 of the Indian Penal Code, the following was directed :

"In illustration (a) of "a British subject of Indian domicile" substitute "a citizen of India".

In Section 3 of the Indian Patents and Designs Act, 1911, the following was directed:

"*for "British subject"* substitute *"citizen of India"*

It is, therefore, clear that after the coming into force of the Constitution, there ceased to exist any class of persons in this country who were known as "British subjects". The expression "British subjects" in any pre-existing law, was not be treated as non-existent as was done by the Division Bench in ***Re: Patrick Martin-II***, *supra,* but is now to be construed as "Citizens of India". Quite obviously, the Adaptation of Laws Orders, 1950, could not amend the terms of the 1800 Chapter for the simple reason that the same had been replaced by the Charters of 1862 and 1865.

139 In Francis Bennion's *Statutory Interpretation*, 2nd Edn., Section 288 under the heading "*Presumption that updating construction to be given*", it is stated as under:

> *"****
>
> *(2) It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of*

the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

****"*

In the comments that follow it is pointed out that an ongoing Act is taken to be always speaking. It is also, further, stated thus: (pp. 618-19)

"In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as 'a living Constitution', so an ongoing British Act is regarded as 'a living Act'. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording.

*****

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials." *(emphasis supplied)*

140 The amendments made through the Adaptation of Laws Orders, 1950, post the coming into force of the Constitution, gives the Court a legitimate aid to apply the principle of updating construction to interpret the expression "*British subject*" occurring in the 1800 Charter as telescoped into the Charters of 1862 and 1865 to mean "citizen of India" after 26.01.1950. Such an interpretation would also align the Letters Patent in line with our status

as a constitutional Republic by sweeping away the class of British subjects which is an odious reminder of a bygone era.

141 When so construed, the inherent *parens patriae* jurisdiction originally derived from Clauses 21 and 32 of the 1800 Charter of the Supreme Court of Madras and continued through Clause 17 of the Letters Patent of High Court of Madras, can be invoked by any citizen of India in the State of Tamil Nadu. However, as I have held above, the inherent jurisdiction under Clause 17, *ibid.,* cannot be exercised when a remedy is available under any statute before any Court.

XII. EFFECT OF CONCURRENT JURISDICTION

142 At the risk of repetition, it is necessary to state here that the *parens patriae* jurisdiction on infants, idiots and lunatics provided a forum for the enforcement of common law rights. In the absence of a statute law, the High Court, in exercise of its *parens patriae* jurisdiction, was empowered to pass any order for the benefit of infants, idiots or lunatics. However, with the passing of several subsequent legislations like the Guardians and Wards Act, Juvenile Justice (Care and Protection) of Children Act, the POCSO Act, *etc*. the inherent jurisdiction of the High Court cannot be exercised parallelly with the statutory jurisdictions conferred under those enactments.

143 Another anomalous consequence which would follow if one were to accept the theory of concurrent jurisdiction is that the jurisdiction under Clause 35 of the Letters Patent, which is admittedly independent of the civil jurisdiction of the High Court, would still be available to be exercised, notwithstanding the fact that the Indian Divorce Act, 1869, as amended by the 2001 enactment, provides that the petition for divorce and other remedies under that enactment must lie only to the District Court. As a matter of fact, it has not been disputed before us that as on date, the petitions for divorce under the Indian Divorce Act are presented only to the District Court and not to the High Court in exercise of its power under Clause 35 of the Letters Patent. Now, if we were to hold that the High Court has concurrent jurisdiction with the Family Court under Clause 17 of the Letters Patent for dealing with petitions under the G & W Act, 1890, then, as a sequitur, it is tantamount to saying that there is no bar for presenting a petition under Clause 35 of the Letters Patent in respect of a divorce proceeding under the Indian Divorce Act.

XIII. REFORMS IN THE FAMILY COURT

144 In the order of reference, our learned brother V. Parthiban, J. has taken note of the submissions made at the bar regarding various issues,

administrative and judicial, that are plaguing the working of Family Courts in Chennai City. The learned judge has observed:

> *"Instead, this court feels that if and when a reference is made by the learned Chief Justice the larger bench may kindly consider these practical and logistical issues also, on the justice delivery system before Family Courts, in appropriate perspective and address them as may be deemed fit. That is, to possibly set a Template for the Family Courts to follow in dealing with such causes with efficacy and expedition to render speedy and wholesome justice. With these observations also, this court feels that a sound foundation has been set to justify the reference"*

Even before us, we had the benefit of hearing practitioners from the Family Court who pointed out several anomalies in the working of the system at present. I am of the considered view that these issues merit serious consideration as they have the tendency of affecting the quality of justice administered by the Family Courts. Nevertheless, as this Special Bench has been constituted by the Hon'ble Chief Justice to answer only specific questions of law, I am of the opinion that these issues may be placed before the Hon'ble Chief Justice on the administrative side for appropriate action.

XIV. EFFECT ON PENDING CASES

145 I have concluded, *supra,* that this Court, exercising statutory jurisdiction *i.e.*, ordinary original civil jurisdiction under the G & W Act, 1890, cannot exercise jurisdiction parallelly with the Family Courts in view of the provisions of the FC Act, 1984. I must now work out the consequences that this

finding will have on cases filed under the G & W Act, 1890, and pending before this Court as on date. In doing so, I am alive to the fact that there are several cases where single judges of this Court have passed interim directions like visitation rights, and that these cases are at various stages of hearing. I cannot lose sight of the fact that these cases involve minor children, some of them at a tender age, torn in an emotional conflict between warring spouses, and that the High Court had exercised jurisdiction in these cases keeping in mind their best interests following the law as it stood then.

146 I am of the considered view that uprooting these cases, which are only about 200-250 in number, at this distance of time, will not only cause great inconvenience to the parties, but will also create a limbo on the fate of interim orders, *etc.*, which have been passed by this Court to protect the interests of the minor children. In matters concerning minor children, there cannot and should not be a moment's uncertainty and every effort must be made by me, as the highest Court in this State, to ensure that least inconvenience is caused to the parties in these cases.

147 As to the course of action to be adopted, I draw inspiration from the decision of the Bombay High Court in ***Maria Sera Pinto v Milton Dias [(2000) 4 Mah LJ 633]*** where the Division Bench comprising B.N.Srikrishna

and Ranjana Desai, JJ. was placed in a similar situation concerning the fate of pending cases after the decision of the Full Bench in ***Romila Jaidev Shroff***, *supra*. Their Lordships proceeded to observe:

> "*The life of law is not logic, but convenience, as Holmes pointed out. We must, therefore, interpret the law in such a manner that it causes least inconvenience to innocent parties. Second, in any event, during the period between 1991 to 2000 the judgment which held the field was Kanak Mehta and that was the law which was being followed by the litigants, advocates and Judges. We see no reason or compulsion to totally upset that view at this distant point of time and cause inconvenience to innocent parties. Third, the number of cases to be dealt with is limited, being about 200, once they have been disposed of, there is no question of further cases arising now in view of the clear pronouncement of law by the Full Bench in Romila.*"

Consequently, keeping in mind the vital principle that this order must cause the least inconvenience to the fate of pending cases concerning minor children, I hold that this pronouncement will not impact any case which is already pending before the single judge or the Division Bench on appeal which will be heard and disposed of in accordance with law. The law laid down herein will operate as regards fresh cases on and from the date of pronouncement of this order.

148 While bringing the curtains down on this case, notwithstanding the marked erudition and learning demonstrated by the learned counsel on either camp, I am of the considered view that there was a collective missing of the wood for the trees. The jurisdiction ouster camp was fixated with demonstrating that Section 2(4) CPC as telescoped into the FC Act, 1984, through Section 2(e)

of that Act, ousted the jurisdiction of the High Court. The jurisdiction retention camp went all out to demonstrate that the aforesaid contention was unfounded. In the process, both sides appear to have lost sight of the two very different types of jurisdictions: inherent jurisdiction under Clause 17 of the Letters Patent and statutory jurisdiction under the G & W Act, 1890. That apart, as I have held *supra*, Section 4(4) of the G & W Act, 1890, furnishes a straight answer to the problem. I, however, am extremely grateful for the able assistance that the bar has given us during the hearing of this case.

XV. CONCLUSIONS

149 In view of the aforesaid discussion, my conclusions are summarised as under:

a. The decision of the Full Bench in ***Mary Thomas v K.E. Thomas [AIR 1990 Mad 100]*** does not lay down the correct law and is, hence, overruled.
b. Petitions for custody or access to or appointment of a guardian under the G & W Act, 1890, or any other statutory enactment falling under the Explanation (g) to Section 7(1) of the FC Act, 1984, will be heard and decided exclusively by the jurisdictional Family Court under the FC Act, 1984.
c. Consequently, the High Court cannot exercise its statutory jurisdiction under the G & W Act, 1890, in respect of the

aforesaid matters which will now be heard and decided exclusively by the Family Courts.

d. The inherent jurisdiction of this Court under Clause 17 of the Letters Patent, 1865, is not affected by the FC Act, 1984. However, resort to the inherent jurisdiction under Clause 17 can be had only in cases where there is no statutory remedy before any Court. In all other cases, the High Court cannot exercise its inherent jurisdiction parallelly with the Family Court where there exists a specific statutory remedy for redress.

e. Cases filed under the G & W Act, 1890, that are now pending on the file of this Court either before the single judge or before the Division Bench shall continue to be heard and disposed of by this Court in accordance with law.

f. Fresh cases filed under the G & W Act, 1890, cannot be entertained by the High Court and will now be heard and decided exclusively by the jurisdictional Family Courts or the District Court (where there is no Family Court).

g. The Registry is directed to place the papers before the Hon'ble Chief Justice with a request that the issues flagged by me in paragraph 144, *supra*, may be considered on the administrative side, for necessary action.

The order of reference dated 28.10.2021 is answered on the aforesaid terms.

02.09.2022

cad

R.MAHADEVAN, J.

For easy reference of analysis, the judgement is arranged under the following heads:

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I. PREFATORY NOTE

1. I have had the benefit of perusing the judgements of my Learned Brothers, Justice P. N. Prakash and Justice N. Anand Venkatesh. After having carefully considered the same and with due respect to their respective views, I express my disagreement with the views adopted by them and as such, I render my dissenting opinion hereunder.

2. As Justice P.N. Prakash has dealt in detail with the factual background preceding the reference and the submissions made at the Bar supporting the respective contentions on the question of law referred to this Larger Bench, I am not inclined to repeat the said factual background or the submissions made by each Advocate, while I note with appreciation each one of the submissions made by the members of the Bar. I have also perused in detail the written submissions made by each one of them and have carefully considered them before coming to the following conclusion. Only such submissions, which directly deal with and further opinion adopted by me are discussed and spelt out in detail.

II. GENESIS OF THE REFERENCE AND ITS VALIDITY

3. The starting point of the reference was with the learned Single Judge of this Court expressing his doubt over the tenability of the concurrent jurisdiction of this Court with the Family Court *qua* guardianship and custody matters.

4. The preliminary question that arises for consideration in such a case is, whether the learned Single Judge could have, in the light of an existing Full Bench judgement in ***Mary Thomas v. Dr.KE Thomas [AIR 1990 Madras 100]*** sought for the Constitution of a Bench of appropriate strength to resolve the question referred by him on

(i) Whether the jurisdiction of the High Court, on its original side over matters of custody and guardianship, is ousted in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984, and

(ii) Whether the decision of a Full Bench of this court in ***Mary Thomas v. Dr.K.E. Thomas*** is still good law.

5. As the entire reference owes its existence to this order of the learned Single Judge dated 28.10.2021, it is necessary to examine the law on the point before going further on the subject. A Full Bench of this Court in ***Sundaravalli Ammal v. Government of Tamil Nadu and Ors. [2008 (2) LW 124]*** has dealt

with this very question and categorically held that "*it will be open only to a bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier bench of co-equal strength whereupon the matter may be placed for hearing before a bench consisting of larger strength than the one, which pronounced the decision laying down the law, the correctness of which is doubted*". The relevant paragraphs of the said judgement are extracted hereunder for useful reference.

> *"9. In fact in the present order of reference, the Division Bench has directed the registry to get orders from the Honourable Chief Justice to straightaway make a reference to a Larger Bench. In this context, we wish to be guided by the decisions of the Honourable Supreme Court in Pradip Chandra Parlja v. Pramod Chandra Patnaik MANU/SC/0304/2002 : [2002] 254 ITR 99(SC) and Central Board of Dawoodi Bohra Community v. State of Maharashtra MANU/SC/1069/2004 : AIR2005SC752. In the first case. i.e., in Pradip Chandra Parija v. Pramod Chandra Patnaik MANU/SC/0304/2002 : [2002] 254 ITR 99 (SC) the question that was considered by the Hon'ble Supreme Courts:*
>
> > *Whether two Learned Judges of this Court can disagree with a judgment of three Learned Judges of this Court and whether for that reasons they can refer the matter before them directly to a Bench of Five Judges?*
>
> *After hearing the Learned Counsel on either side, including the Learned Attorney General, the Supreme Court has concluded:*
>
> > *"(6) In the present case the Bench of two Learned Judges has, in terms, doubted the correctness of a decision of a Bench of three Learned Judges. They have, therefore, referred the matter directly to a Bench of Five Judges. In our view, judicial discipline and propriety demands that a Bench of two Learned Judges should follow a decision of a Bench of three Learned Judges. But if a Bench of two Learned Judges concludes that an earlier judgment of three Learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three Learned Judges*

setting out as has, been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three Learned Judges also comes to the conclusion that the earlier judgment of a Bench of three Learned Judges is incorrect, reference to a Bench of five Learned Judges is justified."

In the second case viz., Central Board of Dawoodi Bhora Community v. State of Maharashtra MANU/SC/1069/2004 : AIR 2005 SC 752 which is also a Constitution Bench, after considering all the earlier decisions, including Pradip Chandra Parija v. Pramod Chandra Patnaik MANU/SC/0304/2002 : [2002]254ITR99(SC) summarised the legal position:

12. Having carefully considered the submissions made by the Learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions:

(i) the above said rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(ii) in spite of the rules laid down herein above, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question

dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Hansoli Devi.

13. So far as the present case is concerned, there is no reference made by any Bench of any strength at any time for hearing by a larger Bench and doubting the correctness of the Constitution Bench decision in the case of Sardar Syedna Taher Saifuddin Saheb v. State of Bombay MANU/SC/0072/1962 : 1962 Supp. SCR 496. The order dated 18.3.1994 by the Two-Judge Bench cannot be construed as an order of reference. At no point of time has the chief Justice of India directed the matter to be placed for hearing before a Constitution Bench or a Bench of Seven-Judges.

14. In the facts and circumstances of this case, we are satisfied that the matter should be placed for hearing before a Constitution Bench (of five-Judges) and not before a Larger Bench of seven Judges. It is only if the Constitution Bench doubts the correctness of the law laid down in Sardar Syedna Taher Saifuddin Saheb case that it may opine in favour of hearing by a Larger Bench consisting of Seven-Judges or such other strength as the Chief Justice of India may in exercise of his power to frame a roster may deem fit to constitute."

(Emphasis added)

The above two decisions of the Honourable Supreme Court makes it clear that the Full Bench decision is binding on the Division Bench. If at all this Full Bench comes to a conclusion that the earlier Full Bench decision is incorrect, then a reference can be considered for being made to a Larger Bench. In other words, only if this Bench doubts the correctness of the law laid down in R. Pari v. Special Tahsildar, Adi Dravidar Welfare, Pasumpon Muthuramalinga Thevar District and Anr. MANU/TN/9385/2006 : (2007) 2 MLJ 706 there is no scope for making a reference to a Larger Bench.

10. Keeping the above said legal position in mind when we refer to the order of reference made by the Division Bench dated 19.9.2007, we are of the view that it was not appropriate for the Division Bench to direct the registry for placing the papers before the Learned Chief Justice straightaway to make a reference to a Larger Bench to consider the issue raised before it."

6. In the present case, the learned Single Judge doubted the correctness of the judgement of the Full Bench in ***Mary Thomas***, which he could not have

done as is clear from the above judgement and as per the principles of judicial discipline. Further, the Full Bench constituted pursuant thereto, did not go so far as to express its doubt on the correctness of the judgement of the earlier Full Bench in ***Mary Thomas***, which it should have done before referring the same to the Hon'ble Chief Justice for constitution of a larger bench. It is now trite law that the judgement of a Full Bench is binding on a subsequent Full Bench or a bench of lesser strength and only when the Full Bench expresses its doubt on the correctness of the judgement of the earlier Full Bench, can the question of the constitution of a larger bench arise. In the case at hand, the Full Bench consisting of Justices P.N. Prakash, J., R.Mahadevan, J. (myself), M.Sundar, J. and A.A.Nakkiran, J., while placing the papers before the Hon'ble Chief Justice for constitution of a larger bench, did not express their opinion or reasoning on whether they indeed had doubted the correctness of the judgement in ***Mary Thomas*** and if so, the reasons therefor.

7. In the light of the legal principles set out and summarized in the judgement of the Constitution Bench of the Hon’ble Supreme Court in ***Central Board of Dawoodi Bohra community v. State of Maharashtra [AIR 2005 SC 752],*** as mentioned and applied in ***Sundaravalli Ammal's case*** (cited supra) by the Full Bench of this court, I find, it was neither appropriate nor necessary for

the learned Single Judge to have made a reference to a Full Bench nor was it legally correct for the Full Bench to have straight away referred the matter for constitution of a larger bench without first expressing its opinion on whether it doubted the correctness of the judgement in ***Mary Thomas*** rendered by a Full Bench of this court.

8. Having said the above and being conscious to the fact that the above rules of judicial discipline do not fetter the discretion of the Hon'ble Chief Justice to direct any particular matter to be placed for hearing before any particular bench of any strength and as the matter has been placed before the larger bench, this bench is duty bound to answer the reference.

III. NATURE OF JURISDICTION UNDER CLAUSE 17 OF LETTERS PATENT- PARENS PATRIAE JURISDICTION

9. After the passing of the Indian High Courts Act 1861, Queen Victoria created the three High Courts by issuing *Letters Patent to erect and establish the High Court of Judicature at Calcutta, Madras and Bombay.* The Letters Patent of 1862 is the source of all civil and criminal, intestate, testamentary, admiralty and matrimonial jurisdiction conferred upon the High Court. Under Clause 16 of the Letters Patent of 1862, it was ordained that *the High Court of Judicature at Madras shall have the like power and authority with respect to*

the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras, that which was vested immediately before that in the Supreme Court of Madras. If reference is had to the Charter of 1800 establishing the Supreme Court of Judicature at Madras, it is seen that a similar power was vested in the erstwhile Supreme Court of Judicature at Madras *to appoint guardians and keepers for infants, and their estates, according to the order observed in that part of Great Britain called England; and also guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason, by the act of God, so as to enable to govern themselves and their estates, which we hereby authorize and empower the Supreme Court of Judicature at Madras to enquire, hear, and determine, by inspection of the person or by such are the ways and Means, by which the truth may be the best discovered and known.*

10. The Charter of 1862 was thereafter amended in 1865 and Clause 16 of the Charter of 1862 was amended with the only change that the power vested with the High Court with respect to the custody and estate of infants, lunatics and idiots which was earlier available for all such persons *within and without* the Presidency of Madras came to be restricted to *within* the Presidency of Madras under Clause 17 of the Letters Patent of 1865.

11. While it is seen that the jurisdiction vested upon the High Court of Madras under Clause 17 would broadly fall within the chapter- Civil Jurisdiction, it is seen that what has been vested is an inherent jurisdiction of the superior Court in the nature of *parens patriae* jurisdiction in order to safeguard the interests of such category of persons, such as, infants, lunatics and idiots, who are incapable or not in a position to take care of themselves or to safeguard their own interests. In order to understand the concept of *parens patriae* jurisdiction of the superior constitutional courts, reference may be had to the judgement in ***Shafin Jahan v. Asokan K.M. and Ors. (09.04.2018 - SC) : (2018) 16 SCC 368,*** wherein, it has been held as follows:

> *"31.Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the parens patriae doctrine. Parens Patriae in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. "The parens patriae jurisdiction is sometimes spoken of as 'supervisory'"*
>
> *32. The doctrine of Parens Patriae has its origin in the United Kingdom in the 13th century. It implies that the King as the guardian of the nation is under obligation to look after the interest of those who are unable to look after themselves. Lindley L.J. in Thomasset v. Thomasset [1894] P 295 pointed out that in the exercise of the Parens Patriae jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare." The duty of the King in feudal times to act as Parens Patriae has been taken over in modern times by the State.*
>
> *33. Black's Law Dictionary defines 'Parens Patriae' as:*
> *1. The State regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.*

2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. The State ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.

34. In Charan Lal Sahu v. Union of India MANU/SC/0285/1990 : (1990) 1 SCC 613, the Constitution Bench, while delving upon the concept of parens patriae, stated:

> *35. ... In the "Words and Phrases" Permanent Edition, Vol. 33 at page 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. ...*

35. In Anuj Garg and Ors. v. Hotel Association of India and Ors. MANU/SC/8173/2007 : (2008) 3 SCC 1, a two-Judge Bench, while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public, opined thus in the context of the parens patriae power of the State:

> *29. One important justification to Section 30 of the Act is parens patriae power of State. It is a considered fact that use of parens patriae power is not entirely beyond the pale of judicial scrutiny.*
> *30. Parens patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely*

moralist to a more objective grounding i.e. utility. The subject-matter of the parens patriae power can be adjudged on two counts:
(i) in terms of its necessity, and
(ii) assessment of any trade-off or adverse impact, if any.
This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. (See City of Cleburne v. Cleburne Living Center 473 US 432, 439-41: 105 SCt 3249: 87 L Ed 2d 313 (1985))

36. Analysing further, the Court ruled that the parens patriae power is subject to constitutional challenge on the ground of right to privacy also. It took note of the fact that young men and women know what would be the best offer for them in the service sector and in the age of internet, they would know all pros and cons of a profession. The Court proceeded to state:

31. ... It is their life; subject to constitutional, statutory and social interdicts--a citizen of India should be allowed to live her life on her own terms.

37. Emphasizing on the right of self-determination, the Court held:

34. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to self-determination is an important offshoot of gender justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix.

38. In Aruna Ramachandra Shanbaug v. Union of India MANU/SC/0176/2011 : (2011) 4 SCC 454, the Court, after dealing with the decision in State of Kerala v. N.M. Thomas MANU/SC/0479/1975 : (1976) 2 SCC 310 wherein it has been stated by Mathew, J. that "the Court also is 'State' within the meaning of Article 12 (of the Constitution)...", opined:

130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

39. Constitutional Courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the parens patriae principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain

other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

40. In Heller v. Doe MANU/USSC/0096/1993 : 509 US 312 (1993), Justice Kennedy, speaking for the U.S. Supreme Court, observed:
The State has a legitimate interest under its Parens Patriae powers in providing care to its citizens who are unable to care for themselves.

41. The Supreme Court of Canada in E. (Mrs.) v. Eve [1986] 2 SCR 388 observed thus with regard to the doctrine of Parens Patriae:

> *The Parens Patriae jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity. The need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.*

While the scope of the parens patriae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

42. The High Court of Australia in Secretary, Department of Health and Community Service v. J.W.B. and S.M.B. [1992] HCA 15 (MARION'S Case): (1992) 175 CLR 218, speaking through Mason C.J., Dawson, Toohey and Gaudron JJ., has made the following observations with regard to the doctrine:

> *71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the Parens Patriae jurisdiction springs from the direct responsibility of*

the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind.

43. Deane J. in the same case stated the following:

4... Indeed, in a modern context, it is preferable to refer to the traditional Parens Patriae jurisdiction as "the welfare jurisdiction" and to the "first and paramount consideration" which underlies its exercise as "the welfare principle".

44. Recently, the Supreme Court of New South Wales, in the case of AC v. OC (a minor) [2014] NSWSC 53, has observed:

36. That jurisdiction, protective of those who are not able to take care of themselves, embraces (via different historical routes) minors, the mentally ill and those who, though not mentally ill, are unable to manage their own affairs: Re Eve [1986] 2 SCR 388 at 407-417; Court of Australia in Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case (1992) 175 CLR 218 at 258; PB v. BB [2013] NSWSC 1223 at [7]-[8], [40]-[42], [57]-[58] and [64]-[65].

37. A key concept in the exercise of that jurisdiction is that it must be exercised, both in what is done and what is left undone, for the benefit, and in the best interest, of the person (such as a minor) in need of protection.

45. Thus, the Constitutional Courts may also act as Parens Patriae so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the Parens Patriae doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian."

IV. LETTERS PATENT- EXPRESS REPEAL A NECESSARY MANDATE

12. Understanding the very concept of inherent jurisdiction, the further question would arise as to whether such a power vested in the High Court under Clause 17 of the Letters Patent can ever be ousted by legislation or statute. It is in this regard, I differ from the observations made by my Learned brother

Justice P. N. Prakash, where it has been stressed upon that the jurisdiction under Clause 17 is a facet of inherent jurisdiction, which cannot be exercised when specific remedies exist under the statute. In my considered opinion, to view an inherent jurisdiction such as the *parens patriae* jurisdiction as a residuary jurisdiction or a purely supervisory jurisdiction would be to militate against the very nature of such jurisdiction. In this connection, it is also pertinent to state that while the power and jurisdiction available to this Court under Clause 17 are not only much broader and larger in its scope and extent, but also would encompass and take within its fold every situation that warrants the interference of the High Court as a superior Constitutional Court in order to safeguard the interests of infants, the jurisdiction vested in the Family Court by statute on the guardianship of the person of a minor is only one facet of the jurisdiction which inheres in a superior Constitutional Court like the High Court. I may go so far as to say that the fields occupied by the High Court and the Family Court cannot be said to be one and the same in the matters of guardianship and custody. While the jurisdiction of the High Court is much larger, there may be very few areas of overlapping jurisdiction between the High Court and the Family Court. In this context, reference may also be had to two other important principles, viz.

(i)Whether the power vested in the High Court by the Letters Patent can be taken away by implication or only by express repeal, and

(ii) Whether an inherent jurisdiction that is vested in the Constitutional Court and stated expressly in the Letters Patent and continued thereafter not only by Articles 225 and 372 of the Constitution, but also inheres in the court by virtue of Article 226 of the Constitution can ever be taken away by any statute or legislation.

In this regard, I agree with the submissions made by the learned Senior counsel, Mr.Arvind Datar, who has contended that in view of the judgement in ***P.S.Sathappan***, referred to below, which continues to hold the field, the Letters Patent jurisdiction has to be expressly excluded and in the absence of an express repeal, the Letters Patent may be impliedly taken away only where the special enactment is a self-contained code as has been held in ***Fuerst Day Lawson, infra***. The learned Senior Counsel has also contended that the ratio decidendi in ***P.S.Sathappan*** has not been watered down by the subsequent decision in ***Fuerst Day Lawson*** and the principle that emerges is that only when there is a self-contained code which is necessarily a law which deals with both substantive and procedural aspects of a particular subject matter thereby

covering the whole gamut of laws, can there be said to be any implied taking away of the powers vested in the High Court by the Letters Patent. The Family Courts Act 1984 is only a procedural Legislation and not a self-contained code because the substantive laws continue to be the statutory provisions or the personal laws relating to marriage, maintenance etc. As such, in the absence of any express repeal, the Letters Patent cannot be taken away by legislation which applies to certain aspects where jurisdiction has been concurrently vested on a different court or a subordinate court in tune with the said legislation.

13. Once again on the question whether this Court's jurisdiction is preserved by Articles 225 and 372 of the Constitution, I agree with the submissions made by Mr.Arvind Datar that Article 225 expressly preserves the jurisdiction of the existing High Courts, the law administered in the existing High Courts, respective powers of judges in relation to the administration of justice and the power to make rules. He further stated that the jurisdiction of the High Court under Clause 17 is thus constitutionally preserved and in the absence of an enactment, which is a self-contained code that deals with guardianship, the powers of the High Court cannot be ousted. Further, in view of Article 372, Clause 17 will continue to be in force until altered or repealed or amended by a

competent legislature or by an appropriate self-contained code as there is no provision in the Family Courts Act 1984 or in any other legislation touching upon the very jurisdiction, which is vested in the High Court under Clause 17 of the Letters Patent, the inherent jurisdiction of the High Court under Clause 17 cannot be said to be touched upon by any subsequent legislation including the Family Courts Act, 1984. The provisions of Article 225 and 372 are extracted hereinbelow for useful reference.

> *"225. Jurisdiction of existing High Courts- Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution: Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."*
>
> *"372. Continuance in force of existing laws and their adaptation*
> *(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.*
> *(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be*

specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law

(3) Nothing in Clause (2) shall be deemed
(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said Clause.

Explanation I The expression law in force in this Article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.
Explanation II Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect.

Explanation III Nothing in this Article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under Clause (1) of Article 382, and nothing in this Article shall be construed as continuing any such Ordinance in force beyond the said period."

14. The judgement in ***M.V. Elisabeth and Ors. v. Harwan Investment and Trading Pvt. Ltd. and Ors. (26.02.1992 - SC) : AIR 1993 SC 1014*** makes it plain and clear that the High Courts in India are superior courts of record. They

have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. This view draws inspiration from the judgement in ***Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and another [(1966) 3 SCR 744]***. Reliance is also placed in these judgments on the Halsbury's Laws of England, 4th edition, Vol.10, para 713, which states that "*Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court.*" It was also noted that the observation of this Court in ***Raja Soap Factory and Ors. v. S.P. Shantharaj and Ors. [AIR 1965 SC 1449: (1965) 2 SCR 800]*** that Section 151 of the CPC did not confer on the High Court jurisdiction which was not specifically vested, was made in the context of Section 105 of the Trade and Merchandise Marks Act (43 of 1958) which conferred a specific jurisdiction in respect of infringement of trade mark etc., and that observation is not relevant to the question regarding the inherent and plenary jurisdiction of the High Court as a

superior court of record. The relevant paragraphs of the Constitution Bench decision in ***P.S. Sathappan (Dead) by Lrs. v. Andhra Bank Ltd. and Ors. [(07.10.2004 - SC) : (2004) 11 SCC 672]*** may be set out below, to understand this principle:

> *"138.Thus the unanimous view of all Courts till 1996 was that Section 104(1) C.P.C. specifically saved Letters Patent Appeals and the bar under 104(2) did not apply to Letters Patent Appeals. The view has been that a Letters Patent Appeal cannot be ousted by implication but the right of an Appeal under the Letters Patent can be taken away by an express provision in an appropriate Legislation. The express provision need not refer to or use the words "Letters Patent" but if on a reading of the provision it is clear that all further Appeals are barred then even a Letters Patent Appeal would be barred.*
>
> *139. For the first time in the case of Resham Singh Pyara Singh v. Abdul Sattar MANU/SC/1019/1996 : (1996)1SCC49 a contrary view was adopted by a 2 judge bench of this Court. In this case there was an Appeal, before a Single Judge of the High Court, against an order of the City Civil Court granting an interim injunction. The question was whether a Letters Patent Appeal was maintainable against the order of the Single Judge. This Court, without considering any of the other previous authorities of this Court, without giving any reasons whatsoever, did not follow the ratio laid down in Shah Babulal Khimji's case, (which was binding on it) held as follows:*
>
> > *"6. It would, therefore, be clear that when an appeal was filed against the order of the City Civil Court, Bombay to the Learned Single Judge under Order 43 Rule l(r) as provided in Sub-section (1) of Section 104 by operation of Sub-section (2) of Section 104, no further appeal shall lie from any order passed in appeal under this section. In Khimji case MANU/SC/0036/1981 : [1982]1SCR187 the suit was filed on the original side of the High Court and the Learned Single Judge on the original side passed an interlocutory order. Against the orders of the Learned Single Judge, though it was an interlocutory order, since the appeal would lie to the Division Bench under the Letters Patent, this Court held that against the interlocutory orders passed by the Single Judge, Letters Patent Appeal would be maintainable. That ratio, therefore, is clearly inapplicable to the facts in this case."*

140. Then in the case of New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corporation and Ors. MANU/SC/0220/1997 : [1997]1SCR395 the question, whether a Letters Patent Appeal was maintainable, again arose. In this case a status quo order was passed by the trial Court. In Appeal, a Single Judge of the High Court, vacated the Order of status quo. Attention of this Court was drawn to the 3 Judge Bench decision in the case of Shah Babulal Khimji (supra) and to the 2 Judge Bench decision in the case of Resham Singh Pyara Singh (supra). Shah Babulal Khimji's case being a 3 Judge Bench decision would prevail over Resham Singh Pyara Singh's case. It was also a binding decision on this Bench yet surprisingly the Court followed Resham Singh Pyara Singh's case. Of course, the other decisions of this Court do not appear to have been brought to the attention of the Court. In this case it was also held that the concerned Order was not covered by Clause 10 of the Letters Patent. The following observations make this clear:

> *It would, thus, be seen that Clause 10 of the Letters Patent consists of only two parts. In the first part, an appeal shall lie from a judgment of a Learned Single Judge to the Division Bench not being a judgment passed in exercise of the appellate jurisdiction or revisional jurisdiction. In other cases, where the Learned Single Judge exercises the appellate jurisdiction, if he certifies that it is a fit case for an appeal to the Division Bench. Notwithstanding the prohibition contained in the latter part of Clause 10, an appeal would lie."*

With greatest of respect to the Learned Judges it must be mentioned that it has been omitted to be noticed that the concerned Letters Patent had three limbs as set out in Central Mine Planning & Design Institute Ltd. v. Union of India reported in MANU/SC/0053/2001 : (2001)ILLJ1069SC . In this case the three limbs have been noted. It is held as follows:

> *"8. A close reading of the provision, quoted above, shows that it has three limbs : the first limb specifies the type of judgments of one Judge of the High Court which is appealable in that High Court and the categories of judgments/orders which are excluded from its ambit; the second limb provides that notwithstanding anything provided in the first limb, an appeal shall lie to that High Court from the judgment of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act (now Article 225 of the Constitution of India), on or after 1-2-1929 passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; and the third limb says that the right of appeal from other judgments of Judges of the*

> *said High Court or such Division Court shall be to "us, our heirs or successors in our or their Privy Council, as hereinafter provided."*

Thus it is clear that the cases of Resham Singh Pyara Singh and New Kenilworth Hotel (P) Ltd. lay down wrong law and are overruled.

141. It must now be noticed that even after the aforementioned two decisions this Court has continued to hold that a Letters Patent Appeal is not affected.

142. In the case of Vinita M. Khanolkar v. Pragma M. Pai MANU/SC/0867/1998 : AIR1997SC4415 an Appeal had been filed against an Order passed under Section 6 of the Specific Relief Act. It was contended that such an Appeal was barred by Sub-section (3) of Section 6 of the Specific Relief Act. This Court agreed that Section 6(3) of the Specific Relief Act barred such an Appeal but went on to consider whether Section 6(3) could bar a Letters Patent Appeal. In this context this Court held as follows:

> *"3. Now it is well settled that any, statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount Charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under Letters Patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by Learned counsel for the respondents that if Clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of Clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by Learned Single Judge of the nigh Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed."*

The question whether a Letters Patent Appeal was maintainable against the Judgment/Order of a Single Judge passed in a First Appeal under Section 140 of the Motor Vehicles Act was considered by this Court in the case of Chandra Kanta Sinha v. Oriental Insurance Co. Ltd. MANU/SC/0339/2001: [2001] 3 SCR 759. In this case, it was held that such an Appeal was maintainable. It is held that the decision of this Court in the case of New Kenilworth Hotel (P) Ltd. (supra) was inapplicable.

143. Thereafter in the case of Sharda Devi v. State of Bihar (2002) 3 SCC 705: MANU/SC/0184/2002 : [2002]2SCR404 the question again arose whether a Letters Patent Appeal was maintainable in view of Section 54

of the Land Acquisition Act. A three Judges Bench of this Court held that a Letters Patent was a Charter under which the High Courts were established and that by virtue of that Charter the High Court got certain powers. It was held that when a Letters Patent grants to the High Court a power of Appeal, against a Judgment of a Single Judge, the right to entertain such an Appeal does not get excluded unless the statutory enactment excludes an Appeal under the Letters Patent. It was held that as Section 54 of the Land Acquisition Act did not bar a Letters Patent Appeal such an Appeal was maintainable. At this stage it must be clarified that during arguments, relying on the sentence "The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court" in para 9 of this Judgment it had been suggested that a Letters Patent had the same status as the Constitution of India. In our view these observations merely lay down that the powers given to a High Court are the powers with which that High Court is constituted. These observations do not put Letters Patent on par with the Constitution of India.

144. In the case of Subal Paul v. Maline Paul MANU/SC/0149/2003 : [2003]1SCR1092 , the question was whether a Letters Patent Appeal was maintainable against an Order passed by a Single Judge of the High Court in an Appeal under Section 299 of the Succession Act, 1925. It was held that an Appeal under Section 299 was permitted by virtue of Section 299 and not under Section 104 C.P.C. Section 299 of the Indian Succession Act, 1925 reads as follows:

> *"299. Appeals from orders of District Judge.--Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals."*

Thus Section 299 permitted an Appeal to the High Court in accordance with the provision of CPC. That provision was Section 104. The Order passed by the Single Judge was an Order under Section 104. The further Appeal was under Letters Patent only. Section 299 of the Indian Succession Act did not permit it. The Letters Patent Appeal was saved/permitted by the words "any other law for the time being in force" in Section 104(1). It was thus held that Clause 15 of the Letters Patent permitted a right of Appeal against Order/Judgment passed under any Act unless the same was expressly excluded. It was held that the bar under Section 104(2) would not apply if an Appeal was provided in any other law for the time being in force. Thus, this authority also recognizes that an appeal permitted by "any other law for the time being in force" will not be hit by Section 104(2).

145. Thus, the consensus of judicial opinion has been that Section 104(1) Civil Procedure Code expressly saves a Letters Patent Appeal. At this stage it would be appropriate to analyze Section 104 C.P.C. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under Sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force. Sub-section (1) therefore contemplates three types of orders from which appeals are provided namely,
1) orders enumerated in Sub-section (1).
2) appeals otherwise expressly provided in the body of the Code and
3) appeals provided by any law for the time being force. It is not disputed that an appeal provided under the Letters Patent of the High Court is an appeal provided by a law for the time being in force.

146. As such an appeal is expressly saved by Section 104(1). Sub-Clause 2 cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading Sub-Clause (2) by ignoring the saving Clause in Sub-section (1) would lead to a conflict between the two sub-Clauses. Read as a whole and on well established principles of interpretation it is clear that Sub-Clause (2) can only apply to appeals not saved by Sub-Clause (1) of Section 104. The finality provided by Sub-Clause (2) only attaches to Orders passed in Appeal under Section 104, i.e., those Orders against which an Appeal under "any other law for the time being in force" is not permitted. Section 104(2) would not thus bar a Letters Patent Appeal. Effect must also be given to Legislative intent of introducing Section 4 C.P.C. and the words "by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As Appeals under "any other law for the time being in force" undeniably include a Letters Patent Appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in Sub-Clause (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a Letters Patent Appeal. However, when Section 104(1) specifically saves a Letters Patent Appeal then the only way such an appeal could be excluded is by express mention in 104(2) that a Letters Patent Appeal is also prohibited.' It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

> *"4. Savings.- (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of*

> *procedure prescribed, by or under any other law for the time being in force.*
>
> *(2) In particular and without prejudice to the generality of the proposition contained in Sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."*

As stated hereinabove, a specific exclusion may be clear from the words of a statue even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "Order will be final" are not sufficient. In such cases, i.e., where there is an express saving, there must be an express exclusion. Sub-Clause (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100A. The present Section 100A was amended in 2002. The earlier Section 100A, introduced in 1976, reads as follows:

> *"100A. No further appeal in certain cases.-Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in such appeal or from any decree passed in such appeal."*

It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was aware that it had incorporated the saving Clause in Section 104(1) and incorporated Section 4 in the C.P.C. Thus, now a specific exclusion was provided. After 2002, Section 100A reads as follows:

> *"100A. No further appeal in certain cases.-Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."*

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position

that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal.

147. Applying the above principle to the facts of this case, the appeal under Clause 15 of the Letters Patent is an appeal provided by a law for the time being in force. Therefore, the finality contemplated by Sub-section (2) of Section 104 did not attach to an Appeal passed under such law.

148. It was next submitted that Clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, Clause 44 permits amendment or alteration of Letters Patent but then which legislation is not subject to amendment or alteration. CPC is also subject to amendments and alterations. In fact, it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in Vinita Khanolkar's case (supra) and Sharda Devi's case a Letters Patent is the Charter of the High Court. As held in Shah Babulal Khimji's case (supra) a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail.

A Letters Patent is a special law for the concerned High Court. Civil Procedure Code is a general law applicable to all Courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail.

We see no conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 C.P.C. only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100A.

15. The relevant portion in ***Fuerst Day Lawson Ltd. and Ors. vs. Jindal Exports Ltd. and Ors. [(08.07.2011 - SC) : (2011) 8 SCC 333]*** which substantiates on the point that the Letters Patent can be deemed to be impliedly repealed only by virtue of a self-contained Code, is as follows:

> *"9. Mohindra Supply Co. was last referred in a constitution bench decision of this Court in P.S. Sathappan, and the way the constitution bench understood and interpreted Mohindra Supply Co. would be clear from the following paragraph 10 of the judgment:*
>
> > *10. ...The provisions in the Letters Patent providing for appeal, in so far as they related to orders passed in Arbitration proceedings, were held to be subject to the provisions of Section 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration.*
>
> *72. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in P.S. Sathappan) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.*
> *73. We, thus, arrive at the conclusion regarding the exclusion of a Letters Patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by Sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under Section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself.*

74. In light of the discussions made above, it must be held that no Letters Patent appeal will lie against an order which is not appeal able under Section 50 of the Arbitration and Conciliation Act, 1996."

16. The further question that arises is whether the nature of the jurisdiction being a *parens patriae* jurisdiction under Clause 17 which is inherent, as opposed to being conferred, can be taken away by any legislation. Even if it is taken for the sake of argument that after the coming into force of the Constitution, there exist no other express provision akin to Clause 17 of the Letters Patent, it is now well established that the High Court as a superior Constitutional Court can deal with matters of guardianship and custody even in its exercise of writ jurisdiction; and both the High Court as well as the Supreme Court have exercised their *parens patriae* jurisdiction in exercise of their writ jurisdiction which takes within its fold the inherent jurisdiction of these superior Constitutional Courts in all matters including that of guardianship and custody of infants and minors, apart from lunatics and idiots.

V. APPLICABILITY OF DECISION IN RAJA SOAP FACTORY CASE TO THE CASE AT HAND

17. It is in this context, the further question as to whether the High Court's jurisdiction to deal with guardianship and custody matters under Clause 17 of the Letters Patent would stand ousted by section 8 of the Family Courts Act,

1984 which ousts the jurisdiction of District Courts, is to be decided. The learned Single Judge, who first raised a doubt as to the correctness of the judgement in ***Mary Thomas*** had stated that the said Full Bench did not take into account the judgement in ***Raja Soap Factory,*** cited infra. In the said case, the observations made in Paragraph 3 of the decision are relied upon by the learned Senior Counsel Mr. Sankaranarayanan and others, supporting the ouster Clause to bolster their contention that the High Court is a District Court when it exercises the ordinary original civil jurisdiction. The learned Single Judge also supports his reasoning on the basis of this judgment. Per contra, Mr.Arvind Datar, learned Senior Counsel argued at length that the observations made in Paragraph 3 are not the Court's observations or the ratio decidendi, but recording the submissions of the defendant counsel. The relevant paragraph of ***Raja Soap Factory and Ors. v. S.P. Shantharaj and Ors. [(20.01.1965 - SC) : AIR 1965 SC 1449: (1965) 2 SCR 800]*** is extracted hereunder:

> *"3. In this appeal with special leave, counsel for the defendants argues that the High Court has no jurisdiction to entertain the action instituted by the plaintiffs and had no power to make an order issuing a temporary injunction. The action, as framed, could properly be instituted in the District Court. The expression "District Court" has by virtue of section 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 exercised*

that jurisdiction be included, for the purpose of Act 43 of 1958, in the expression "District Court".

18. It is to be importantly mentioned that the factual background of the decision in ***Raja Soap Factory*** would show that the matter arose out of a trademark dispute and in the specific circumstances of the case, the question that arose for consideration was whether the High Court while exercising its power under its ordinary original civil jurisdiction would be a "District Court" for the purposes of the Trade and Merchandise Marks Act, 1958. Further, as rightly pointed out by learned senior counsel Mr.Arvind Datar, ***Raja Soap Factory*** is not an authority for the proposition that the High Court is a "District Court" but rather that it had acted as a "District Court" in exercise of its ordinary original civil jurisdiction in the specific circumstances of the case. In my considered opinion, to telescope this decision in order to find the meaning and scope of the provisions under section 2(4) of the CPC and section 8 of the Family Courts Act as well as section 4(4) of the Guardians and Wards Act, 1890 would be to fail to recognize the large extent of the jurisdiction inherent in the nature of the jurisdiction in Clause 17 of the Letters Patent.

19. The provisions of Section 2(4) of the Civil Procedure Code, the relevant provisions of the Family Courts Act, 1984 in Sections 7, 8 and 20, and Sections 3 and 4(4) of the Guardians and Wards Act, 1890 are extracted hereunder:

Section 2(4) of the Civil Procedure Code 1908 states as follows:-
“"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a District Court), and includes the local limits of the ordinary original civil jurisdiction of a High Court;”

Section 2(e) of the Family Courts Act, 1984 states as follows:-
“(e) all other words and expressions used but not defined in this Act and defined in the Code of Civil Procedure, 1908 (5 of 1908) shall have the meanings respectively assigned to them in that Code.”

Section 7 of the Family Courts Act, 1984 states as follows:-
***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.

Section 8 of the Family Courts Act, 1984 states as follows:-

***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 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.

Section 20 of the Family Courts Act, 1984 states as follows:-
***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.
Section 3 of the Guardians and Wards Act, 1890 states as follows:-

3. Saving of jurisdiction of Courts of Wards and Chartered High Courts.—
This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [any competent legislature, authority or person in [any State to which this Act extends]], and nothing in this Act shall be construed to affect, or in any way derogate from the jurisdiction or authority of any Court of Wards, or to take away any power possessed by [any High Court].

Section 4(4) of the Guardians and Wards Act, 1890 states as follows:-

> ***4. Definitions**.— In this Act, unless there is something repugnant in the subject or context,—*
> *(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction:*

20. It may further be stated that in order to exercise its jurisdiction in guardianship and custody matters of infants and minors, the High Court does not need an appendix of other statutory provisions of either the Guardians and Wards Act or any other statute in order to exercise its jurisdiction under Clause 17 of the Letters Patent, and the very fact that a petition has stated the provisions under the Guardians and Wards Act, 1890 and invoked the jurisdiction of the High Court under Clause 17 will not in my considered opinion make the High Court a District Court for the purposes of its exercise of jurisdiction under Clause 17 of the Letter Patent. It is in this regard also that I differ with the opinion of my Learned brother, Justice P.N. Prakash. Further, it may be clarified that taking this proposition forward, the exercise of the ordinary original jurisdiction of the High Court within the meaning of Section 4(4) of the Guardians and Wards Act 1890, when invoked along with or in tune with and within the meaning of Clause 17 of the Letters Patent, cannot be said to be ousted by the Family Courts Act, 1984.

VI. WHETHER THE JUDGMENT IN MARY THOMAS REQUIRES RECONSIDERATION

21. To recapitulate in brief the circumstances that led to the reference to the Full Bench in ***Mary Thomas***, Mary Thomas had filed a suit against her husband Dr. KE Thomas for permanent injunction restraining him from disturbing her possession of property at Adyar, for rendition of accounts, return of documents et cetera. On the strength of the orders passed in ***Re:Patrick Martin (by Abdul Hadi. J. on 09.11.1988)***, Abdul Hadi, J. passed an order directing that the plaint be returned for presentation before the Family Court opining that the prayer sought for in the suit came within the scope of section 7 read with explanation (c) of the Family Courts Act 1984. The OSA filed by Mary Thomas that arose from the above order was pending when in a different case, one T.K.Chandrashekar had filed a suit in OMS No. 4 of 1988 for dissolution of marriage against his wife under Section 10 of the Divorce Act, 1869. Simultaneously, his wife Margaret Chandrashekar had filed OMS No.16 of 1988 against her husband TK Chandrashekar under section 22 of the Divorce Act, 1869 seeking a decree of judicial separation. The said Margaret Chandrashekar had also filed OP No. 29 of 1988 against her husband under sections 3, 7 to 10 of the Guardians and Wards Act 1890 seeking to be

appointed as the guardian of their minor son. When her husband filed Transfer OPs to transfer the applications to the file of the Family Court, while placing reliance on the decision in ***Re: Patrick Martin***, Justice M.Srinivasan, while noting that the decision of the Single Judge in ***Re: Patrick Martin*** (dated 09.11.1988) had been confirmed by a Division Bench, held that the decision of the Division Bench in ***Re: Patrick Martin (AIR 1989 Madras 231)***, which confirms the decision of Abdul Hadi, J. requires to be reconsidered inasmuch as it is in conflict with earlier Bench judgement of this court in ***Rajah of Vizianagaram v. Secretary of State [(1937) 44 L.W. 904 : A.I.R. 1937 Madras 51]***.

22. It is in these circumstances that the Chief Justice had constituted a Full Bench and the OSA filed by Mary Thomas, came to be clubbed along and listed before the Full Bench, where the Full Bench had formulated the following question for its consideration:

> *"Whether 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 (sic) under the explanation to section 7 of the act is ousted or not?"*

23. There is no dispute about the fact that the Full Bench has gone ahead and answered the reference to finally hold that the jurisdiction of the High Court is not ousted by virtue of the provisions of sections 7 and 8 of the Family Courts Act, 1984. The reasoning adopted by the Full Bench in ***Mary Thomas and***

Others v. K.E. Thomas and Ors. [(06.10.1989 - MADHC) : AIR 1990 Madras 100] can be gathered from the following extract of the judgment:

> *"13. In the light of these submissions, it is necessary to consider in what context and in what circumstances some of the decisions cited already held that the High Court when it exercises jurisdiction on the Original Side could be equated to or could be called a District Court. The earliest of the decisions cited is reported in Kedarnath Mondal's case, (1908) 12 Cal WN 446 supra. There a suit was filed on the Original Side of the Calcutta High Court to restrain the defendants from infringing the specification filed by the plaintiff under S. 8 of the Inventions and Designs Act. In that suit, a defence was taken, which inter alia fell within the scope of S. 29 of the Inventions and Designs Act. S. 29 of that Act states that an inventor may institute a suit in the District Court against any person who, during the continuance of an exclusive privilege acquired by him.....makes, sells or uses the invention without his license, or counterfeits or imitates it. Sub-sec. (2) states that the suit shall not be defended upon the grounds of any defect or insufficiency of the specification of the invention, or upon the grounds that the original or any subsequent application relating to the invention or the original or any amended specification, contains a wilful or fraudulent misstatement, or upon the ground that the invention is of no utility. When the defendant raised a contention which would fall under sub-sec. (2) of S. 29 of the said Act, it was submitted on behalf of the defendant that S. 29 applied only to suits filed in a "District Court", that the expression did not include High Court, and that, consequently, the restrictions to defence mentioned in that section did not apply to that case. It is in the course of considering this defence, the Court referred to S. 30, which vested jurisdiction in the High Court to declare an exclusive privilege in respect of an invention to be specified in the rule has not been acquired and the final conclusion was as follows:*
>
> > *".....I think, on the whole, that the legislature intended that these defences should not be raised in an action for infringement of an exclusive privilege but must be raised under Ss. 30 and 31 when the various objections mentioned before fall."*
>
> *It was in this view, the Court held that the defendants cannot raise these defences which would fall under sub-sec.(2) of S. 29 . Al though in this judgment there is an observation that when a High Court exercises its Ordinary Original Civil Jurisdiction it comes within the definition of a District Court as mentioned in the Civil Procedure Code, in a later judgment of the same High Court reported in Hyat Mahomed's case MANU/WB/0116/1926 : AIR1927Cal290 supra, the Division Bench*

expressly dissented from the view expressed by Fletcher, J. in Kedarnath Mondal's case, (1908) 12 C WN 446 supra. We have also given our anxious consideration to this question and we are of the firm view that the reasoning of Fletcher, J. cannot be supported when he intended to mean that whenever the High Court exercises jurisdiction on the Original Side it acts as a District Court.

14. The decision reported in Official Assignee of Madras v. Ramasamy lyengar MANU/TN/0471/1912 : (1912)23MLJ726 supra, cited by Mr. G. Subramaniam, is also not of much assistance for the purpose of this case. All that this decision states is that the High Court when it exercises its Original Civil Jurisdiction is a local Court. There cannot be two opinions on this issue.

15. In Kuppuswami Nayagar, in re, ILR 53 Mad 237 : AIR 1930 Mad 779)an order of reference for hearing before a Bench was made by Kumaraswami Sastri, J. in the following circumstances: A petition for the grant of a succession certificate under Part X of the. Indian Succession Act was filed on the Original Side of the High Court. In the Indian Succession Act though it was provided that a petition would lie before the District Court yet there was no definition of a District Court and the Learned Judge after referring to the definition of "District Judge" in the General Clauses Act, felt that white dealing with the definition of "District Judge" the same interpretation should be given to the words "District Judge" in Chapter IV of the Act, which refers to the grant of probates and letters of administration, as in Part X which gives the District Judge jurisdiction to grant succession certificates. It was in this view the Learned Judge observed that if the definition of "District Judge" excludes the High Court altogether, the High Court cannot grant probate or letters of administration under the Indian Succession Act. The Learned Judge noticed the fact that in the definition of "District Judge" given in the General Clauses Act, the proviso expressly excluded the High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction. The Learned Judge felt that there was no justification for enabling persons in the mofussil to obtain succession certificate on payment of nominal Court-fee while at the same time denying such facility to those in Madras. In the concluding portion of the Order of Reference, Kumaraswami Sastri, J. observed as follows (at Pp. 781-82 of AIR):

> *"For the reasons given by me, J am of opinion that having regard to the Indian Succession Act of 1925, which has repealed both the Probate and Administration Act and the Succession Certificate Act, and incorporated the provisions of these Acts in the body of the Indian Succession Act and has omitted to define the words "District Judge" leaving us to fall back on the definition of*

"District Judge" in the General Clauses Act, the High Court is a "District Court" when it does not exercise its Ordinary or Extraordinary Civil Jurisdiction conferred by Cls. 11 to 18 of the Patent "."

However, the reference to the Bench became unnecessary because Act 18 of 1929 was passed which amended the Succession Act by the insertion of the definition of "District Judge" as a Judge of a principal Civil Court of Original Jurisdiction.

16. The facts in The Daily Calendar Supplying Bureau's case, AIR1967 Mad 381 supra, which is strongly relied in support of the judgment of Abdul Hadi, J. may have to be noticed. Alleging infringement of copyright under S. 62 of the Copyright Act, the plaintiff sought for an injunction, damages, etc. While defending the case on merits the defendants raised a plea that the High Court at Madras has no jurisdiction to try the suit because the defendants resided outside the territorial jurisdiction of the High Court and also because no part of the cause of action had arisen within the limits of the jurisdiction of this Court. A Learned Single Judge held that the High Court had jurisdiction because the plaintiff, who had complained of the infringement resided and carried on his business within the local limits of the original jurisdiction of the High Court. The reliefs of injunction and damages were granted. On appeal by the defendants, the Division Bench extracted S.62 of the Copyright Act, 1957, which was as follows (at p. 383):

"Jurisdiction of Court over matters arising under this Chapter -(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the District Court having jurisdiction.

(2) For the purpose of sub-sec. (1), a 'District Court' having jurisdiction shall notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such person, any of them actually and voluntarily resides or carries on business or personally works for gain". The Learned Judges referred to the prior Act, viz., Indian Copyright Act, 1914, which in S. 13 expressly provided that civil proceedings relating to infringement of copyright shall be instituted in the High Court or the Court of the District Judge. But in the Copyright Act of 1957, the word 'High Court' was omitted. It was contended in that case that in the absence of any reference in the definition in the Copyright Act, 1947, to the Code of Civil Procedure one has to necessarily fall back upon the definition of District Judge found in the General Clauses Act and

consequently, the jurisdiction of the High Court would be excluded: But having regard to the fact that for the Madras district, the City Civil Court has only a limited pecuniary jurisdiction, if interpretation is given by excluding the jurisdiction of the High Court to cases under the Copyright Act, "an anomalous result would follow that when a case of infringement of copyright arises within the area of the original jurisdiction of the High Court, there will be no Tribunal competent to try the suit. No doubt, if such an anomalous result ensures because of a real lacuna in the legislative provisions, the Court cannot step in to fill up that lacuna. Therefore, it was necessary to consider whether such a lacuna really exists, or whether the existing provision is not sufficient to give jurisdiction to the High Court.

17. Placed in that situation, the Division Bench proceeded to consider the question whether for finding out the meaning of the terms "District Court" it will be proper to resort to the definition in the General Clauses Act of the term 'District Judge' and concluded that it should not be done. Thereafter, relying upon the judgment of the Calcutta High Court in Kedarnath Mondal's case, (1908) 12 Cal WN 446 supra, the Bench held that the term "District Court" in S. 62(1) of the Copyright Act should be given the same meaning as in S. 2(4) Civil Procedure Code. The Bench summed up their conclusion as follows:

> *"Summing up, it appears to us that in the present case there is no warrant for applying the definition of District Judge in the General Clauses Act, for finding out the jurisdiction of District Court under S. 62 of Act XIV of 1957 especially when it will lead to the anomalous result of a plaintiff aggrieved against the infringement of the copyright arising in the Madras City limits being left without a forum for obtaining his relief. Secondly, the terms of S. 62 especially sub-sec. (2) imply that the definitions of District and District Court in the Civil Procedure Code will apply for the purpose of determining the jurisdiction under the Copyright Act. We hold that the High Court has jurisdiction to try this suit".*

18. From a reading of the above case and the conclusion arrived at, it can easily be seen that only because of the fact that an anomalous situation would have otherwise arisen, which will leave the plaintiff aggrieved against infringement of copyright arising in the Madras City limits without any remedy, the Division Bench came to the rescue for giving an enlarged definition of the term "District Court" limited for the purpose of the Copyright Act by including the High Court in the exercise of its original jurisdiction. This case, therefore, can hardly be an authority for the general proposition that the High Court when it exercises its original jurisdiction over its local area should be equated to a District Court. The

law laid down in The Daily Calendar Supplying Bureau's case, MANU/TN/0256/1967 : AIR 1967 Mad 381 supra, should be confined to the facts of that case.

19. In S.B.S. Jayam and Co. v. Gopi Chemical Industries, India (1977) 1 MLJ 286 supra, which was a case arising under the Trade and Merchandise Marks Act of 1958, on the Original Side of this Court, N. S. Ramaswami, J. has laid down the law correctly by stating that the term "District Court" would not include the High Court and the fact that the local limits of the ordinary original jurisdiction of this Court is a district would not mean that this Court becomes a District Court. The Learned Judge also reiterated the law that in suits filed on the Original Side it will be the Original Side Rules and the provisions of the Letters Patent that will have application.

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, MANU/TN/0230/1989 : AIR1989Mad231 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".

24. While answering the question on whether the Full Bench decision in ***Mary Thomas*** requires reconsideration, my Learned brother, Justice P.N. Prakash has stated that the Full Bench decision had not overruled the decision in ***Re: Patrick Martin*** by answering the specific question referred by Justice Srinivasan, but on a point that was never raised and referred to the Full

Bench in that case at all. According to him, the important point for consideration before the Full Bench was on the point of conflict between in ***Re:Patrick Martin*** and the ***Rajah of Vizianagaram*** case, which was raised by Justice M.Srinivasan and the said issue did not figure in the judgement of the Full Bench as there is no discussion on Clause 17 of the Letters Patent nor is there any reference about the ***Vizianagaram*** case.

25. In this regard, I am not able to agree that only because the Full Bench did not discuss about the conflict between the judgements in ***Re:Patrick Martin*** and ***Rajah of Vizianagaram,*** and because the Full Bench had adverted to whether the High Court was a "District Court" under section 2(4) of the CPC when it exercised its jurisdiction on its original side, that as the Full Bench felt that the term "District Court" would not include the High Court, and the fact that the local limits of the ordinary original jurisdiction of this court is a "District" would not mean that this court becomes a District Court, approving the decision in ***S.B.S. Jayam and Co***., infra, the decision of the Full Bench in ***Mary Thomas*** requires any reconsideration. The Full Bench opined that while ***S.B.S.Jayam and Co. v. Krishnamoorthi [(24.08.1976 - MADHC) : (1977) 1 MLJ 286]*** had correctly laid down the law, the decision in ***The Daily Calendar***

Supplying Bureau, Sivakasi v. The United Concern [(16.01.1964 - MADHC) : AIR 1967 Madras 381] should be restricted to the facts of the said case.

26. At the outset, it may be stated that neither did Justice M Srinivasan point out the exact area of conflict between the judgements in ***Re:Patrick Martin***, cited supra and the decision in ***Rajah of Vizianagaram*****,** nor was there apparent conflict between these two judgements. It is a fact that these judgements have been rendered by two Division Benches at different points in time where the legal circumstances surrounding them were very different. Importantly, the decision in ***Re: Patrick Martin*** had not even mentioned the judgement in ***Rajah of Vizianagaram***. While the ***Vizianagaram*** case was of the year 1939, dealing exclusively with guardianship in custody under Clause 17 of the Letters Patent, ***Patrick Martin*** was one of guardianship immediately after the coming into effect of the Family Courts Act, 1984. The decision of the Division Bench in the ***Vizianagaram*** case arose from a matter under Clause 17 of the Letters Patent, concerning minors outside the city of Madras (Presidency town) but within the Presidency of Madras. It is also to be fairly noted that the Full Bench was faced with composite cases, one relating to matrimonial jurisdiction, one relating to guardianship and the other relating to the civil rights of parties. The Full Bench in its own judicial wisdom, had decided therefore to deal with the

question viewing it from the angle of whether the High Court's jurisdiction under the Letters Patent in its original side would be ousted by virtue of the provisions of sections 7 and 8 of the Family Courts Act, 1984. It would not be appropriate for any subsequent bench to overrule a decision on a ground that would not have a direct bearing or would not take away the basis for the said decision or would alter the conclusion by virtue of the fact that certain aspects were not discussed. Therefore, the Full Bench in ***Mary Thomas*** has appropriately dealt with the issue and the only fact that the said decision did not advert to, discuss or analyse the conflict between the decisions in ***Re: Patrick Martin*** and in ***Vizianagaram*** case alone, cannot be a reason to hold that this decision of the Full Bench requires reconsideration. As such, in my view, the judgment in ***Mary Thomas*** does not require reconsideration on the grounds stated above and on the more pertinent ground that it discussed and analyzed in detail the law laid down in ***Re: Patrick Martin*** and differed with it to hold that the latter was not good law any longer.

VII. INHERENT POWER OF THE HIGH COURT AND THE SUPREME COURT AS AN INVIOLABLE FACET OF THE CONSTITUTION

27. Applying the principle enunciated in ***Navivahoo and Ors. v. Turner and Ors. [(12.04.1889 - PRIVY COUNCIL) : 1889 L.R 156]***, while it is accepted that the jurisdiction exercised by the High Court under Clause 17 is "ordinary", the power of the High Court under Article 226 of the Constitution is extraordinary. However, the common factor running through both is the aspect of "inherent jurisdiction".

28. The relevant portion of the judgement in ***Navivahoo***, is extracted hereunder:

> *"9. The Royal Charter which regulates the Bombay High Court, under the provisions of the High Court Act, is dated the 28th of December, 1865. Sections 11 to 18 are a group of Clauses headed "Civil Jurisdiction of the High Court." Sections 11 and 12 describe the local limits of the ordinary original civil jurisdiction, which is said to extend to all kinds of suits within those limits, except small cause suits. Section 13 gives to the High Court power to remove and to try as a Court of extraordinary original jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 1.0 confer appellate jurisdiction. Section 17 confers authority over infants, idiots, and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India.*
>
> *10. From this brief statement of the material statutes and Charters, it appears that, though the Insolvency Court determines the substance of the questions relating to the insolvent's estate, such as the amount of the judgment to be entered up against him, and the propriety of issuing execution upon it, the proceedings in execution are the proceedings of the High Court, and the judgment itself is the judgment of the High Court. And it is clearly entered up in the exercise of civil jurisdiction and of original jurisdiction.*

11. But it was strongly contended at the bar that this jurisdiction, though civil and original, was not ordinary; and Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such, as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction which the Court may assume at its discretion upon special occasions and by special orders. They are confirmed in this view by observing that in the next group of Clauses, which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate. The judgment of 1868 was entered up by the High Court, not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with. It was therefore entered up in exercise of the ordinary original civil jurisdiction of the High Court; and no present right accrued to the official assignee to move for execution until the order of the 5th of April, 1886, was made."

29. The power of the Constitutional Courts in exercise of their inherent jurisdiction is also to be noted for understanding the concept of inherent powers of constitutional courts and that such powers are inviolable as they cannot be taken away by legislation or even by a constitutional amendment if that would hamper the basic structure of the Constitution. In this regard, reference may be had to the following. In ***Benedict Denis Kinny and Ors. v. Tulip Brian Miranda and Others [(19.03.2020 - SC) : AIR 2020 SC 3050]***, it was held as follows:

"20. We need to first notice the nature and extent of the jurisdiction of the High Court Under Article 226 of the Constitution of India. The power of judicial review vested in the High Courts Under Article 226 and this

Court Under Article 32 of the Constitution is an integral and essential feature of the Constitution and is basic structure of our Constitution. The jurisdiction Under Article 226 is original, extraordinary and discretionary. The look out of the High Court is to see whether injustice has resulted on account of any decision of a constitutional authority, a statutory authority, a tribunal or an authority within meaning of Article 12 of the Constitution. The judicial review is designed to prevent cases of abuse of power or neglect of a duty by the public authority. The jurisdiction Under Article 226 is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge the public functions entrusted on them. The Courts are guardians of the rights and liberties of the citizen and they shall fail in their responsibility if they abdicate their solemn duty towards the citizens. The scope of Article 226 is very wide and can be used to remedy injustice wherever it is found. The High Court and Supreme Court are the Constitutional Courts, which have been conferred right of judicial review to protect the fundamental and other rights of the citizens. Halsbury's Laws of England, Fifth Edition, Volume 24 dealing with the nature of the jurisdiction of superior and inferior courts stated that no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so. In paragraph 619, Halsbury's Laws of England States:

> *The chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of claims, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular claim.*

21. The nature of jurisdiction exercised by the High Courts Under Article 226 came for consideration by this Court in large number of cases. In Sangram Singh v. Election Tribunal Kotah and Anr., MANU/SC/0044/1955 : AIR 1955 S.C. 425, Article 226 of the Constitution of India in reference to Section 105 of the Representation of the People Act, 1951 came for consideration. Section 105 of the Representation of People Act provided that "every order of the Tribunal made under this Act (Representation of People Act) shall be final and conclusive". Argument was raised in the above case that neither the High Court nor the Supreme

Court can itself transgress the law in trying to set right what it considers is an error of law on the part of the Court or Tribunal whose records are under consideration. It was held that jurisdiction of the High Court remains to its fullest extent despite Section 105. This Court also held that jurisdiction of the High Court in Article 226 and Under Article 136 conferred on this Court cannot be taken away by a legislative device. In paragraph 13, following has been laid down:

> *13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal.*

It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review Under Articles 226 and 136. Therefore, the jurisdiction of the High Courts Under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105.

22. A Seven Judge Bench of this Court in In re The Kerala Education Bill, 1957, MANU/SC/0029/1958 : AIR 1958 SC 956 had occasion to consider the jurisdiction of High Court Under Article 226 in reference to a provision in Kerala Educational Bill, 1957. Clause 33 of Kerala Education Bill provided:

> *33. Courts not to grant injunction-Notwithstanding anything contained in the Code of Civil Procedure, 1908, or in any other law for the time being in force, no court shall grant any temporary injunction or make any interim order restraining any proceedings which is being or about to be taken under this Act.*

23. In exercise of power vested in him by Article 143(1), the President of India had referred to this Court four questions for consideration. Question No. 4, which is relevant for the present case was to the following effect:

> *Q.4. Does Clause 33 of the Kerala Education Bill or any provisions thereof, offend Article 226 of the Constitution in any particulars or to any extend?*

24. Answering the question No. 4, this Court held that no enactment of State Legislature can take away or abridge the jurisdiction and power conferred on the High Court Under Article 226. The Learned Counsel appearing for the State of Kerala submitted before this Court that the Constitution is the paramount law of the land, and nothing short of a constitutional amendment as provided for under the Constitution can affect any of the provisions of the Constitution, including Article 226. It was submitted that the power conferred upon High Courts Under Article 226 of the Constitution is an over-riding power entitling them, under certain conditions and circumstances, to issue writs, orders and directions to subordinate courts, tribunals and authorities notwithstanding any Rule or law to the contrary.

30. Again on contempt jurisdiction, it was held in ***T. Sudhakar Prasad v. Govt. of A.P. and Ors. [(13.12.2000 - SC) : (2002) 2 SCC 516]***, as follows:

"9. Articles 129 and 215 Of the Constitution of India declare Supreme Court and every High Court to be a Court of Record having all the powers of such a court including the power to punish for contempt of itself. These Articles do not confer any new jurisdiction or status on the Supreme Court and the High Courts. They merely recognise a pre-existing situation that the Supreme Court and the High Courts are Courts of Record and by virtue of being Courts of Record have inherent jurisdiction to punish for contempt of themselves. Such inherent power to punish for contempt is summary. It is not governed or limited by any rule of procedure excepting the principles of natural justice. The jurisdiction contemplated by Articles 129 and 215 is inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. The provisions of the Contempt of Courts Act, 1971 are in addition to and not in derogation of Articles 129 and 215 of the Constitution. The provisions of Contempt of Courts Act, 1971 cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the said two Articles.

10. In Supreme Court Bar Association v. Union of India and Anr. MANU/SC/0291/1998 : [1998]2SCR795 , the plenary power and contempt jurisdiction of the Supreme Court came up for the consideration of this Court and in that context Articles 129, 142, 144 and 215 of the Constitution were noticed. This Court held that Courts of Record enjoy power to punish for contempt as a part of their inherent jurisdiction; the existence and availability of such power being essential to enable the

courts to administer justice according to law in a regular, orderly and effective manner and to uphold the majesty of law and prevent interference in the due administration of justice (para 12). No act of Parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and Parliament's power of legislation on the subject cannot be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts though such a legislation may serve as a guide for their determination of the nature of punishment which a Court of Record may impose in the case of established contempt. Power to investigate and punish for contempt of itself vesting in Supreme Court flows from Articles 129 and 142(2) of the Constitution independent of Section 15 of the Contempt of Courts Act, 1971 (para 21). Section 12 of the Contempt of Courts Act, 1971 provides for the punishment which shall ordinarily be imposed by the High Court in the case of an established contempt. This Section does not deal with the powers of the Supreme Court to try or punish a contemnor in committing contempt of the Supreme Court or the courts subordinate to it (paras 28, 29,37). Though the inherent power of the High Court under Article 215 has not been impinged upon by the provisions of the Contempt of Courts Act, the Act does provide for the nature and types of punishments which the High Court may award. The High Court cannot create or assume power to inflict a new type of punishment other than the one recognised and accepted by Section 12 of the Contempt of Courts Act, 1971.

11. In L. Chandra Kumar v. Union of India and Ors. MANU/SC/0261/1997 : [1997] 228 ITR 725 (SC) the matter had come up before the seven-Judges Bench of this Court consequent upon a reference made by a Division Bench of this Court which doubted the correctness of a five-Judges Constitution Bench of this Court in S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987)ILLJ1 28 SC and felt the need of the same being comprehensively reconsidered. This Court framed three broad issues for its consideration and proceeded to consider the constitutional validity of Articles 323A, 323B and several provisions of the Administrative Tribunals Act, 1985. We need not extensively reproduce several conclusions arrived at by the Constitution Bench (excepting where necessary); it would suffice to briefly summarise the conclusions of the Constitution Bench insofar as necessary for our purpose. The Constitution Bench held that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively is a part of the inviolable basic structure of our Constitution. The power of judicial review over legislative action vesting in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution are an integral and essential feature of such basic structure and therefore their power to test the constitutional validity of legislations can never be

ousted or excluded (paras 73, 78). The power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution and a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided (para 79). Though the subordinate judiciary or Tribunal created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental - as opposed to a substitutional - role in this respect. Clause (3) of Article 32 itself contemplates that Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2), without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2).

31. In ***Rojer Mathew v. South Indian Bank Ltd. and Ors. [(13.11.2019 - SC) : (2020) 6 SCC 1]***, it was held as under:

"The jurisdiction Under Article 226, being part of the basic structure, can neither be tampered with nor diluted. Instead, it has to be zealously-protected and cannot be circumscribed by the provisions of any enactment, even if it be formulated for expeditious disposal and early finality of disputes. Further, High Courts are conscious enough to understand that such power must be exercised sparingly by them to ensure that they do not become alternate forums of appeal. A five-judge bench in Sangram Singh v. Election Tribunal MANU/SC/0044/1955 : (1955) 2 SCR 1 whilst reiterating that jurisdiction under Article 226 could not be ousted, laid down certain guidelines for exercise of such power:

13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative

conclusion which is subject to review Under Articles 226 and 136. Therefore, the jurisdiction of the High Courts Under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105."

32. ***In Re: Prashant Bhushan and Ors. [(14.08.2020 - SC) : AIR 2020 SC 4074]***, it was held as follows:

> *In Pritam Pal v. High Court of Madhya Pradesh, Jabalpur Through Registrar, a 2 Judge Bench of this Court held as follows:*
>
> > *15. Prior to the Contempt of Courts Act, 1971, it was held that the High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it gives a fair and reasonable opportunity to the contemnor to defend himself. But the procedure has now been prescribed by Section 15 of the Act in exercise of the powers conferred by Entry 14, List III of the Seventh Schedule of the Constitution. Though the contempt jurisdiction of the Supreme Court and the High Court can be regulated by legislation by appropriate Legislature under Entry 77 of List I and Entry 14 of List III in exercise of which the Parliament has enacted the Act of 1971, the contempt jurisdiction of the Supreme Court and the High Court is given a constitutional foundation by declaring to be 'Courts of Record' Under Articles 129 and 215 of the Constitution and, therefore, the inherent power of the Supreme Court and the High Court cannot be taken away by any legislation short of constitutional amendment. In fact, Section 22 of the Act lays down that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law relating to Contempt of Courts. It necessarily follows that the constitutional jurisdiction of the Supreme Court and the High Court Under Articles 129 and 215 cannot be curtailed by anything in the Act of 1971...*
>
> *21. In Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat. a three-Judge Bench of this Court relied upon the judgment in the case of Sukhdev Singh Sodhi (supra) and held that the Supreme Court had inherent jurisdiction or power to punish for contempt of inferior courts under Article 129 of the Constitution of India."*

33. Once it is agreed that the jurisdiction exercised by the High Court under Clause 17 of the Letters Patent is inherent in nature, such power can neither be taken away nor is it possible to place fetters on such a power or to mention the

exact circumstances in which such a power can be exercised. Infact, the meaning of the word 'inherent' would be that which inheres in an authority irrespective of or inspite of a statute and to say that such a broad power of a constitutional court which can be taken away only by way of a constitutional amendment and not by a statute, can therefore be limited by statute to be used only as a residuary power, is a contradiction of sorts and I do not subscribe to such a view. On the contrary, there are copious number of judgements that wherever the constitutional courts exercise inherent jurisdiction as those falling under Article 32 of the Constitution in respect of the Supreme Court and Article 226 of the Constitution in respect of the High Court, as well as the power to punish for contempt, such a power can never be taken away by a statute or in certain cases even by a constitutional amendment if the said powers form part of the basic structure of the Constitution.

34. In the present case, since the *parens patriae* jurisdiction of the High Court is an inherent power stated expressly in the Letters Patent and saved by Articles 225 and 372 of the Constitution, they continue to be part of the inherent powers of the superior constitutional courts and no statute much less a procedural Legislation, can place fetters on such a power. The question that is

formulated for consideration is, whether the jurisdiction of the High Court on its original side over matters of child custody and guardianship is ousted in view of the provisions of explanation (g) to section 7(1) read with sections 8 and 20 of the Family Courts Act 1984. The jurisdiction of the High Court on its original side in respect of guardianship and custody matters over the person and property of infants and minors is governed by Clause 17 of the Letters Patent. The question whether the said power exercised by the High Court in exercise of its ordinary original civil jurisdiction under the Guardians and Wards Act, 1890 (which would then be affected by territorial limits) and the exercise of such a jurisdiction without invoking Clause 17 of the Letters Patent would be fundamentally a different issue. This is, because the jurisdiction exercised by the High Court as a Court of territorial jurisdiction under the Guardians and Wards Act, 1890 is different from the jurisdiction exercised by the High Court under Clause 17 of the Letters Patent (not limited by territorial limits of a District) when both are invoked independently and not together. While the former is a statutorily conferred jurisdiction to be exercised in its ordinary original civil jurisdiction within the limits of a “District”, the latter is an inherent jurisdiction to be exercised in its ordinary jurisdiction unlimited by

territorial limits of a "District". It is in this context that I am of the view that such an inherent jurisdiction can never be limited or fettered by a statute.

35. In this context, it is pertinent to mention that an apprehension has been expressed in the order of Justice P.N. Prakash that if the theory of concurrent jurisdiction is accepted it would mean that the jurisdiction under Clause 35 of the Letters Patent would still be available to be exercised notwithstanding the Indian Divorce Act, 1869 as amended by the 2001, and that if there is a bar on Clause 35 by virtue of the Indian Divorce Act, there should also be a corresponding bar to Clause 17 jurisdiction. To put it in other words, my learned brother has stated that if there is no ouster of jurisdiction under Clause 17 of the Letters Patent by virtue of the provisions of the Family Courts Act, 1984, equally there would be no ouster of jurisdiction under Clause 35 of the Letters Patent notwithstanding the provisions of the Indian Divorce Act, 1869 (as amended in 2001). I am afraid that such a corollary may not be legally sound and the apprehension expressed thereby may have no basis. This is because the very nature of the jurisdiction vested in the High Court under Clause 17 is 'inherent' and embodying the *parens patriae* jurisdiction, which cannot be likened to any other jurisdiction vested in the High Court by virtue of

the Letters Patent. It is not possible to draw a parallel between the jurisdiction under Clause 17 and Clause 35 of the Letters Patent as the two are fundamentally different and as a consequence, the corollary that if a principle applies to one of them, the same would apply to the other, is undoubtedly fallacious.

36. Even before the Letters Patent was issued at the time when the Supreme Court of Madras was established, it was a trite principle of common law that the English courts exercised inherent *parens patriae* jurisdiction over infants and lunatics. The following paragraph in ***Hope v. Hope [43 ER 535]***, could explain the same:

> *"The jurisdiction of this Court, which is entrusted to the holder of the great Seal as a representative of the crown with regard to the custody of infants face upon this ground, that it is the interest of the state and of the sovereign that children should be properly brought up and educated: and according to the principle of our law, the sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects."*

VIII. ON TERRITORIAL JURISDICTION OF THE HIGH COURT UNDER CLAUSE 17 OF THE LETTERS PATENT

37. The next question of relevance is whether the jurisdiction exercisable by the High Court under Clause 17 of the Letters Patent is throughout the State of Tamil Nadu or restricted to the District of Chennai ('within the Presidency of Madras' or 'within the Presidency town of Madras'). The jurisdiction of the

High Court under Clause 17 by its very nature is applicable to the whole of the State. Clause 17 uses the words "within the Presidency of Madras". The Presidency of Madras later became the Madras province in 1947 on independence, then the Madras State under the Constitution of India and the States Reorganization Act, 1956, and then the State of Tamil Nadu by the Madras State (Alteration of Name) Act, 1968 (Central Act 53 of 1968) which took effect on 14.01.1969. It is also pertinent to mention here that the local limits of the ordinary original jurisdiction of the High Court as stated in Clause 11 of the Letters Patent is fundamentally different from what has been stated in terms of territorial limits under Clause 17 of the Letters Patent. A reading of Clause 11 of the Letters Patent would make it clear that it envisages the exercise of the ordinary original civil jurisdiction of the High Court within such local limits as may from time to time be prescribed. It is seen that these local limits are mentioned to be within the District limits and not pan-State as in the case of Clause 17. The very language employed in Clause 11 "within such local limits" can be distinguished from the words "within the Presidency of Madras" as used in Clause 17.

38. When the High Court as the superior Constitutional Court and the highest court of the State exercises jurisdiction which is inherent and which is

in the nature of a *parens patriae* jurisdiction, it is only natural that the said jurisdiction is to be exercised by the High Court all over the State. Applying such logic, and in the context of the meaning and the words used in the Letters Patent and the exposition and meaning of the *parens patriae* jurisdiction as employed by the Constitutional Courts while interpreting the *parens patriae* jurisdiction and also in line with the thinking that such jurisdiction is also included in the present writ jurisdiction of this court under Article 226 of the Constitution, it is impossible to place limits on the jurisdiction of the High Court under Clause 17 by the territorial limits of the "District". It is in this context that the submissions made on whether the High Court would be a "District Court" going by the definition of "District" and the understanding of the words "District Court" by virtue of the definition under the Civil Procedure Code and the reading of the ouster Clause under section 8 of the Family Courts Act, would pale into insignificance in view of the above discussion.

39. The primary authority for the proposition that the jurisdiction of the High Court under Clause 17 of the Letters Patent extends throughout the State of Tamil Nadu, the then Presidency of Madras, is the decision in ***Vizianagaram*** case cited infra. As the decision assumes importance to understand the scope and extent of the power of the High Court under Clause 17 of the Letters

Patent, something more in detail needs to be deliberated upon on the basis of this judgment and whether the decision in ***Vizianagaram*** still holds good to support the proposition that Clause 17 jurisdiction of the High Court extends throughout the State of Tamil Nadu, apart from the other reasons to uphold the proposition as stated in the earlier paragraphs of this order.

40. It may be stated that the ***Vizianagaram*** case is the most cited authority to contend that the jurisdiction under Clause 17 extends throughout the State. The observations of the Division Bench in the case of ***Rajah of Vizianagaram v. Secy. of State [(1937) 44 L.W. 904 : A.I.R. 1937 Madras 51]***, have been extracted for useful reference and the same run thus:

> *"32. If my conclusions so far are correct, it would inevitably follow that this application would have been allowed, had it been filed under the Guardians and Wards Act, before the District Court of Vizagapatam where the minors are residing; but it is maintained that as the petitioner has chosen to move the High Court which has no jurisdiction in the matter, his petition is incompetent and ought to be dismissed. After carefully considering the question, I feel compelled altogether to dissent from this view. Section 3 of the Guardians and Wards Act saves the power of the Chartered High Courts and there is also a provision in the Court of Wards Act (Section 3), which similarly saves the High Court's jurisdiction. If we confine ourselves to the relevant provisions relating to infants in the various Charters of justice, the question to my mind presents little difficulty. The argument has covered much ground, in my opinion quite unnecessarily. A careful scrutiny of the Charters will show that the Court is vested with different kinds of jurisdiction, sometimes restricted, sometimes extensive; and at the outset it seems to me that this distinction ought to be borne in mind. To illustrate my point I may refer, taking the Madras High Court Charter of 1865, to a few sections for showing that*

the extents of the jurisdictions vary. As regards the Original Civil Jurisdiction, Clause 11, declares that it shall not extend beyond certain prescribed local limits. By way of contrast, Clause 34 may be referred to, which says that the High Court's testamentary and intestate jurisdiction is not subject to such territorial limitation. Again, provisions in regard to other jurisdictions, such as, criminal, admiralty and matrimonial, are entirely dissimilar. Now the question is, what is the extent of the High Court's jurisdiction in regard to infants? Clause 17 of the 1865 Charter says that the jurisdiction of the High Court in regard to infants within the Presidency of Madras is the same as that vested in it under Clause 16 of the Charter of 1862; the jurisdiction under the latter provision is declared to be "that which is now vested in the said Supreme Court at Madras." Turning to the Charter of 1800 establishing the Supreme Court, the relevant provision is Clause 32, the material part of which runs as follows:

We do hereby authorise the said Supreme Court of Judicature at Madras to appoint guardians and keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England.

33. It will be observed that this Clause confers plenary authority unlike several other Clauses which occur in this Charter. In defining the ambit of jurisdiction, Clause 4 uses words of extensive application. It says that the Court shall have (I quote the relevant portion):

> *Full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdictions, both as to natives and British subjects, and to be invested with such power and authorities, within the Fort St. George and the town of Madras and the limits thereof and the factories subordinate thereto, and within the territories which then were, or thereafter might be, subject to, or dependent upon, the Government of Madras, as the Supreme Court of Judicature at Fort William in Bengal is invested with, or subject to within the Fort William or the Kingdom and provinces of Bengal, Behar and Orissa.*

34. I have set out a good part of this Clause, as its language shows beyond doubt that subject to the provisions that follow, the jurisdiction conferred, both as to territory and as to persons, is general and not restricted. Passing on to the succeeding Clauses, each of them deals with a different kind of jurisdiction. In Clause 21, for instance, there is a reference to "British subject" and to the powers possessed by the abolished Recorder's Court. Now turning to the Charter of 1798 establishing that Court, we find in the Clause dealing with the extent of civil jurisdiction, reference is

made to "our subjects, which teer is equivalent to "His Majesty's subjects", the expression occurring in (1797) 37 Geo. 3, Chap. 142, in pursuance of which statute, the aforesaid Charter was granted. To return to the 1800 Charter, the point I wish to make is this. Clause 4 defines the extent and ambit of jurisdiction and as I have said, the words used there are perfectly general. Then follow several heads of jurisdiction, not in all cases of equal extent some restricted, some not; but in the case of infants with which alone we are concerned, the jurisdiction conferred is plenary for in Clause 32, as already stated, there is no restriction either as to place or persons, as it provides in the most general terms, that the Supreme Court in the matter of appointing guardians for infants, is authorised to follow the same order and course, as that:
Observed in that part of Great Britain called England.

35. It is further material to observe that the power and authority with which the Madras Supreme Court is invested under Clause 4 already quoted, is similar to that possessed by the Supreme Court in Bengal; as regards the jurisdiction over infants, there is no difference whatsoever between the powers conferred on the Madras and the Calcutta Courts (Clause 25 of the Calcutta Charter, 1774). The Learned Advocate-General contends that the Supreme Court's jurisdiction over infants is both as to territory and as to persons restricted in the same way as its Original Civil Jurisdiction, in other words, that its jurisdiction is limited to the City of Madras and, outside the city limits, to European British subjects only. We are in effect asked to read into the Clause relating to infants, all the limitations that appear in the Clause relating to Original Civil Jurisdiction. I fail to see why we should depart from the plain meaning of the provision and read into it restrictive words which do not occur there. It is urged that the view that the High Court possesses a general jurisdiction over infants, would lead to the result that the provincial Courts and the High Court possess a concurrent jurisdiction over them. But does the Learned Advocate-General's argument avoid this result altogether? Even according to him, the jurisdiction over infants would extend beyond the city in the case of European British subjects, who undoubtedly under the Guardian and Wards Act are subject, to the Provincial Courts. The argument therefore based upon the supposed anomaly entirely falls to the ground. I agree, with respect with the observations of Sir Arnold White, C.J., who says:

> *The jurisdiction in connection with the estates and persons of minors is, in my opinion, the jurisdiction which was exercisable by the Lord Chancellor in England acting for the Sovereign as parens patriae when the Supreme Court in Madras was instituted. Annie Besant v. Narayaniah MANU/TN/0133/1913 : (1913) 25 MLJ 661.*

36. The contention urged in that case was that the fact that the minors were outside the Presidency, ousted the jurisdiction of the High Court. Here the minors are within the Presidency but outside the City, but for the purpose of the present argument that makes no difference. Referring to Clause 32 of the Letters Patent of, 1800 the Learned Chief Justice says:

> *The language of this Clause is quite general and is not qualified by any limitations as to persons or place such as we find in other Clauses of these Letters Patent (see, for instance, Clause 4, 21, 22, 31 and 41). Annie Besant v. Narayaniah MANU/TN/0133/1913 : (1913) 25 MLJ 661 .*

37. There has been a good deal of discussion at the Bar as to what is meant by the expressions "the British subjects" and "His Majesty's subjects", occurring in the various statutes and Charters belonging to the period 1773 to 1824. It was then that the Recorder's Courts at Madras and Bombay and the Supreme Courts in the three Presidency towns came into existence:
Before the Government had passed from the company to the Crown, it was a matter of doubt whether natives of India (excepting the island of Bombay which had owe been a Crown possession) were ' British subjects', as that term was occasionally used in Acts of Parliament relating to India. 10, Halsbury's Laws of England, First Edn., p. 588.

38. This has been a moot point on which divergent opinions have been expressed. It is sufficient to refer to the judgments of the Bombay High Court in Ardaseer Cursetjee v. Perozeboye (1856) 6 M.I.A. 348 to show how widely, eminent jurists and writers have differed on this question. Sir Williams Yardley, C.J., in his judgment refers to the opinion of Sir Erskine Perry in support of his extended interpretation of the term "British subjects". Sir Charles Jackson, the other Learned Judge, who places a narrower meaning on the expression, finds support in the opinion of Sir Charles Grey. Indeed it would be tedious and would serve no useful purpose to attempt a solution. As "writers on constitutional law point out, the Parliament deliberately avoided a precise definition of the term "British subjects", and the Act of 1813 (53 Geo. 3, Chap. 155) for the first time expressly proclaimed the sovereignty of the Crown over the company's possessions, then by the Charter Act of 1833 (3 and 4 William IV, Chap. 85) the territorial possessions of the company were continued to it for twenty years "but in trust for His Majesty, his heirs and successors for the service of the Government of India." (Keith's Constitutional History of India, 1600-1935, pp. 127 and 131.) True, as observed by the Judicial Committee in another connection in In re Southern Rhodesia (1919) A.C. 211 , if there is a conquest by the company's arms, then by well-settled constitutional practice, that conquest would be on

behalf of the Crown. Equally unassailable is the proposition, that all persons born within King's dominions, by whatsoever manner acquired, are natural born British subjects. But this most fundamental principle of British nationality, the statesmen of the period shrank from asserting unequivocally, as they found it sometimes convenient or even necessary, to recognise the formal over lordship of the Moghul Emperor. It is not possible to define exactly at what precise point of time sovereignty became applicable to the various territories which fell under the company's control Mayor of the City of Lyons v. The Honourable The East India Co (1836) 1 M.I.A. 175 . Ilbert observes:

> *Notwithstanding the declaration in the preamble to the Charter Act of 1813, there was still room for doubt whether the native inhabitants of those possessions were British subjects within the meaning usually attached to that term by Acts of Parliament and whether their status did not more nearly resemble that of natives of the territories in Africa which are under protection but have not been formally incorporated in the British Dominions. (p. 411.)*

39. After the assumption of direct control by the Crown under 21 and 22 Vict., Chap. 106, the doubt as to sovereignty no longer existed and the Crown became the paramount power both in theory and in fact. (See 10, Halsbury's Laws of England, First Edition, p. 588.)

40. But how far is this discussion germane to the point at issue? As I have said, I am emphatically of the opinion, and I wish to repeat it, that in regard to the jurisdiction over infants, the relevant Clause in the Charter, differing in this respect, from several other Clauses, recognises no kind of limitation. So, to my mind, the question as to who were British subjects, possesses little importance. If I am correct in this view, the High Court possesses undoubted jurisdiction in regard to the minors, though not of British birth, resident outside the limits of the Presidency town. But supposing that the jurisdiction of the Supreme Court over infants was confined to British subjects of British descent, what follows? The moment direct control was assumed by the Crown, every native of British India became ipso facto a British subject and from that time onwards nothing could hinder the Supreme Court from exercising jurisdiction over native Indian infants in the mofussal. To put it concretely in 1856 it would be (I am granting this for the purpose of the argument) beyond the competence of the Supreme Court to assert jurisdiction over native Indian minors outside the city, but in 1859 such a bar would no longer exist. This seems to my mind simple enough, for I stress once again that under Clause 32, the jurisdiction is general and it contains no reference to British subjects; but if nevertheless the test of a person being a British subject is to be applied, the question is merely, at the material time is he a British subject

or not? By Section 8 of the Indian High Courts Act the Supreme Court and the Courts of Sudder Adaulat and Foundation Adaulat were abolished upon the establishment of the High Court and by Section 9 the jurisdiction of the abolished Courts became, subject to certain limitations, vested in the High Court. What matters, therefore, is the power possessed by the Supreme Court at the time of its abolition and it was that power that the newly established High Court was vested with. If, as I have shown, the Supreme Court between the passing of the Government of India Act, 1858 and its abolition, could have exercised jurisdiction over native Indian infants in the mofussal, the High Court inherited its power and jurisdiction. This removes every possible doubt which, in spite of what I have already said, might still be supposed to exist on the point.

41. There is another aspect to which I may advert, making it, however clear that it is not intended to seek any ground for my judgment, in the remarks to be made in this connection. By Clause 22 of the 1800 Charter, jurisdiction is conferred upon the Supreme Court over the inhabitants of Madras, irrespective of any question of race or birth. The petitioner, the Rajah of Vizianageram, owns a valuable and spacious house at Madras, for which he pays the rates, keeps up an establishment there and resides in it during his visits to the city at frequent intervals. That on these facts which are not disputed, he would answer the description of the "inhabitant of Madras", does not admit of doubt. Sir W. Page Wood, V.C., observes:

> *Generally, if a party has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some years. If he keeps up an establishment in it, the place is still his residence; and thus he may be said to have his residence in two or three different counties. Walcol v. Botfield (1854) Kay. 534 : 69 E.R. 226 .*

42. In Moir In re : Warner v. Moir (1884) 25 Ch. D. 605 , the legatee was bound under the terms of a will to reside in a certain house for at least six months in every year. In one year he actually resided for 18 days only and in the year following for no more than 24 days. The question arose whether there was such non-compliance as would lead to a forfeiture. Bacon, V.C., observes that it is necessary, in order to comply with the conditions contained in the will, that the place should be kept up and goes on to say:

> *Kept up it has been, for there is a staff of servants there, and the man's horses and poultry are there.... The defendant has resided there; he did take possession; he has complied in all respects with the reasonable interpretation of the will, and there is no ground for saying that he has not done so. In re Moir : Warner v. Moir (1884) 25 Ch. D. 605.*

43. These cases have been followed in India in Anilbala v. Dhirendra (1920) 32 C.L.J. 314, where Sir Ashutosh Mukherjee, A.C.J., points out that some persons have more than one residence and that in respect of them the word 'reside' may be used in relation to either their personal or legal residence (see p. 330). I have now shown that the Rajah of Vizianagaram would answer the description of "the inhabitant of Madras" occurring in Clause 22 of the 1800 Chapter. I have already said that at any rate subsequent to the Act of 1358, the Supreme Court would undoubtedly possess jurisdiction over the native inhabitants in the mofussal. But even prior to that year, the position of the inhabitants of Madras in virtue of Clause 22 was different from that of the inhabitants of the rest of the Province; the Supreme Court's jurisdiction over them did not depend upon any question of nationality. I conceive, therefore, that the Supreme Court, acting upon the English analogy would not have hesitated to assist a resident of Madras invoking its jurisdiction, in asserting his parental authority over his children resident in the mofussal. Indeed the question is not, who would have to move the Supreme Court? for, by whomsoever moved, it would have exercised jurisdiction over the infant children, though resident in the mofussal, of the inhabitants of Madras. In In re Willoughby (1885) 30 Ch. D. 324 C.A., the infant was born abroad but his paternal grandfather was a natural born British subject and it was held that the Court had jurisdiction to appoint a guardian of such infant, although resident abroad. Kay, J., whose decision was upheld by the Court of appeal, observes:

> *According to the principle of our law, the Sovereign as parens patriae is bound to look to the maintenance and education of all his subjects. First the question is, whether this principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment it is established by statute that the children of a natural-born father born out of the Queen's allegiance are to all intents and purposes to be treated as British-born subjects, of course it is clear that one of the incidents of a British-born subject is, that he or she is entitled to the protection of the Crown as parens patriae. (P. 328.)*

44. This case of course does not in terms apply; but if for "British subject" is substituted "inhabitant of British India", the parallel would be complete. The Court of Chancery would extend its protection to the child of a British subject, though resident abroad; thus the residence of the infant is immaterial. By analogy, in the case of an inhabitant of Madras over whom the Supreme Court had jurisdiction, it would extend the same protection to his children wherever resident.

45. For these reasons it seems to me that the contention that the High Court has no jurisdiction, completely fails.

> *46. In the result, an injunction will issue restraining the Court of Wards from removing the minors out of the Province or otherwise interfering with them or exercising any sort of control over them, subject to the condition, that directions of the High Court may be applied for, by any party interested, in regard to their removal to any place, within the limits of British India. The enquiry is adjourned for the purpose of ascertaining, whether the petitioner has rendered himself unfit to continue to be the guardian of the minors in question, for appointing, if necessary, in his place a suitable person as their guardian and for passing final orders.*

41. The aforesaid judgement has been relied upon and the observations made therein have been applied in many cases by this Court as well as by other High Courts and some of them are cited hereunder. The Full Bench of Bombay High Court in ***Re: Ratanji Ramaji [AIR 1941 Bombay 397]***, had infact relied upon the judgment of the Division Bench of this Court in ***Rajah of Vizianagaram,*** *(*cited supra) and concluded that the High Court in exercise of its original jurisdiction has jurisdiction even over minors residing outside its territorial jurisdiction. While doing so, the Hon'ble Full Bench observed as follows:

> *"15. In this state of case-law, it appears that there is nothing in the words of Clause 37 to exclude infants, who are outside the limits of the ordinary original civil jurisdiction of the Court, but who are stated in this case to be within the Bombay Presidency from its operation. The weight of judicial decisions is in favour of that view."*

42. Again, in ***Re: A.T. Vasudevan and Ors. [(16.03.1948 - MADHC) : AIR 1949 Madras 260]***, it was held that:

> *"2.The first question is whether this Court has jurisdiction to entertain this application. It is not denied that under the Guardians and Wards Act no guardian of the property of an infant will be appointed where the minor is a member of an undivided family governed by the Mitakshara Law, the reason being as laid down by the Judicial Committee in*

Gharibullah v. Kalaksingh (1903) L.R. 30 IndAp 165 :I.L.R. 25 All. 407 that the infant's interest is not individual property. As observed by their Lordships, it has been well settled by a long series of decisions in India that a guardian cannot be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. This was pointed out to be clearly right, on the plain ground that the interest of a member of such a family is not individual property at all and that therefore a guardian, if appointed, would have nothing to do with the family property.

3. This view has been acted upon in a series of cases collected in footnote (n) to paragraph 230 of Mayne's Hindu Law. It is, however, mentioned by the same Learned author that the High Court has inherent jurisdiction to appoint a guardian of the property of the minor who is a member of the joint family even where the minor's interest in the property is an undivided share in the family property unlike under the Guardians and Wards Act. This jurisdiction is conferred by Clause 17 of the Letters Patent which is in these terms:

And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to persons and estates of infants, idiots and lunatics within the Presidency of Madras, as that which is now vested in the said High Court immediately before the publication of these presents.

This is substantially a reproduction of Clause 16 of the Letters Patent of 1862 in which it was stated that this Court would have the jurisdiction which was then vested in the Supreme Court. The jurisdiction of the Supreme Court was laid down in Clause 32 of the Madras Charter of 1800 which is as follows:

And we do hereby authorise the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England.

That jurisdiction was exercised in England by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown virtute officii. As it has been laid down in a series of cases in England, the Chancellor's jurisdiction has its foundation in the prerogative of the Crown flowing from its general power and duty as parens patrie. Now the Court of Chancery in exercise of this jurisdiction does not permit the conversion of real property belonging to a minor into personal property; but that is because under the English Law a distinction obtains between realty and personality both with regard to the infant's power of disposal thereof by will and with regard to the line of succession. No such distinction applies to a Hindu family in India as it is now well settled. The reference in the Charter of 1800 to the order and course followed in England is primarily with regard to matters of jurisdiction and not to the entire body of the law applicable such as the distinction with

regard to conversion of real property belonging to the minor into personal property. There is no direct case decided by this Court on the question of inherent jurisdiction of the High Court under Clause 17 of the Letters Patent in a matter like this except for an obiter reference contained in the judgment of Venkataramana Rao, J., in Raja of Vizianagaram v. Secretary of State for India MANU/TN/0134/1936 : (1936)71MLJ873 . There the question was whether under this Clause the High Court had jurisdiction with regard to minors outside the limits of the Presidency Town and whether its jurisdiction to act under that Clause was not affected by the Guardians and Wards Act. Venkatasubba Rao and Venkataramana Rao, JJ., held that the jurisdiction of the Supreme Court was not limited to the City of Madras, that that jurisdiction was not in the exercise of its ordinary original jurisdiction and that it is saved by Section 3 of the Guardians and Wards Act. What is the effect of the decision of the Privy Council in Ryots of Garabandho v. Zamindar of Parlakimedi MANU/PR/0052/1943 will be upon that ruling is a matter which does not arise here, but the only material portion of the judgment in the Madras case that is relevant for the purpose of this case is the dictum of Venkataramana Rao, J., at page 459 of the report. After referring to a number of Bombay, Calcutta and Allahabad decisions the Learned Judge concluded that the High Court has jurisdiction to appoint a guardian for a minor apart from the Guardians and Wards Act and then observed:

> *The practice in this Court, so far as my experience goes, has been consistent with the view taken by the other High Courts.*

This observation is relied on by Mr. Panchapakesa Sastri to show that although there are no reported cases bearing upon the question at issue there has been an invariable practice here following the line of the various decisions of the Bombay, Calcutta and Allahabad High Courts. I shall refer to a few of those cases. In In re Jairam Luxmon I.L.R. (1892) Bom. 634 and In re Jagannath Ramji I.L.R. (1893) Bom. 96, this question had arisen, but in those cases no directions for alienation of the property were given. Guardians were appointed and the responsibility with regard to the alienation was thrown upon them. In In re Manilal Hurgoven I.L.R. (1900) Bom. 353, the proposed alienation by the guardian was duly sanctioned by the Court after considering the various objections raised against it. The facts of that case were very similar to those of the present case. Jenkins, C.J., raised the question whether the manager of the family, the father, had not the right to deal with the family property and whether by granting sanction the Court would not be depriving the minor of the right to object to the alienation after attaining majority if he thought proper to do so. Eventually sanction was given holding that the High Court had power in such cases to appoint a guardian of the property of the minor apart from the Guardians and Wards Act. This case was followed by the same Court in Narsi Tokersey v. Sachindranath Gajanan

MANU/MH/0152/1928 : I.L.R. (1929) Bom. 75. The correctness of this view was however doubted by Kania, J., as he then was in In re Dattatraya Govind Haldanker MANU/MH/0060/1932 : I.L.R. (1932) Bom.519. The Learned Judge raised two important doubts (1) Why should the purchaser demand an order of sanction from the Court before purchasing the property? (2) In spite of the Court passing the order of sanction, the purchaser would not be absolved from the duty of making the necessary enquiries and in the event of the minor challenging the transaction the purchaser would still have to prove that he made independent enquiries and satisfied himself as to the power of the manager of the joint family to enter into that transaction. In Mahadev Krishna, In re MANU/MH/0098/1936 : I.L.R. (1937) Bom. 432, the question again arose for consideration and Sir John Beaumont, C.J. and Rangnekar, J., reaffirmed the principle of the earlier decisions in In re Manilal Hurgoven I.L.R. (1900) 26 Bom. 353 and in Narsi Tokersey v. Sachindranath Gajanan MANU/MH/0152/1928 : I.L.R. (1929) Bom. 75, and referring to Kania, J.'s decision in In re Dattatraya Govind Haldanker MANU/MH/0060/1932 : I.L.R. (1932) Bom. 519, dissented from it and answered both of his doubts. With regard to the first of his doubts it was said that the purchaser does not seek to cast any burden on the Court. He merely says that he is not going on with the transaction unless he gets a good title. It was pointed out that it was difficult for a purchaser to satisfy himself as to the existence of legal necessity or benefit to the estate and that evidence with regard to legal necessity might not be available when the transaction may be attacked in years to come by a minor son of the manager. The youngest minor in the present case, it may be noted here, is one year old and the transaction may be questioned 20 years later. With regard to the second doubt Rangnekar, J., further pointed out that although the legal position is correct that the purchaser should satisfy himself that a legal necessity exists or that moneys are required for the benefit of the estate many transactions take place which are not challenged and the burden placed upon the purchaser or the mortgagee in such cases is completely discharged without the parties coming to the Court. The latest pronouncement of the Bombay High Court is contained in Full Bench decision in Ratanji Ramji, In re MANU/MH/0060/1941 : I.L.R. (1942) Bom. 39. The entire case-law was fully reviewed and the jurisdiction of the Court to appoint a guardian of the minor was affirmed both on the ground of the power conferred under Clause 17 of the Letters Patent and by virtue of the long standing practice in that Court. This view has been acted upon by the Calcutta High Court in Hari Narain Das, In re I.L.R. (1922) Cal. 141 and In re Bijaykumar Singh Budar I.L.R. (1931) Cal. 570 and by the Allahabad High Court in In the matter of Govind Prasad MANU/UP/0179/1928 : I.L.R. (1928) All. 709. The Allahabad High Court has jurisdiction by virtue of Clause 12 of

the Letters Patent in respect of the persons and property of the minors. That Court, however, refused to exercise that jurisdiction in that particular case on the ground of inexpediency and want of precedent. The result of this foregoing survey is that in the other Chartered High Courts the consensus of opinion has been that in the exercise of its inherent jurisdiction vested in it under the Letters Patent, which jurisdiction is preserved by Section 3 of the Guardians and Wards Act, the High Court has power to appoint a guardian in respect of the person and property of the minors covering even their undivided interest. Although there is no direct decision of this Court with regard to this matter there is the statement of Venkataramana Rao, J., that the practice in this Court has been on the same lines as indicated in the Bombay and Calcutta decisions. That practice is warranted by Clause 17 of the Letters Patent."

43. In ***Pamela Williams v. Patrick Cyril Martin [AIR 1970 Madras 427]***, another Division Bench of this Court had after exhaustive consideration of the Law relating to the jurisdiction concluded that though the Court has got jurisdiction, it is a matter of discretion to appoint a person resident outside India as the guardian of the minor. The Division Bench upheld the jurisdiction of this Court to deal with guardianship of a minor, who is a resident outside its jurisdiction.

44. The Learned Judge had also extensively quoted from another judgment of this Court in ***Bhagyalakshmi and another v. Narayana Rao [1981 TLNJ 451]***, wherein it was observed as follows:

"The words "ordinarily resides" would in my view, cannot be, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion. The place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular Court has jurisdiction to

entertain the proceedings or not, as it would be easy to stifle proceedings under the provisions of the Act by the mere act of the moving the minors from one place to another and consequently from one jurisdiction to another. The question whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case. The paternal family house or the family residence may normally be taken to be the place of ordinary residence of the minors as well. The words "ordinarily resides" are incapable of any exhaustive definition as those words have to be construed according to the purpose for which the enquiry is made. The intention of not reverting back to the former place of residence would normally be relevant; but, in the case of minors, it is rather difficult to impute any such intention to them. It has also to be borne in mind that mere temporary residence or residence by compulsion at a place however long, cannot be equated to or treated as the place of ordinary residence."

45. In ***Jaideep and Ors. v. Sucharitha Gautam [(14.11.1990 - MADHC) : MANU/TN/1003/1990]***, this Court observed as follows:

"In re Tarunchandra Ghosh A.I.R. 1930 Calcutta 598 Learned single Judge of the Calcutta High Court has held as follows:

> *There is no restriction in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the town or to European British subjects, and even if any such limitation exists, it does not apply where person who is outside the limits of ordinary original jurisdiction or who is not a European British subject desires to avail himself of the jurisdiction of the court and there is no opposition thereto.*

In re Mahadev Krishna AIR 1937 Bombay 98 Re Manilal (sic) minor, Manchand I.L.R. 25 Bom 353 the Bombay High Court has held that the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu Family and where the minor's property is an undivided share in the family property apart from the Guardians and Wards Act. It is further held that the Court has jurisdiction to sanction an alienation by the father or the manager of a joint family where the court was satisfied that the transaction was for the benefit of the minor. On the general jurisdiction, and apart from the Guardians and Wards Act, the Bombay High Court following the Full Bench decision reported in 25 Bombay 353 held that the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu Family and where the minor's property is an undivided share in the family property, and the Court has jurisdiction to sanction an alienation by the father or

the manager of a joint family where the Court was satisfied that the transaction was for the benefit of the minor. In re Lovejoy Patell AIR (31) 1944 Calcutta 433, a Learned Single Judge of the Calcutta High Court has held as follows:

> *The jurisdiction of the Calcutta High Court to appoint guardian of the persons and estates of minors is not limited to minors residing within its ordinary original civil jurisdiction but extends to minors residing outside it but within the Bengal Division of the Presidency provided they are British Subjects.*

In exercising the jurisdiction under Cl.17 in the matter of appointment of a guardian of the person and estate of minor, the High Court should follow the principles adopted by the Court of Chancery in England. This jurisdiction of the High Court has been expressly preserved by S. 3, Guardians and Wards Act. This does not, however, mean that the High Court ignores the principles embodied in that Act. The provisions of that Act in effect adopt the cardinal principles upon which the Court of Chancery in England used to act.

Where the Act is silent or the provisions thereof are contrary to or inconsistent with the principles of the Court of Chancery, the High Court in appropriate cases will act on the principles on which the Court of Chancery in England would act in similar circumstances.

In Pamela Williams v. Patrick Cyril Martin AIR 1970 Madras 427 = MANU/TN/0196/1970 : (1970) 83 L.W. 206 = 1970 (2) MLJ 53, the Division Bench of this Court by considering Clause 17 of the Letters Patent held as follows:

> *The jurisdiction of the Court is all embracing and wide under Clause 17 of the Letters Patent and it is not controlled by the restrictions imposed and on the Court exercising jurisdiction under the Guardians and Wards, Act.*

The argument advanced by the Learned Counsel for the respondent that hardship would be caused to his clients if they are asked to appear before this Court and to contest the proceedings, cannot have any basis when the question of jurisdiction is involved in this case. As stated above Clause 17 of the Letters Patent confers jurisdiction on this Court. When the question of jurisdiction is involved the question of convenience as alleged by the respondent does not arise at all for any consideration. Hence I reject the arguments advanced by the Learned Counsel for the respondent and accept the arguments for the petitioner with regard to the jurisdiction. In my opinion all the decisions referred to above are directly applicable to the facts and circumstances of this case. Respectfully following the above decisions I hold, that this Court has jurisdiction to try the O.P. filed by the husband in this Court, for the custody of the minor children."

46. In ***Gautam Menon v. Sucharitha Gautam [1991 (1) MLJ 212]***, the Hon'ble Mr. Justice A.R. Lakshmanan had considered the question of jurisdiction and after referring to the Division Bench judgments in ***Rajah of Vizianagaram*** and ***Pamela Williams***, referred to supra, had held as follows:

> *"10. The argument advanced by the Learned Counsel for the respondent that hardship would be caused to his clients if they are asked to appear before this Court and to contest the proceedings, cannot have any basis when the question of jurisdiction is involved in this case. As stated above Clause 17 of the Letters Patent confers jurisdiction on this Court. When the question of jurisdiction is involved the question of convenience as alleged by the respondent does not arise at all for any consideration. Hence I reject the arguments advanced by the Learned Counsel for the respondent and accept the arguments for the petitioner with regard to the jurisdiction. In my opinion all the decisions referred to above are directly applicable to the facts and circumstances of this case. Respectfully following the above decisions, I hold that this Court has jurisdiction to try the O.P. filed by the husband in this Court, for the custody of the minor children."*

47. The Learned Single Judge of the Calcutta High Court in ***Sanjib Saha v. Bidisha Sana, [AIR 2006 Cal 214]***, had after taking note of the language of Clause 17 of the Letters Patent, concluded as follows:

> *"15. The language of Clause 17 of Letters Patent 1865, and also the Supreme Court as far the Bengal division of the Presidency of Fort William are same with those of the Bombay Division. It is the historical event therefore, Supreme Courts in three different Presidency towns by the Charter were established, thereafter three Chartered High Courts were established by first Letters Patent 1862 followed by 1865. I with respect following the aforesaid interpretation of the corresponding Clause 17 of Bombay division hold that the jurisdiction conferred upon this Court is not restricted to the territory of Presidency town of Calcutta, but extend to Bengal Division of the Presidency of Fort William meaning thereby throughout State of West Bengal. The phrase 'shall have like power*

and authority', means the power and authority over the subject-matter, not restricting to territory.

16. The decision of this Court reported in MANU/WB/0180/1929 : AIR 1930 Cal 598 cited by this Court was not approved nor it was taken to be an authority on the question of jurisdiction by the said Special Bench judgment of Bombay High Court. Justice Kania (as His Lordship then) in the same judgment considered the decision of this Court cited by Mr. Kar expressed his own views in extenso. His Lordship considering the said decision of this Court and the decisions of the other High Courts came to the same interpretation as that of Chief Justice. Under those circumstances, I am unable to accept the arguments of Mr. Kar that scope and purview of Clause 17 of Letters Patent restrict to Presidency town of Calcutta meaning thereby within the city of Calcutta in its Ordinary Original civil Jurisdiction. I feel this provision is independent of Clause 12 of the Letters Patent. Precisely for this reason under Section 3 of the Guardians and Wards Act 1890 power under Clause 17 of Letters Patent of the High Court has been carved out and kept untouched."

48. In ***C.V. Ananth Padmanabhan v. Bindu [2008 (7) MLJ 22]***, the Hon'ble Mr. Justice V. Ramasubramanian has upheld the jurisdiction of this court. In fact, the Learned Judge in para 31 of the judgment, has observed as follows:

"31. In my considered view, the jurisdiction of this Court to entertain the O.P. did not depend upon the physical availability of the children at Chennai on the date of presentation of the O.P. Even if the applicant had not gone to Hyderabad on 16.02.2008 and brought back the children to Chennai, this Court would have still had jurisdiction to entertain the O.P. for the simple reason that from the dates of their birth in the years 1999 and 2003 respectively, both the minors were ordinarily residing at Chennai till October 2007. The fact that the respondent shifted the children to Hyderabad in October 2007 and admitted them to a school in Hyderabad, whether with or without the consent of the applicant, did not make them non-resident Chennaites."

49. In the decision in ***K. Amarnath v. Vardhini Amarnath and Ors. [(06.07.2009 - MADHC) : MANU/TN/3620/2009]***, this Court held as follows:

"14. In Rajah of Vizianagaram v. Secretary of State AIR 1937 Mad 51 : (1936) 2 MLJ 873, a Division Bench of this Court considered the question of jurisdiction of this Court under Clause 17 of the Amended Letters Patent of 1865 read with Clause 16 of the Letters Patent of 1862 and the Charter of 1800 (of the Supreme Court of Madras) with reference to the provisions of the Guardians and Wards Act, 1890. Since Clause 17 of the Letters Patent, 1865, retained the powers vested in the High Court immediately before the publication of the Letters Patent, the Division Bench held in the said case that "what was vested in Clause 17 was what was vested under Clause 16 of the Letters Patent, 1862". Since what was vested under Clause 16 of the Letters Patent of 1862, was the same as the power of the Supreme Court at Madras and since the power conferred on the Supreme Court at Madras was just the same as the order and course observed in that part of the Great Britain called England, Venkataramana Rao, J. in his concurring opinion held as follows:

> *The question is, what is the order and course observed in England? The jurisdiction in regard to persons and properties of infants is that exercised by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown virtute officii. It has therefore its foundation in the prerogative of the Crown flowing from its general power and duty as parens patriae see (1891) AC 388 Barnardo v. Mac Hug, (395). This power is exercised even if the infant is residing outside the jurisdiction of the Court of Chancery: vide 30 Ch D 324 at p.338, (an infant) (per COTTON, L.J.) and arising out of the prerogative of the Crown is not subject to any territorial limitation. All that is necessary is that at the time it is invoked the minor must be a subject of His Majesty. It is the same jurisdiction which is conferred by Clause 32.*

15. The Division Bench found that the extents of jurisdiction in relation to Ordinary Original Civil Jurisdiction, Admiralty Jurisdiction, Testamentary and Intestate Jurisdiction etc., under the Madras Charter of 1800 (establishing the Supreme Court of Madras) which were retained under Letters Patent of 1862 and the Amended Letters Patent of 1865 varied. In some cases, the jurisdiction was found to be restricted as in the case of Ordinary Original Civil Jurisdiction. But in some cases, like Testamentary and Intestate Jurisdiction, the Division Bench found that it was not subject to any territorial limitation. Similarly, in the case of infants, the Division Bench held that the jurisdiction conferred was plenary and that there was no restriction either as to place or persons.

16. After referring to Section 3 of the Guardians and Wards Act, 1890, the Division Bench held that the jurisdiction of the High Court under Clause 17 of the Letters Patent is not in the exercise of its ordinary original civil jurisdiction, but it is saved by Section 3. Therefore, ultimately the Division

Bench held that the residence of the children is immaterial. The relevant portion of the judgment at page-76 is as follows:

The residence of the children is immaterial. Clause 17, Letters Patent does not impose as a condition the residence of the infant for the exercise of the jurisdiction thereunder.

Under similar circumstances in 43 ER 534 (Hope v. Hope) (1854) 43 E R 534); LORD CHANCELLOR CRANWORTH made an order in respect of an infant residing in France against the mother, Ms. Hope, on the ground that she submitted herself to the jurisdiction of the Court. In 25 MLJ 661 at p.686, WHITE, C.J., observes:

> *If the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have been sufficient to the Court in England, I think the same facts mutatis mutandis would be sufficient to give jurisdiction here.*

Again at p.687:

> *In the present case the statutory power as regards, the appointments of guardians for infants is given with express reference to 'the order and course observed in that part of Great Britain called England. The test seems to be, would the fact that an infant was resident out of England in itself deprive the Courts in England of power on the application of a father domiciled and resident in England to appoint a guardian of the person of the non-resident infant? The answer is surely "no".*

I am therefore of opinion that on this ground also this Court has power in this case to exercise its jurisdiction under Clause 17, Letters Patent and give protection to the father and safeguard his parental rights.

17. The aforesaid decision in Rajah of Vizianagaram v. Secretary of State (supra) case was followed by Justice AR. LAKSHMANAN, as he then was, in Gautam Menon v. Sucharitha Gautam 1991 (1) MLJ 217 in a case where the minor was residing at Coimbatore.

18. Even the Division Bench of the Bombay High Court, took a similar view in re Makadeo Krishna Rupji MANU/MH/0098/1936 : AIR 1937 Bom. 98. It was held therein that since the Bombay High Court (like the Madras High Court) inherited the jurisdiction of the Supreme Court, it had a general jurisdiction unlimited by the provisions of the Guardians and Wards Act, 1890. That case arose out of an application for appointment of a guardian with permission to sell the undivided share of a minor in a coparcenary property, which could not be done under the Guardians and Wards Act, 1890. The Bombay Division Bench held, following an earlier Full Bench that its powers under the Letters Patent are not curtailed.

19. The Supreme Court though not in the context of Section 25 of the GAWA, but in the context of Section 28 of the GAWA, dealt with the cases in Mahadev Krishna Rupji's case (cited supra) and the Raja of

Vizianagaram v. The Secretary of State and Ors. (cited supra) and held that Section 3 of the GAWA cannot be pressed into service for any extended jurisdiction. It is necessary to refer to the said judgment in Chandre Prabhuji Jain Temple v. Harikrishna reported in MANU/SC/0262/1973 : (1973) 2 SCC 665. The following passage found in paragraph 15 of the said judgment may be usefully extracted below:

> *15. Mr. Tarkunde for the appellants argued that Section 3 of the Act preserves the inherent powers of certain High Courts to appoint a guardian and determine his powers and to sanction any alienation by the guardian of the properties of the ward, apart from the provisions of the Act. He cited In re Mahadev v. Krishna Rupji and Raja of Vizianagaram v. Secretary of State for India-in-Council and said that High Court of Madras had inherent jurisdiction to appoint a guardian and determine his powers untrammeled by the provisions of the Act. In the first of the cases above referred to, it was held by the Bombay High Court that though the Act does not sanction the appointment of a guardian in respect of undivided share of a minor in a Joint Hindu Family, the High Court of Bombay had inherent power to appoint a guardian. In the latter case, the Madras High Court held that the High Court has, under Clause 17 of the Letters Patent, 1865, jurisdiction in regard to minors, though not of British birth, resident outside the limits of the Presidency-town and its jurisdiction to act under that Clause is not affected by the Act. The court also said "the jurisdiction of the High Court under Clause 17 of the Letters Patent is not in the exercise of its ordinary original civil jurisdiction and it is saved by Section 3 of the Guardian and Wards Act which says that 'nothing in the Act shall be construed to take away any power possessed by any High Court established under the Statutes 24 and 25 Vic. 104'." It does not follow from these rulings that the principle underlying Section 28 of the Act should not bind the High Court even while exercising its inherent powers. The principle underlying Section 28 is that when a guardian is appointed under a will and his powers are expressly restricted by that instrument, the court must be apprised of the will and of the restrictions on his powers imposed by the testator in order to exercise its discretion to determine whether those restrictions should be removed or not. The section enacts a salutary principle for the exercise of its parental jurisdiction.*
>
> *(Emphasis added)*

20. It is necessary to briefly refer to the various amendments which finally became Clause 17 of the Letters Patent. Clause 17 of the Letters Patent extracted above is of the Amended Letters Patent of 1865. It merely retained the power vested in this Court as on the date immediately

preceding the date of publication of the Amended Letters Patent, 1865. In other words, Clause 17 of the Amended Letters Patent, 1865, retained the power vested under Clause 16 of the Letters Patent of 1862, which read as follows:

And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court at Madras.

21. Therefore, what was vested under Clause 16 of the Letters Patent of 1862 was the power vested in the Supreme Court at Madras under Clause 32 of the Madras Charter of 1800, which read as follows:

> *And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint guardians and keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England*

22. Noting the change from the Clause 16 of the Letters Patent of 1862 with that of Clause 17 of the Letters Patent, 1865, V. Ramasubramanian, J. vide his decision in C.V. Ananth Padmanabhan v. Bindu reported in (2008) 7 MLJ 22, in paragraph 29 observed as follows:

> *29. Therefore, it cannot be contended, by simply taking a blind recourse to Section 9(1) of the Guardians and Wards Act, 1890, that this Court has no jurisdiction, especially in view of Section 3 of the Act read with Clause 17 of the Letters Patent. I am not for a moment suggesting that this Court has sky high powers. There is a small difference in the wording of Clause 17 of the Amended Letters Patent of 1865 and Clause 16 of the Letters Patent of 1862. While Clause 16 of the Letters Patent of 1862 uses the expression "within or without the Presidency of Madras", Clause 17 of the Letters Patent of 1865 uses the expression "within the Presidency of Madras". Therefore, on a strict construction of Clause 17 of the Letters Patent, it may be possible to contend that the minor should at least be within the Presidency of Madras, so as to confer jurisdiction upon this Court.*
>
> *(Emphasis added)*

23. Though the power of this Court under the Letters Patent more particularly Clause 17, is saved by Section 3 of the GAWA, one has to give full meaning to both provisions. Section 3 of the GAWA reads as follows:

> *3. Saving of jurisdiction of Courts of Wards and Chartered High Courts. - This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by any competent legislature, authority or person in any State to which this Act extends; and nothing in this Act shall be construed*

> *to affect, or in any way derogate from the jurisdiction or authority of any Court of Wards, or to take away any power possessed by any High Court.*
>
> *(Emphasis added)*
>
> *24. Therefore, in cases where the cause of action arose either in the Presidency Town or within the Madras Presidency, this Court gets jurisdiction in terms of Clause 17."*

50. Thus, the judgement in ***Vizianagaram*** which arises from a case where a petition was filed under Clause 17 of the letters patent, is certainly an authority for the proposition that the jurisdiction of the High Court under Clause 17 extends throughout the State. The question whether the decision in ***Vizianagaram*** still holds good for the proposition that it lays down with respect to the jurisdiction of the High Court under Clause 17 over the entire State of Tamil Nadu, has been analysed in the judgement of my Learned brother, Justice P.N. Prakash, wherein he has held that the line of reasoning in the ***Vizianagaram*** case to conclude that Clause 17 of the Letters Patent extended to native Indians outside the town of Madras, cannot be supported on the strength of the decision in ***Re: Nataraja Iyer (ILR 36 Madras 72)*** as the same has been disapproved in the case of ***Ryots of Garabandho v. Zamindar of Parlakimedi (AIR 1943 PC 164)*** by the Privy Council and on the basis of the overruling of the Full Bench judgement in ***Re: Govindan Nair (1921 ILR 45 Mad 14)*** by the Five judge Bench in ***Re. Mammen Mapillai (ILR 1939 Madras 708)***, which was affirmed by the Privy Council in ***Re. C.P. Matthen (AIR 1939 PC 213)***. I

differ from this view on the strength of the reasons stated in the following paragraphs.

IX. IS THE VIZIANAGARAM CASE STILL GOOD LAW TO HOLD THAT THE JURISDICTION OF THE HIGH COURT UNDER CLAUSE 17 OF LETTERS PATENT EXTENDS THROUGHOUT THE STATE OF TAMIL NADU?

51. At the outset, it may be stated that the decision in ***Rajah of Vizianagaram*** is a well-reasoned and well analysed judgement in a specific case of a petition under Clause 17 of the Letters Patent. Having held above that the jurisdiction of the High Court under Clause 17 is one of inherent jurisdiction and in the capacity of a constitutional court and as such jurisdiction is automatically applicable to the entire State, taking into consideration the concept of *parens patriae* jurisdiction of the High Court under Clause 17 reading it along with its preceding provisions in the previous Charters, as well as importantly taking into consideration the constitutional status of the High Court, whether it is now open to this bench to go into the correctness or otherwise of the judgement in ***Rajah of Vizianagaram*** seems to me to be questionable and mostly academic.

52. Also, it is seen from the judgement of my learned brother that inspite of holding that the decision in the ***Vizianagaram*** case has now crumbled, even according to him, he has gone ahead to hold that it can never be said that Clause 17 of the Letters Patent has been rendered a dead letter on account of the colonial past, by placing reliance on the Adaptation of Laws Order, 1950. The Adaptation of Laws Order, 1950 was issued by the President in exercise of the powers under Article 372 of the Constitution wherein the 'province' was construed to be a 'State' meaning thereby that the 'province of Madras' which existed between 15.08.1947 and 26.01.1950 was called the Madras State and which later became the State of Tamil Nadu. By way of the Tamil Nadu Adaptation of Laws Order, 1970, which came into effect from 14.01.1969, the expression "British subjects" was directed to be construed as "citizens of India", and hence, my Learned brother has held that Clause 17 of the Letters Patent of the High Court of Madras can be invoked by any citizen of India in the State of Tamil Nadu. Having held thus, the question whether the very basis for the decision in ***Vizianagaram*** has crumbled or not becomes of decreased significance. However, since arguments have been placed contending that the very basis of the judgment in Rajah of ***Vizianagaram*** has crumbled and hence,

the said decision is no longer good law, I am dealing with the same in some detail.

53. In my considered opinion, the Division Bench in the ***Vizianagaram*** case was right in holding that there was no necessity to depart from the plain meaning of the provision and to read into it restricted words that do not occur in the provision. The Division Bench went further to analyse whether the jurisdiction is exercisable over Indian natives outside the Presidency town and within the Presidency of Madras pointing out that after the beginning of the direct control of the Crown, every Indian in British India should become a British subject of the purposes of the exercise of jurisdiction of the High Court. The argument that the Bench in the **Vizianagaram** case placed reliance on the Division Bench judgment in ***Annie Besant*** case (29.10.1913) and the fact that the Privy Council had on appeal set aside the decision of the Division Bench in the ***Annie Besant*** case, and that as such, the very basis of the reasoning in ***Vizianagaram*** falls, is not appealing for the reason that the Privy Council set aside the Division Bench decision in ***Annie Besant*** not on the point of jurisdiction, but on the merits of the exercise of the power related to guardianship in custody. Infact, the Privy Council had not rendered any specific finding on whether there were any limitations on the exercise of the jurisdiction

of the High Court under Clause 17. It can be seen from the words used by the Privy Council that they have not ventured into rendering a definite finding on the question. Rather, the Privy Council made its observations in the context of the fact that the suit filed before the District Court of Chingleput was transferred to the High Court under Clause 13 of the Letters Patent, and on what was the general power of the High Court under Clause 13 of the Letters Patent. Under Clause 13, the High Court has the power to remove, and to try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court whether within or without the Presidency of Madras, subject to its superintendence when the said High Court shall think proper to do so either on the agreement of the parties to that effect or for purposes of justice, the reason for so doing being recorded on the proceedings of the said High Court. In ***Annie Besant's*** case, the original suit was filed by Narayaniah under the Guardians and Wards Act, 1890 and the Privy Council was of the opinion that the entire suit was misconceived as the suit could not have been filed in the District Court of Chingleput if the infants concerned are not ordinarily resident within that District as per Section 9 of the Guardians and Wards Act, 1890. It is in this context that the Court held that though the suit was subsequently transferred to the High Court under Clause 13

of the Letters Patent, 1865, the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court. The following paragraph in ***Annie Besant v. G. Narayaniah and Ors. [(25.03.1914 - PRIVY COUNCIL) : AIR 1914 Madras 41]*** would make it clear :

> *"In their Lordships' opinion this suit was entirely misconceived. It was not, and indeed could not be disputed that the plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th of March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further, a suit inter parties is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.*

54. Further, it is important to note that in ***Annie Besant*** case, supra, what was invoked was not Clause 17 of the Letters Patent, but the petitions were filed under the Guardians and Wards Act, 1890 and the entire decision is to be

viewed in the background of that pertinent fact. Also, as regards the decision in ***Re: Nataraja Iyer,*** which stood overruled by the Privy Council in the case of ***Ryots of Garabandho v. Zamindar of Parlakimedi (AIR 1943 PC 164),*** the question in issue was on the power of the High Court to issue a writ of certiorari, and these authorities do not touch upon the inherent power of the High Court in its *parens patriae* jurisdiction. Even if reliance was not had to the judgement in ***Re. Nataraja Iyer***, the reasoning and the analysis made by the Division Bench in the ***Rajah of Vizianagaram*** case would not stand altered. To state once again at the risk of repetition, it is held that once *parens patriae* jurisdiction under Clause 17 is held to be inherent in nature, these distinctions at this distance of time would only seem to be academic and cannot stand in the way of the exercise of the High Court's jurisdiction under Clause 17 throughout the State of Tamil Nadu.

55. The decisions in ***Re: Ameer*** as well as ***Re: Nataraja Iyer*** are all in the context of issue of writs by the High Court and in the context of specific legislative provisions. The decision on ***Re: Mammen Mapillai (ILR 1939 Mad 708)*** was in the specific context of the existing statutory provision under section 491 of the Criminal Procedure Code of 1898, which placed fetters on the power of the High Court to issue a writ of habeas corpus. The five judges of

this Court in the said case had overruled the decision in ***Re: Govindan Nair (1923 ILR 45 Mad 14)*** on the ground that the specific provision under section 491 was not brought to the attention of the court in ***Govindan Nair's*** case.

56. The relevant portions of the judgment in ***District Magistrate v. K.C. Mammen Mapillai and Ors. [(08.11.1938 - MADHC) : (ILR 1939 Mad 708)]***, may be usefully extracted below to understand the context in which it was issued:

> *"8. Section 81 of the Code of Criminal Procedure of 1872 provided that any European British subject who was detained in custody by any person, and who considered such detention unlawful, might apply to the High Court for an order directing the person detaining him to bring him before the Court to abide such further order as might be made by it. The section also provided that the High Court might issue such orders throughout the territories over which it had jurisdiction, and over such other places as the Governor-General in Council might direct. The section, however, only applied to European British subjects. Section 82 prohibited a High Court or any Judge thereof issuing a writ of habeas corpus, mainprise, de homine replegiando, or any other writ of the like nature, beyond the Presidency towns. The section was inserted as the result of the decision of Norman, J., in In the matter of Ameer Khan (1870) 6 Beng. L.R. 392. that the Supreme Court at Calcutta had power to issue writs of habeas corpus to persons in the mofussil and that the same power was continued to the High Court. In inserting Section 82 the Legislature wished to make sure that prerogative writs should not issue beyond Presidency towns.*
> *9. The Criminal Procedure Code of 1872 was followed by the Criminal Procedure Code of 1875. In that year the High Courts were empowered to issue directions of the nature of a habeas corpus. The section conferring these powers was Section 148 and as it has a very important bearing I will quote it in full. It read as follows:*
> *Any of the High Courts of Judicature at Fort William, Madras, and Bombay may, whenever it thinks fit, direct:*
> *(a) that a prisoner, legally committed and within the local limits of its ordinary original criminal jurisdiction be brought before it to be bailed ;*
> *(b) that a person within such limits be brought up before the Court to be dealt with according to law;*

(c) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;
(d) that a prisoner detained in any gaol situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
(e) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the Governor-General in Council, for trial, or to be examined touching any matter depending before such Court-martial or Commissioners respectively;
(f) that a prisoner within such limits be removed from one custody to another for the purpose of trial;
(g) that the body of a defendant within such limits may be brought in on the Sheriff's return of cepi corpus to a writ of attachment;
and neither the High Court nor any Judge thereof shall hereafter issue any writ of habeas corpus for any of the above purposes.
Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure in cases under this section ; and till such rules are framed, the practice of such Courts as to the obtaining, granting and serving of writs of habeas corpus, and as to the returns thereto, shall apply in such cases.
Nothing in this section applies to persons detained under Bengal Regulation III of 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the Acts of the Governor-General in Council No. XXXIV of 1850 or No. III of 1858.
10. It will be observed here that the power of the High Court or any Judge to issue a writ of habeas corpus for any of the purposes mentioned in the section was expressly taken away and the High Courts were given legislative authority to frame rules to regulate the procedure contemplated by the section. Clauses (b) and (c) correspond to Clauses (a) and (b) of Section 491 of the Code now in force.
11. The Criminal Procedure Code of 1882 omitted the prohibition against the writ of habeas corpus and also made the rule making Clause read:
Each of the said High Courts may from time to time frame rules to regulate the procedure in cases under this section.
12. In other respects Section 148 of the Act was reproduced. The omission of the words:
Neither the High Court nor any Judge thereof shall hereafter issue any writ of habeas corpus for any of the above purposes.
did not, however, alter the law. Section 2 of the Act provided that the enactments mentioned in the first schedule should be repealed to the extent specified, but not so as to restore any jurisdiction or form of procedure not then existing or followed or to render unlawful the continuance of any confinement which is then lawful.

13. The whole of the Act of 1875 was repealed except Section 144 and so much of Section 146 as related to informations, but by virtue of Section 2 of the new Act the repeal of Section 148 did not restore any former jurisdiction or procedure and in effect continued the prohibition in the Act of 1875 against the issue of prerogative writs.

14. The Criminal Procedure Code of 1898 repealed the Code of 1882 but reproduced Section 491 as it stood in the Code of 1882 and Section 2 was to the same effect as Section 2 of the earlier Code. Section 2 of the Code of 1898 has since been repealed but the prohibition against the issue of prerogative writs contained in the Code of 1875 still continues. Section 6 of the General Clauses Act of 1897 provides that where the Act, or any Act of the Governor-General in Council or Regulation made after the commencement of the Act, repeals any enactment the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect unless a different intention appears and Section 7 says that in any Act of the Governor-General in Council or Regulation made after the commencement of the General Clauses Act, it shall be necessary for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose. Section 7 applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. Section 2 of the Code of Criminal Procedure of 1898 was repealed by the Amending and Repealing Act of 1914, but Section 4 provided that the repeal should not affect the existing position. The object of the repeal of Section 2 of the Code of 1898 was to remove from the statute book a redundant provision. The effect of the General Clauses Act and the Repealing and Amending Act of 1914 is therefore to keep in operation the prohibition of the Code of 1875.

15. By Section 30 of the Criminal Law Amendment Act of 1923, Sub-section (1) and Clause (a) of Section 491 of the Code of 1898 were altered to read as follows:

Any High Court may, whenever it thinks fit, direct:

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law.

16. Previously, Clause (a) only referred to the ordinary original civil jurisdiction of the High Court. The Act of 1923 extended the Clause to cover its appellate criminal jurisdiction. The effect is that any High Court can now give directions of the nature of habeas corpus throughout the whole of its jurisdiction. The Act of 1923 also did away with the distinction between European and British Indian subjects in such matters.

17. The High Courts Act of 1861 authorised the legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the legislature has taken

away the power to issue the prerogative writ of habeas corpus in matters contemplated by Section 491 of the Code of Criminal Procedure of 1893. Rankin, C.J. and Majumdar, J., came to the same conclusion in Girindra Nath Banerjee v. Birendra Nath Pal I.L.R. (1927) 54 Cal. 727 and I respectfully agree with them that the Legislature has used the most specific terms in carrying out its intention. The respondents have their remedy under the Code of Criminal Procedure and it is admitted that their case comes within Clause (a) or Clause (b) of Section 491.

18. Before I leave the question of the powers of the Legislature, I must refer to a further argument advanced by the Learned Advocate for the first respondent in this connection. He says that, inasmuch as the last proviso to Section 22 of the Indian Councils Act of 1861 prohibits the Governor-General in Council making laws which may affect any part of the unwritten laws of constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, the Legislature has no power to abolish the prerogative writ of habeas corpus. The abolition of the right to issue a prerogative writ is not a matter which can be deemed to affect allegiance to the Crown. This provision only refers to laws,

which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance, or a modification of the obligations thereby imposed.

19. The words which I have quoted are taken from the decision of the Privy Council in Bugga v. King-Emperor MANU/PR/0086/1920 : (1920) 39 M.L.J 1 : I.L.R. 1 Lah. 326 (p.c) where a similar argument was advanced. The Learned Advocate has not advanced before us the argument which was raised before Burn and Stodart, JJ., that the penultimate proviso to Section 22 of the Indian Councils Act restricted the powers of the Legislature and affected its right to abolish the prerogative writ of habeas corpus. The argument was not accepted by the Learned Judges and their answer has evidently satisfied the respondents. I agree with what the Learned Judges say and have only to add that the argument was negatived by the Privy Council in Empress v. Burahs MANU/PR/0013/1878.

20. The decision of the Judicial Committee in Eshugbayi Eleko v. Officer Administering the Government of Nigeria (1928) A.C. 459. on which Pandrang Row, J., so much relied in holding that he had jurisdiction in the matter has in our opinion no application. The decision in that case would, of course, be binding upon this Court if the position were the same in British India as it is in Nigeria. In Nigeria the right to issue the prerogative writ of habeas corpus still exists, but here the right has been taken away. Govindan Nair's case MANU/TN/0041/1922 : (1922)43MLJ396 on which the Learned Judge also relied was binding on him, but I consider that it was wrongly decided and should be overruled.

The attention of the Learned Judges who decided Govindan Nair's case MANU/TN/0041/1922: (1922) 43 MLJ 396 was not drawn to the provisions of the Code of 1872, and the succeeding enactments which affected the question under consideration. If attention had been drawn I have no doubt that the decision would have been a different one, but be that as it may, the decision cannot be allowed to stand in the light of the statutory prohibition which exists against the issue of the writ. The same objection applies to In re Kochunni Elaya Nair MANU/TN/0064/1921 : AIR 1922 Mad 215 and Mahomedalli Allabux v. Ismailji Abdulali MANU/MH/0002/1926 : I.L.R.(1926) 50. Bom. 616. as Rankin, C.J., pointed out in Girindra Nath Banerjee v. Birendra Nath Pali I.L.R.(1927) 54 Cal. 727."

57. Further, the reaffirming the decision in ***Re: Mammen Mapillai*** in the case of in ***Re: CP Matthen*** by the Privy Council, was also on the ground that section 491 of the Criminal Procedure Code, 1898 specifically placed fetters on the power of the High Court to issue a writ of habeas corpus. I am afraid that these decisions, which not only in the context of Clause 17 of the Letters Patent, but also in the teeth of specific legislative or statutory provisions, cannot be brought in to dilute the reasoning adopted by the Division Bench in the case of ***Vizianagaram*** which was analysed on the strength of its own facts as well as the legal position then existing with respect to Clause 17 of the Letters Patent. The decision in these cases would not in my considered opinion, alter the cogent analysis on the basis of which the Division Bench in the ***Vizianagaram*** case had stated that Clause 17 can be exercised by the High Court over all citizens throughout the State of Tamil Nadu. As such, the judgement in the ***Vizianagaram*** case is still good law.

X. FAMILY COURTS ACT, 1984 - FRONTIERS AND FAULT LINES

58. It may also be pertinent to state that extensive arguments have been placed at the Bar about the circumstances in which the Family Courts Act, 1984 was passed, highlighting the objects and reasons of the Act, elaborating on how the Act is a special enactment and hence, it will exclude any general jurisdiction under the Letters Patent. On the contrary, submissions were made by the learned Senior Counsel Mrs. Chitra Sampath, Mrs. Geetha Ramaseshan, assisted by Mrs. B.Poonkuzhali, Mrs. A. Arulmozhi, on the issues faced by the litigants in the Family Court and the practical importance of the exercise of jurisdiction of the High Court under the Letters Patent under Clause 17. I have considered these submissions. Reliance was also placed on the decisions of the Bombay High Court and the Delhi High Court in ***Romila Jaidev Shroff v. Jaidev Rajnikant Shroff [2000 3 MhLJ 468] and Amina Bharatram v. Sumant Bharatram [2016 SCC Online Del 3929]*** respectively by supporting the ouster of the jurisdiction under Clause 17 by the Family Courts Act, 1984.

59. These judgments explain the scheme of the Family Courts Act, 1984, the inquisitorial, adversarial as well as conciliatory mechanism envisaged in the Act and the intention of the legislature in coming out with a full-fledged

procedural legislation to handle cases arising out of family disputes. While the question of usurping jurisdiction from a court created exclusively for such disputes beyond the prescribed frontiers would not arise, it may be mentioned that the judgments of Full Bench of the Bombay High Court in ***Romila Jaidev Shroff's case*** and the Division Bench of the Delhi High Court in ***Amina Bharatram's case***, were rendered in the context of guardianship and custody, and not in the context of jurisdiction under Clause 17 of the Letters Patent. It is in this context that the decision in ***Balram Yadav v. Fulmaniya Yadav [(2016) 13 SCC 308]***, is to be viewed and understood to mean that any question falling within the purview of the subjects mentioned in the Family Courts Act, 1984, whether positive or negative in respect of the nature of relief sought for, would have to be filed before the Family Court. The judgment does not touch upon the jurisdiction of the High Court under the Letters Patent and hence, cannot be of any help to support the argument of ouster of jurisdiction of the High Court.

60. The Judgment of the Full Bench of the Bombay High Court in ***Romila Jaidev Shroff v. Jaidev Rajnikanth Shroff [2003 MHLJ 468]*** was in the context of a suit filed by the wife against the husband for maintenance and expenses. It was not in the context of Letters Patent jurisdiction under Clause

17. The Judgment of the Delhi High Court in ***Amina Bharatram v. Sumanth Bharatram and others [AIR 2016 DEL 171]*** was in the context of a suit in respect of matrimonial property. Therefore, neither of these decisions were in the factual or legal matrix of the present case and the exercise of jurisdiction by this Court in guardianship and custody issues under Clause 17 of the Letters Patent. The fact that these decisions have been followed by the respective High Courts in subsequent cases arising before them in matters of guardianship and custody of minors, as a matter of judicial discipline, cannot make them an authority on the subject in issue in the Reference.

61. In this regard, I am also placing my specific dissent from the view taken by my learned brother, Justice P.N. Prakash, that Section 7 (1) read with Explanation (g) of the Family Courts Act, 1984 should be interpreted to mean that it includes within its fold the power of the Family Court to appoint a guardian for the property of the minor as well, apart from for his person or for his custody. Such an interpretation would clearly go against the clear and unambiguous language of the provision. Under Clause (g) of the Explanation, the words used are: “a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.” To stretch such a clearly

articulated provision to mean and include something which is conspicuous by its absence, would be to violate the cardinal principles of statutory interpretation. If the legislature intended to include the power to appoint a guardian for the property of the minor, it would have specifically added the same alongside the words "person", "custody", "access", etc. Therefore, an interpretation that Clause (g) would mean the power to appoint a guardian for the property of the minor also along with the person of a minor would not be legally permissible and hence, I am in disagreement with the same. As a sequel to this, it would once again become clear that the Family Courts Act, 1984 is not a complete code on all aspects of guardianship of a minor and is not a complete code in itself.

62. As regards the submission of practical difficulties and certain unpalatable realities on the systemic delays, it is my considered view that anomalies, aberrations and fault lines in the legislation or in its working cannot be a reason for the High Court or any other Court to retain jurisdiction. It is made clear that it is not on this ground that I am taking the view that the jurisdiction of the High Court under Clause 17 of the Letters Patent is not ousted by Section 8 of the Family Courts Act, 1984. The reasons adduced by me, are strictly legal and

not on account of the question of practical difficulties. That issue is a separate subject to be deliberated upon in order to strengthen the legislation and the institution of Family Courts accordingly. Also, reliance was placed on the Geneva Convention on the Rights of Child to show the importance of *parens patriae* jurisdiction of the High Court. It was stressed that these Articles of the convention emphasise the necessities of the State parties to protect the interest of the child even against the acts of their parents, legal guardians or relatives. To exercise such powers, the High Court of Judicature is empowered by Clause 17 of the Letters Patent. The scope and the requirements for consideration of the welfare of the child are larger than the ambit of the provisions of the Family Courts Act, 1984. This submission is noted with approval in the context of the *parens patriae* jurisdiction of the High Court.

XI. CONCLUSION

63. In the light of the above detailed discussion, analysis and findings arrived at, I am of the view that the jurisdiction under Clause 17 of the Letters Patent embodies the inherent jurisdiction of the High Court as a superior constitutional Court in exercise of its *parens patriae* jurisdiction, inherent jurisdiction of the High Court cannot be fettered, restricted or limited by

legislation or other statutory provisions, Letters Patent can be repealed only expressly, the inherent jurisdiction of the High Court (in this aspect and even generally) cannot be taken away by legislation or by any other legislative device short of a constitutional amendment if it satisfies the test of the 'basic structure' doctrine, the decision in ***Mary Thomas*** does not require reconsideration, the judgment in ***Vizianagaram*** case is still good law insofar as it lays down that the jurisdiction of the High Court under Clause 17 of the Letters Patent extends throughout the State of Tamil Nadu (then Presidency of Madras).

64. Accordingly, I answer the reference in the following terms:

i. The jurisdiction of the High Court on its Original Side in guardianship and custody matters, under Clause 17 of the Letters Patent, is NOT ousted by the provisions of Section 7 (1) Explanation (g) read with Section 8 and 20 of the Family Courts Act, 1984.

ii. The judgement in ***Mary Thomas v. Dr. KE Thomas, (AIR 1990 Madras 100)*** is still good law.

(R.M.D., J.)

Index: Yes / No
Internet: Yes / No
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M.SUNDAR. J.,

I had the benefit of reading the views of Hon'ble Mr.Justice P.N.Prakash. In paragraph 149 captioned '**XV. CONCLUSIONS**', Hon'ble Mr.Justice P.N.Prakash has crystallised his conclusions and made an adumbration of the same as 7 points vide sub paragraphs (a) to (g) thereat. On views penned by Hon'ble brother Judge, with the greatest of respect, I find myself in disagreement with the conclusions with the exception of one limb of one of the conclusions, viz., first limb of the conclusion set out in sub paragraph (d) of paragraph 149 which reads as follows:

> 'd. The inherent jurisdiction of this Court under Clause 17 of the Letters Patent, 1865 is not affected by the FC Act, 1984. However, resort to the inherent jurisdiction under Clause 17 can be had only in cases where there is no statutory remedy before any Court. In all other cases, the High Court cannot exercise its inherent jurisdiction parallelly with the Family Court where there exists a specific statutory remedy for redress.'
>
> (*Underlining made by me for ease of reference*)

For the sake of specificity, I deem it appropriate to clarify that by the first limb of Clause (d), I refer to the first sentence in clause (d) (portion underlined by me) which reads as follows:

> 'd. The inherent jurisdiction of this Court under Clause 17 of the Letters Patent, 1865 is not affected by the FC Act, 1984.'

2 I also had the benefit of reading the views of Hon'ble Mr.Justice N.Anand Venkatesh.

3 I am writing this order in the sanctus spirit that two men can come to bipolar opposite conclusions qua the same issue without forfeiting their right to be termed as gentlemen and noblemen.

4 I had the further benefit of reading the views penned by Hon'ble Mr.Justice R.Mahadevan. Though it is axiomatic, I deem it appropriate to write that I concur with the conclusions arrived at by Hon'ble Mr.Justice R.Mahadevan and I am giving reasons which are supplemental qua some facets and separate in some other facets, for supporting the conclusions that have been arrived at by Hon'ble Mr.Justice R.Mahadevan, owing to which I have taken efforts to eliminate avoidable repetitions.

5 I also had the benefit of hearing profound submissions articulated by various learned senior counsel and learned counsel in the sittings of Larger Bench in the course of hearings forming part of answering the reference on hand. The submissions were extremely illumining regarding Letters Patent and the rich legal history culminating in obtaining Letters Patent which started operating on and from 28.12.1865 nearly 157 years ago. However, it is my considered view that more than this historical perspective, interpretation of section 7 more particularly Explanation to sub section (1) thereat, clause (g) of this Explanation in particular, sections 8 and 20 of 'The Family Courts Act, 1984 (Act No.66 of 1984)' [hereinafter 'Family Courts Act' for the sake of brevity, convenience and clarity] is of significance to answer the question qua ouster, as these provisions talk about jurisdiction of Family Courts and overriding effect of Family Courts Act. Owing to section 2(e) of Family Courts Act read with section 2(4) of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) the conundrum of sorts which appears to have arisen in interpreting Explanation to sub section (1) of section 7, clause (g) thereat in particular, sections 8 and 20 of Family Courts Act, will have to be solved inter-alia by resorting to settled principles of statutory interpretation.

6 Before I embark upon the above exercise, let me set out the interesting scenario as it played out in two other High Courts with Original Sides.

7 The interesting scenario is, this very question of ouster of jurisdiction of Original Side of a High Court owing to Sections 7 and 8 of Family Courts Act came up by way of reference in Bombay High Court and thereafter in Delhi High Court after *Mary Thomas* was rendered by a Hon'ble Full Bench of this Court. In Bombay High Court which is a Chartered High Court like Madras High Court, reference was answered by a three Member Hon'ble Full Bench. In Delhi High Court which is not a Chartered High Court but a High Court which has a original jurisdiction put in place, the reference was answered by a Hon'ble Division Bench (obviously, two member Bench).

8 In Bombay, it was *Romila Jaidev* case being ***Romila Jaidev Shroff Vs. Jaidev Rajnikant Shroff*** reported in ***(2000) 3 Mah.L.J. 468*** (date of decision is 05.05.2000) and in Delhi, it was *Amina Bharatram* case being ***Amina Bharatram Vs. Sumant Bharatram*** reported in ***2016 SCC OnLine Del 3929*** (decision dated 19.07.2016). Bombay and Delhi High Courts referred to *Mary Thomas* but took a different view and came to the conclusion that the

jurisdiction of High Court stands ousted but with utmost respect to Hon'ble Benches in these two High Courts and some of the learned Members of the Bar who pressed into service these reference decisions (to support ouster), I am of the considered view that both *Romila Jaidev* and *Amina Bharatram* are neither guiding principles nor precedents for the reference in hand. The reason is, though both Hon'ble Benches (Full Bench and Division Bench) answered a reference, it is necessary to look at the circumstances and factual matrix which led to the reference, more so as the references have been answered by discussing the fact scenario.

9 In Bombay, the reference arose out of a suit filed by a wife against her husband seeking maintenance / expenses for herself and her children. In this suit, the jurisdiction issue was raised by the defendant by predicating the same on Section 7 of Family Courts Act. Learned Single Judge had the benefit of a Division Bench order of Bombay High Court but owing to *Raja Soap Factory* decision (rendered by Hon'ble Supreme Court under the erstwhile Trade and Merchandise Marks Act, 1958) thought it fit to make a reference. Therefore, *Romila Jaidev* in Bombay arose out of a suit for maintenance and expenses by wife for herself and her children. *Raja Soap Factory* in any event pertains to trademark (passing off) suit in Mysore High Court which did not have original

jurisdiction on the date of presentation of passing off suit in High Court which in turn was owing to closure of District Court. To be noted, the passing off suit was presented in Mysore High Court in the vacation court and there is no disputation that the Mysore High Court was a Court of Appeal on the date of presentation of the passing off suit. Maintenance is covered by clause (f) of Explanation to Section 7(1), whereas we are concerned with clause (g) of Explanation to section 7(1) of Family Courts Act.

10 In *Amina Bharatram* also, the reference arose out of a suit for maintenance and separate residence. Learned Single Judge expressed a tentative prima facie view that it would be appropriate for the High Court to exercise its ordinary original jurisdiction as the plaintiff claimed right in the assets of defendant's family (HUF) and as third party interests are involved. Thereafter, learned Judge made a reference, given the importance of the issue involved. Therefore, *Amina Bharatram* also arose out of a suit for maintenance and separate residence which would fall under clause (f) of Explanation to Section 7(1) of Family Courts Act. *Amina Bharatram* in turn placed reliance on *Romila Jaidev*. Interestingly, the sheet anchor dispositive reasoning in *Amina Bharatram* is that the Parliament did not intend especially in matters of

maintenance to vest powers of the Magistrate in High Courts thereby depriving litigants of normal appeal and revisional remedies. Therefore, if the *Padma Sundara Rao* constitution Bench declaration of law (about which there will be discussion / elaboration elsewhere infra in this order) is applied, a reference arising out of maintenance suits and answer to the same is no guide much less a precedent to answer the reference on hand. Though both *Romila Jaidev* and *Amina Bharatram* refer to *Mary Thomas* and make a departure from the same, as we are concerned with a reference predicated, posited and pivoted on clause (g) of Explanation to Section 7(1) of Family Courts Act, I am of the view that both these reference orders cannot be relied on in my quest for answers to the reference before this Larger Bench. In any event, both *Romila Jaidev* and *Amina Bharatram* are decisions of a three Member Full Bench and a Division Bench (obviously two Members), i.e., orders of other High Courts which are neither coordinate nor coequal Benches.

11 As we are concerned with the Letters Patent, it may be reasonably relevant to talk about order and course observed in that part of Great Britain called England and for this purpose, let me make a birds eye view survey of international scenario.

12 On the interest of the child, it has been noted in the United Nations Convention on the Rights of the Child which entered into force on 02.09.1990, vide Article 9.3 which reads 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. Article 18.1 of the United Nations Convention reads as follows:

> 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

13 In ***S.Anand @ Akash Vs. Vanitha Vijaya Kumar*** reported in ***(2011) 4 Mad LJ 494***, Hon'ble Mr.Justice V.Ramasubamanian as a Single Judge of this Court (as His Lordship then was) has made an observation qua child custody and visitation rights. The relevant paragraph is paragraph 31 and the same reads as follows:

> '**31.** It is quite unfortunate that the Courts still dabble with the age old concepts of custody and visitation rights. These terms emanate from a

> rights regime rather than a responsibilities regime. Today the emphasis has shifted from the regime where we were concerned with the rights of the parents over the child, to a regime where we should be concerned about the responsibilities of the parents towards the child. After the advent of the Children Act, 1989 in U.K., the old terminology of "custody", "guardianship" and "custodianship orders", have gone [see *Cheshire and North's Private International Law*-Thirteenth Edition-Lexis Nexis Butterworths Publication (page 857)]. Instead, Section 8 of the Act, uses the terms "residence" and "contact" (or access). Taking the law from the rights regime to the responsibilities regime, the Hague Conference concluded a Convention in 1996 known as "Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility for the Protection of Children". The provisions of this Convention lay emphasis on parental responsibility and it requires that the child should be treated as an individual and not simply as an appendage of its parents. '

To be noted, facts of *S.Anand @ Akash* case have been captured elsewhere infra in this case and the factual matrix persuades me to believe that it is applicable to the reference on hand.

14 The objects of Hague Convention on Civil Aspects of International Child Abduction, 1980 are to secure the prompt return of children wrongfully removed to or retained in any contracting State and to ensure that rights of

custody and of access under the law of one contracting State are effectively respected in the other contracting States. Articles 12 and 13 of the Hague Convention are relevant and the same read as follows:

'**Article 12** :

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13 :

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

15 To put it in a nutshell, as regards child custody and visitation rights, suffice to say that there is a shift from 'rights regime' to 'responsibilities regime' and India cannot be an exception in gravitating in this direction. It would be appropriate to take into account these changed obtaining circumstances in testing *Mary Thomas*. This reminds me of what Lord Denning did in ***Schorsch Meier G.m.b.H Vs. Hennin*** reported in ***[1975] 1 QB 416***,

presiding the Court of Appeal along with Justices Foster and Lawton in examining the question as to whether an English Court can make an award in foreign currency. Though House of Lords in ***Re United Railways of the Havana and Regla Warehouses [1961] AC 1001*** held that an English Court cannot make an award in foreign currency, Lord Denning applied *cessante ratione* principle (to be noted, *cessante ratione* principle means changed condition rule) and held that the rule laid down by House of Lords in ***United Railways*** case was obsolete as the reason that existed in 1961 during ***United Railways*** case is no longer existing owing to changed economic conditions. In other words, it was Lord Denning's considered view that economic conditions that existed in 1961 which impelled House of Lords to hold that a English Court cannot make an award in foreign currency ceased to exist in 1974 when he penned ***Hennin*** opinion. To be noted, in ***Hennin***, Justice Lawton dissented and it was not a unanimous opinion. Further to be noted, ***Hennin*** was not carried in appeal, i.e., it was not carried to House of Lords. However, a similar issue arose before House of Lords a year later in 1976 in ***Miliangos Vs. George Frank (Textiles) Ltd. [1976] AC 443***. Lords Wilberforce, Simon, Cross, Edmund-Davies and Fraser unanimously agreed that their old rule, i.e., rule of House of Lords regarding currency of judgment should be changed. In other

words, the view taken by Lord Denning presiding over the Court of Appeal in ***Hennin*** case was approved and they did say that it required a change, i.e., the ***United Railways*** principle required a change. It was held that Courts of law which are bound by the rule of precedents are not free to disregard an established rule of law because it is conceived that another device made by a Court of Law in the hierarchy is more reasonable. Be that as it may, it is apposite to mention that cessante i.e., changed circumstances may also buttress a view expressed far earlier qua point of time and this may make the view prophetic.

16 The reason for opening my order with a English scenario is to say that this Larger Bench can always agree with the Full Bench even if it is for different set of reasons by taking into account changed circumstances.

17 Before proceeding further, as part of this prefatory passages, I deem it appropriate to make it clear that this is a reference by Hon'ble Chief Justice (unlike a regular appeal under clause 15 of Letters Patent) qua *Mary Thomas* being ***Mary Thomas Vs. K.E.Thomas*** reported in ***AIR 1990 Mad 100***.

18 The rich and illumining submissions made at the Bar have been captured by Brother Hon'ble Mr.Justice P.N.Prakash and therefore, I refrain from embarking upon that exercise again, so that this judgment as a whole is free from the vice of prolixity. The trajectory that led to the reference on hand has also been captured by Brother Justice P.N.Prakash. Therefore, this aspect is also not written again to avoid verbosity.

19 It has to be borne in mind that the epicentre of the issue lies in distinction between 'High Court' and 'District Court'. 'High Court' is defined in Article 366(14) of the Constitution of India. This has to be read with section 3(25) of The General Clauses Act, 1897. 'District Court' is not defined in the Constitution, in the Family Courts Act and it is not directly defined in CPC. It is not defined as a term directly in CPC as it forms part of the description deployed for defining the term 'district'. Therefore, whether aforementioned clauses (a), (b) and (g) of Explanation to sub section (1) of section 7, sections 8 and 20 of Family Courts Act read in the context of section 2(e) of Family Courts Act in the light of section 2(4) of CPC, Article 366(14) of the Constitution read with section 3(25) of the General Clauses Act would result in ouster of jurisdiction of High Court in proceedings relating to guardianship of a

person, custody and / or access to minor is the neat fundamental question that has to be addressed as an integral part of the exercise of answering the reference.

20 It is clear that sections 7 and 8 of Family Courts Act do not refer to 'High Court'. It is equally clear that Family Courts Act has used 'High Court' in at least 8 sections including section 21, where the rule making power has been vested in the High Court. Therefore, there can be no doubt that Parliament in its wisdom has consciously not used the term 'High Court' {'High Court' within the meaning of Article 366(14) of Constitution of India has not been used in Sections 7, 8 or 20 of Family Courts Act}. To be noted, other than section 21, the other provisions of Family Courts Act where the term 'High Court' has been used are Sections 3, 4, 5, 6, 9, 19 and 23. These eight provisions in the Family Courts Act are as follows:

'**Section 3** :

3.Establishment of Family Courts.—(1) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government, after consultation with the **High Court**, and by notification,—

(a) shall, as soon as may be after the commencement of this Act, establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court;

(b) may establish Family Courts for such other areas in the State as it may deem necessary.

(2) The State Government shall, after consultation with the **High Court**, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.

Section 4 :

4.Appointment of Judges.—(1) The State Government may, with the concurrence of the **High Court**, appoint one or more persons to be the Judge or Judges of a Family Court.

(2) When a Family Court consists of more than one Judge, —

(a) each of the Judges may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force;

(b) the State Government may, with the concurrence of the **High Court**, appoint any of the Judges to be the Principal Judge and any other Judge to be the Additional Principal Judge;

(c) the Principal Judge may, from time to time, make such arrangements as he may deem fit for the distribution of the business of the Court among the various Judges thereof;

(d) the Additional Principal Judge may exercise the powers of the Principal Judge in the event of any vacancy in the office of the Principal Judge or when the Principal Judge is unable to

discharge his functions owing to absence, illness or any other cause.

(3) A person shall not be qualified for appointment as a Judge unless he—

(a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or

(b) has for at least seven years been an advocate of a **High Court** or of two or more such Courts in succession; or

(c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.

(4) In selecting persons for appointment as Judges,—

(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and

(b) preference shall be given to women.

(5) No person shall be appointed as, or hold the office of, a Judge of a Family Court after he has attained the age of sixty-two years.

(6) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, a Judge shall be such as the State Government may, in consultation with the **High Court**, prescribe.

Section 5:

5.Association of social welfare agencies, etc.—The State Government may, in consultation with the **High Court**, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of—

(a) institutions or organisations engaged in social welfare or the representatives thereof;

(b) persons professionally engaged in promoting the welfare of the family;

(c) persons working in the field of social welfare; and

(d) any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

Section 6 :

6. Counsellors, officers and other employees of Family Courts.—(1) The State Government shall, in consultation with the **High Court**, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.

Section 9 :

9. Duty of Family Court to make efforts for settlement.—(1) In every suit or proceeding, endeavour shall be made by the Family Court 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 and for this purpose a Family Court may, subject to any rules made by the **High Court**, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

Section 19 :

19. Appeal.—(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure,1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the **High Court** both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a **High Court** or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.]

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

[(4) The **High Court** may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.]

[(5)] Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family Court.

[(6)] An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.

Section 21 :

21. Power of High Court to make rules.—(1) The **High Court** may, by notification in the Official Gazette, make such rules as it may deem necessary for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) normal working hours of Family Courts and holding of sittings of Family Courts on holidays and outside normal working hours;

(b) holding of sittings of Family Courts at places other than their ordinary places of sitting;

(c) efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and persuading parties to arrive at a settlement.

Section 23 :

23. Power of the State Government to make rules.—(1) The State Government may, after consultation with the **High Court**, by notification, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1) such rules may provide for all or any of the following matters, namely:—

(a) the salary or honorarium and other allowances payable to, and the other terms and conditions of Judges under sub-section (6) of section 4;

(b)the terms and conditions of association of counsellors and the terms and conditions of service of the officers and other employees referred to in section 6;

(c) payment of fees and expenses (including travelling expenses) of medical and other experts and other persons referred

to in section 12 out of the revenues of the State Government and the scales of such fees and expenses;

(d) payment of fees and expenses to legal practitioners appointed under section 13 as *amicus curiae* out of the revenues of the State Government and the scales of such fees and expenses;

(e) any other matter which is required to be, or may be, prescribed or provided for by rules.

(3) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature. '

(Underlining and bold font made by me for supplying emphasis, highlighting and for ease of reference)

21 A careful reading of Sections 7(1)(a) and 8(a) make it clear that 'Courts' which stand replaced by 'Family Courts' (Family Courts constituted within the meaning of Section 3(1) of Family Courts Act) have been mentioned in the order of hierarchy (in descending order) by using expressions '... any district Court or any subordinate civil Court ....' and 'no district Court or any subordinate civil Court.....'. This means that the hierarchy starts with 'district Court' and not the 'High Court'. The Parliament in its wisdom having used the term 'High Court' (a term defined under Article 366(14) of the Constitution) in not one but eight different provisions of Family Courts Act, has consciously

chosen to not to use this term in Sections 7 and 8 of Family Courts Act. Therefore, none of the parameters for invoking the reading into principle in statutory interpretation (about which there shall be elaboration infra) jurisprudence comes into play.

22 Therefore, the question is whether the term 'High Court' should be read into sections 7, 8 and 20 of Family Courts Act when the Parliament in its wisdom has not used the term 'High Court' in these sections / provisions. Section 20 does not come into play as it is nobody's case that there is any inconsistency.

23 In the jurisprudence of interpretation of statutes, the question of reading into and supplying or adding a word will arise when (a) there is something semantically ambiguous in the language in which a provision is couched, (b) when words in an instrument make a sense that they can reasonably bear more than one meaning, (c) where supplying or adding a word and reading into becomes essential for evolving some sense which may be said to carry the intention of the Parliament and / or (d) any other similar situation. A careful perusal of Sections 7 and 8 of Family Courts Act makes it clear that

none of these situations are present in the reference on hand. This means that the language of the statute is the determinative factor qua legislative intent. In this regard, one can readily think of three oft quoted case laws of Hon'ble Supreme Court and they are ***Sri Ram Ram Narain Medhi Vs. State of Bombay*** reported in ***AIR 1959 SC 459, Union of India Vs. Sankalchand Himatlal Sheth and another*** reported in ***AIR 1977 SC 2328*** and ***Union of India and another Vs. Kartick Chandra Mondal and another*** reported in ***(2010) 2 SCC 422***.

24 In *Sri Ram Ram Narain Medhi* case, certain landlords of Kolhapur and Sholapur districts have filed petitions before Bombay High Court under Article 226 challenging various provisions of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 passed by the State legislature on various grounds. It was dismissed by a Division Bench of Bombay High Court and thereafter, petitions under Article 32 of the Constitution was filed before Hon'ble Supreme Court challenging the vires of the aforesaid Act. Hon'ble Supreme Court held that the intention of the legislature has to be gathered only from the words/language used by it and no liberties can be taken by the Courts for effectuating a supposed intention of the legislature. The facts permit this case to be treated as a precedent qua statutory interpretation Rule which we are

now concerned with. The relevant paragraph in *Sri Ram Ram Narain Medhi* case is paragraph 36, which reads as follows:

> '**36.** ..... If the language of the enactment is clear and unambiguous, it would not be ligitimate for the courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature. The intention of the legislature is to be gathered only from the words used by it and no such liberties can be taken by the courts for effectuating a supposed intention of the legislature. There is no warrant at all, in our opinion, for adding these words to the plain terms of Article 31-A(1)(*a*) and the words "extinguishment or modification of any such rights" must be understood in their plain grammatical sense without any limitation of the type suggested by the petitioners. '

25 It has been held by Hon'ble Supreme Court in *Sankalchand Himatlal Sheth* case that the Court must deduce the intention of Parliament from the words/language used in the Act. This was a case where the issue before Hon'ble Supreme Court was the constitutionality of a notification issued by the President of India transferring a Judge from one High Court to another. This being the facts, this case can also be treated as a precedent as we are concerned with statutory interpretation Rule. The relevant paragraph in

Sankalchand Himatlal Sheth case is paragraph 11 and the same reads as follows:

> '**11.** The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *Westminster Bank Ltd.* v. *Zang* [1966 AC 182] observed that "no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act". Applying such a rule, this Court observed in *S. Narayanaswami* v. *G. Panneerselyam* [(1972) 3 SCC 717, 726 (Para 19) : AIR 1972 SC 2284, 2290] that "where the statute's meaning is clear and explicit, words cannot be interpolated". What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the Court would be justified in construing the words in a manner which will make the particular provision purposeful..... '

26 In *Kartick Chandra* Mondal case, respondents were engaged as casual labourers by the Ordnance Factory Board without going through the regular process of recruitment of their names being sponsored by the Employment Exchange. They were disengaged from service after two years on

the ground that their names were not sponsored by the employment exchange. Original Application was filed before the Tribunal seeking to direct the appellant to reengage the respondents and for regularisation of service. Tribunal granted the prayer of respondents, against which a writ petition was filed, which was dismissed stating that no interference is required. It was carried in appeal to Hon'ble Supreme Court which held that the Court cannot read into a statutory provision which is plain, unambiguous. Therefore, the facts scenario in this case allows this case to be treated as a precedent qua statutory interpretation jurisprudence. The relevant paragraph in *Kartick Chandra Mondal* case is paragraph 15, which reads as follows:

> **'15.**Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent not found in the statute. Reference in this regard may be made to the recent decision of this Court in *Ansal Properties and Industries Ltd.* v. *State of Haryana* [(2009) 3 SCC 553] .'

27 Indian Social Action Forum (INSAF) had filed a writ petition before the Delhi High Court for a declaration that Sections 5(1) and 5(4) of the

Foreign Contribution (Regulation) Act, 2010 and Rules 3(i), 3(v) and 3(vi) of the Foreign Contribution (Regulation) Rules, 2011 are violative of Articles 14, 19(1)(a), 19(1)(c) and 21 of the Constitution, which was dismissed. The same was carried in appeal to Hon'ble Supreme Court. Hon'ble Supreme Court in ***Indian Social Action Forum (INSAF) Vs. Union of India*** reported in ***2020 SCC OnLine SC 310*** held that it is a settled principle of interpretation that the provisions of a statute have to be interpreted to give the words a plain and natural meaning and the endeavour of the court should be to interpret the provisions of a statute to promote the purpose of the Act. This case also can be treated as a precedent considering such facts as we are now concerned only statutory interpretation Rules. The relevant paragraph is paragraph 17 and the same reads as follows:

> '**17.** It is settled principle of interpretation that the provisions of the statute have to be interpreted to give the words a plain and natural meaning. But, if there is scope for two interpretations, the Courts have preferred purposive construction, which is now the predominant doctrine of interpretation. In case of ambiguity in the language used in the provision of a statute, the Courts can take aid from the historical background, the Parliamentary debates, the aims and objects of the Act including the long title, and the endeavour of the Court should be to interpret the provisions of a statute to promote the purpose of the Act. (See : *Chiranjit Lal Chowduri* v.

Union of India, (1950) SCR 869; *Union of India* v. *Elphinstone Spinning and Weaving Co. Ltd.*, (2001) 4 SCC 139). '

28 In ***Commercial Taxes Officer, Circle-B, Bharatpur Vs. Bhagat Singh*** reported in ***2021 SCC OnLine SC 344***, Hon'ble Supreme Court held that the court must interpret a statute in a manner which is just, reasonable and sensible. It was a case where the respondent had purchased a vehicle in the year 2009 which was registered in Bharatpur in Rajasthan. After three years, summons were issued to the respondent under sections 3, 6 and 7 of the Rajasthan Tax on Entry of Motor Vehicle into Local Areas Act, 1988. However, the respondent failed to appear pursuant to the summons. An assessment order was passed against the respondent demanding a total sum of Rs.3,00,376/-, against which an appeal filed before the appellate authority was allowed. The petitioner filed an appeal before the Rajasthan Tax Board and the same was rejected. A revision petition filed before the High Court was also dismissed. Aggrieved by the same, a Special Leave Petition was filed before Hon'ble Supreme Court. Relevant paragraph of decision of Hon'ble Supreme Court is paragraph 18, which reads as follows:

> '**18.** The Court must interpret a statute in a manner which is just, reasonable and sensible. If the grammatical construction leads to

> some absurdity or some repugnancy or inconsistency with the legislative intent, as may be deduced by reading the provisions of the statute as a whole, the grammatical construction may be departed from to avoid anomaly, absurdity or inconsistency. To quote Venkatarama Aiyar, J. in *Tirath Singh* v. *Bachittar Singh*. AIR 1955 SC 830 (at 833), "where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." This view has been reiterated by this Court. '

The facts in this case permit the above case to be treated as a precedent in the light of Rule of statutory interpretation which we are now concerned with.

29 In a recent decision in ***Renaissance Hotel Holdings Inc. Vs. B.Vijaya Sai*** reported in ***(2022) 5 SCC 1***, a suit was filed before trial court seeking decree of permanent injunction to restrain the respondents from using a trade mark 'SAI RENAISSANCE' or any other trade mark identical with the plaintiff's trademark 'RENAISSANCE' and for damages. Plaintiff's trademark was infringed by the defendant who was operating a hotel in Bangalore under the name and style 'Sai Renaissance'. Trial Court had granted decree restraining the respondents from using the mark. High Court however, reversed the decree

stating that plaintiff did not disclose trans-border reputation and for the reason that the plaintiff being a five start hotel is not of the same category as the defendant and for the same reason that no proof that defendant tried to take unfair advantage was established. Aggrieved by the same, an appeal was filed before Hon'ble Supreme Court and it has been held that while interpreting the provisions of a statute, it is necessary that the textual interpretation should be matched with the contextual one and the Act must be looked at as a whole and a part of a section cannot be read in isolation. Therefore, this case can also be treated as a precedent on such fact situation as the precedent is for the limited purpose of Rule of statutory interpretation. Relevant paragraphs of this decision are paragraphs 65, 66, 67 and the same reads as follows:

> **'65.** We find that the High Court has failed to take into consideration two important principles of interpretation. The first one being of textual and contextual interpretation. It will be apposite to refer to the guiding principles, succinctly summed up by Chinnappa Reddy, J., in the judgment of this Court in *RBI* v. *Peerless General Finance & Investment Co. Ltd.* [*RBI* v. *Peerless General Finance & Investment Co. Ltd.*, (1987) 1 SCC 424] : (SCC pp. 450-51, para 33)
>
> > "*33*. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the

colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the court construed the expression "Prize Chit" in *Srinivasa* [*Srinivasa Enterprises* v. *Union of India*, (1980) 4 SCC 507] and we find no reason to depart from the court's construction."

66. It is thus trite law that while interpreting the provisions of a statute, it is necessary that the textual interpretation should be matched with the contextual one. The Act must be looked at as a

whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. As already discussed hereinabove, the said Act has been enacted by the legislature taking into consideration the increased globalisation of trade and industry, the need to encourage investment flows and transfer of technology, and the need for simplification and harmonisation of trade mark management systems. One of the purposes for which the said Act has been enacted is prohibiting the use of someone else's trade mark as a part of the corporate name or the name of business concern. If the entire scheme of the Act is construed as a whole, it provides for the rights conferred by registration and the right to sue for infringement of the registered trade mark by its proprietor. The legislative scheme as enacted under the said statute elaborately provides for the eventualities in which a proprietor of the registered trade mark can bring an action for infringement of the trade mark and the limits on effect of the registered trade mark. By picking up a part of the provisions in sub-section (4) of Section 29 of the said Act and a part of the provision in sub-section (1) of Section 30 of the said Act and giving it a textual meaning without considering the context in which the said provisions have to be construed, in our view, would not be permissible. We are at pains to say that the High Court fell in error in doing so.

67. Another principle that the High Court has failed to notice is that a part of a section cannot be read in isolation. This Court, speaking through A.P. Sen, J., in *Balasinor Nagrik Coop. Bank Ltd.* v. *Babubhai Shankerlal Pandya* [*Balasinor Nagrik Coop. Bank Ltd.* v. *Babubhai Shankerlal Pandya*, (1987) 1 SCC 606] , observed thus : (SCC p. 608, para 4)

> "*4*. … It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section."

This principle was reiterated by this Court in *Kalawatibai* v. *Soiryabai* [*Kalawatibai* v. *Soiryabai*, (1991) 3 SCC 410] : (SCC p. 418, para 6)

> "*6*. … It is well settled that a section has to be read in its entirety as one composite unit without bifurcating it or ignoring any part of it."'

30 While on statutory interpretation, it is apposite to set out that there is no ambiguity or ambivalence as regards Sections 7 and 8 of Family Courts Act. If the Family Courts Act is read as a whole starting from 59th Report of the Law Commission, SOR (Statement of Objects and Reasons) and provisions, i.e., if it is read 'Chapter and verse' in every sense of the expression, it is clear that Parliament never intended to denude High Court of its powers in

guardianship of the person or the custody of or access to any minor matters. It is clear as day light that the intention of the legislature is only to create Special Courts and move it out of the realm of regular District Courts.

31 Before moving on to the next aspect of the matter, I deem it appropriate to revert to reference orders in Bombay and Delhi High Courts. As already alluded to and delineated supra elsewhere in this order, reference orders of Bombay and Delhi High Courts pertain to maintenance qua clause (f) of Explanation to Section 7(1) of Family Courts Act, whereas we are now grappling with guardianship of the person or the custody of or access to any minor vide clause (g) of the same Explanation to Section 7(1) of Family Courts Act. There is no ground or reason for reading into sections 7 and 8 of Family Courts Act the term 'High Court'.

32 Similarly, it is also clear that clauses (f) and (g) of Explanation to Section 7(1) of Family Courts Act, 'maintenance' and 'guardianship of the person or the custody of or access to any minor' respectively, unambiguously operate in separate spheres and there is no inkling of doubt much less imperative factor, i.e., compelling reason for resorting to liberal construction of clause (g). This Court is testing ouster, i.e., ouster of the jurisdiction of a

superior constitutional Court (High Court) and therefore, reading the relevant statutory provisions liberally much less liberally reading into the statutory provisions by supplying words and expressions and / or by making the scope and legal perimeter expansive does not arise.

33 I would now examine what one would mean by saying that jurisdiction of High Court is inherent when we talk about Letters Patent. This becomes necessary owing to Clause 17 of Letters Patent inter-alia under which High Court would be exercising jurisdiction in relation to guardianship of persons or custody or access to minors.

34 A classic case to have a better understanding of what is meant by saying 'jurisdiction is inherent' is clause 12. When a Clause 12 Letters Patent application is moved by a plaintiff on the Original Side of Madras High Court and when it is answered in the affirmative, it cannot be gainsaid that the High Court has acquired jurisdiction by answering clause 12 prayer in the affirmative. The reason is, jurisdiction is inherent. In other words, it is not acquired. A clause 12 application is moved when High Court has jurisdiction over a part of the cause of action qua a suit and a clause 12 application is a

prayer requesting High Court to exercise jurisdiction over whole of the suit. Therefore, when a clause 12 Letters Patent application is answered in the affirmative, High Court which has jurisdiction that is inherent (not acquired) albeit over a part of the cause of action / suit, expresses its intention to exercise jurisdiction over the entire suit. To put it differently, the High Court does not acquire jurisdiction by answering a clause 12 prayer in the affirmative as jurisdiction is inherent.

35 I am clear in my mind that 'jurisdiction being inherent' and 'using inherent jurisdiction saving / non limiting provision as a omnibus section when there is a specific provision' are two different jurisdictional and jurisprudential concepts. This can at best be explained by taking an illustrative approach. A classic illustration is a prayer for 'eschewing evidence'. Absent Commercial Courts Act, 2015, there is no provision in the CPC for eschewing evidence / deposition. Therefore, applications for eschewing evidence are always filed under section 151 of CPC which is a provision which saves the inherent powers of the Court to make orders that may be necessary to meet the ends of justice or to prevent abuse of process of the Court. Now, with the advent of the Commercial Courts Act, 2015 (on and from 23.10.2015), there is a specific provision (introduced in CPC) vide section 16 (read with Schedule thereat) of

the Commercial Courts Act, 2015 for eschewing evidence. To be noted, in Commercial Courts Act, the term used is not 'eschewing' and it is 'redaction'. Relevant provision is Order XIX Rule 5, introduced in CPC by Sl.No.10 of the Schedule to the Commercial Courts Act read with section 16 thereat. Therefore, today, if a litigant were to file an application for eschewing evidence under Commercial Courts Act in a Commercial Court or a Commercial Division, the litigant has to necessarily file it under that provision. It cannot be filed under section 151 of CPC as that would tantamount to using section 151 of CPC (which saves the inherent powers of the court and makes it clear that CPC does not limit inherent powers) as a omnibus provision when there is a specific provision for eschewing evidence / deposition albeit with the nomenclature redaction. Equally, if the same litigant before regular court (not before Commercial Court or Commercial Division) seeks for eschewing evidence / deposition, it has to be done by resorting to section 151 of CPC only. Therefore, the principle is, a provision saving the inherent powers cannot be used as an omnibus provision when there are other provisions which specifically provide for such prayers, as such other provisions may have certain determinants / parameters which need to be satisfied for a litigant to have his prayer acceded to. In the case on hand, jurisdiction of the High Court qua

guardianship, custody and access to minors is under clause 17 of Letters Patent which provides for such prayers with clarity and unambiguous specificity.

36 Codification of procedural law is making provisions for possible prayers which can be dealt with by a Court in exercise of its powers which are inherent in it. It may not be possible to envisage / visualize all and every situation and make a provision. Therefore, when a procedure is codified, a provision is made in the codification, i.e., Code making it clear that powers that are inherent in the court are saved and the codification does not limit such powers (that are inherent) to the provisions made in the Code. A classic case in point or a classic illustration is eschewing of evidence / deposition which has been delineated supra. Sections 151 and 482 of CPC and Cr.P.C respectively do not vest inherent powers in a Court. The corollary is, Civil and Criminal Courts do not acquire inherent powers from Sections 151 of CPC and 482 of Cr.P.C respectively. The powers are inherent. These provisions, namely Sections 151 of CPC and 482 of Cr.P.C only save these powers and make it clear that codifications, i.e., Codes do not limit these powers. To put this corollary in a different form, these provisions are residuary and are neither reservoirs nor sources of powers.

37 This takes the discussion back to the question as to whether the term 'District Court' occurring in sections 8 and 7 of Family Courts Act should be construed to include 'High Court'. As already delineated supra, while 'High Court' has been defined in the Constitution, 'District Court' has not been defined independently and it is a part of the description qua definition of 'district' under section 2(4) of CPC. The very question as to whether 'District Court' occurring in sections 8 and 7 of Family Courts Act should be construed as including 'High Court' encompasses in it and presupposes the principle that the two are distinct and different. In any event, this is very rudimentary and elementary. Therefore, it is not necessary to dilate much on this aspect of the matter.

38 A thorough survey of case laws at the hearings by the learned members of the Bar brought to the fore that there is one case law which says that section 2(4) of CPC while defining 'District' in effect defines 'District Court'. This is *Sri Jeyaram Educational Trust* case being ***Sri Jeyaram Educational Trust and others Vs. A.G.Syed Mohideen and others*** reported in ***(2010) 2 SCC 513*** and relevant paragraph is paragraph 5, which reads as follows:

'5.Section 2(4) of the Code is extracted below, while defining the term "district", in effect defines the terms "district court":

> "2.(4) `district' means the local limits of the jurisdiction of a principal civil court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court;"'

39 The fact situation in *Sri Jeyaram Educational Trust* case is the respondent therein had instituted a original suit under section 92 of CPC before the Principal District Court, Cuddalore regarding a dispute in management of a Trust. The appellant had filed a memo before the District Court stating that in the light of the decision of Madras High Court in *P.S. Subramanian* v. *K.L. Lakshmanan* [(2007) 5 MLJ 921] the court did not have jurisdiction to entertain any suit under Section 92 of the Code and therefore the suit may have to be transferred to the file of Principal Subordinate Judge, Cuddalore. The memo was rejected, such rejection was challenged by way of a revision before the High Court, which was dismissed. Challenging the same, an appeal was preferred before Hon'ble Supreme Court.

40 Mr.Arvind P. Datar, learned senior counsel who appeared and assisted this Court in response to the notification in this regard submits that this

paragraph in *Sri Jeyaram Educational Trust* has to be read by applying inversion test which is otherwise known as Wambaugh test. This inversion test / Wambaugh test was elucidatively explained by Hon'ble Supreme Court in ***State of Gujarat Vs. Utility Users' Welfare Association and others*** reported in ***(2018) 6 SCC 21***. On facts, this is a case where the Electricity Act which provided for Central and State Regulatory Commissions said that Chairperson of such Commissions may be a Judge of a High Court for State Commission and a Judge of Supreme Court or Chief Justice of a High Court for Central Commission and there were divergent views taken by Hon'ble Division Benches of different High Courts as to whether this 'may' should be read as 'shall' and it is imperative that such Chairman / Chairpersons should be a Judge and judicial mind of persons presiding over these Commissions is imperative. In this judgment penned by Hon'ble Mr.Justice S.K.Kaul, the relevant paragraphs are paragraphs 113 and 114 which read as follows:

> '**113.**In order to determine this aspect, one of the well-established tests is "the Inversion Test" propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called *The Study of Cases* [Eugene Wambaugh, *The Study of Cases* (Boston : Little, Brown & Co., 1892).] in the year 1892. This textbook propounded inter alia what

is known as the "Wambaugh Test" or "the Inversion Test" as the means of judicial interpretation. "the Inversion Test" is used to identify the *ratio decidendi* in any judgment. The central idea, in the words of Professor Wambaugh, is as under:

> "In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also. [Eugene Wambaugh, *The Study of Cases* (Boston : Little, Brown & Co., 1892) at p. 17.] "

114. In order to test whether a particular proposition of law is to be treated as the *ratio decidendi* of the case, the proposition is to be inversed i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case. This test has been followed to imply that the *ratio decidendi* is what is absolutely necessary for the decision of the case. "In order that an opinion may have the weight of a precedent", according to John Chipman Grey [Another distinguished jurist who served as a Professor of Law at Harvard

Law School.] , “it must be an opinion, the formation of which, is necessary for the decision of a particular case”. '

41 If the aforementioned inversion test / Wambaugh test is applied and if *Sri Jeyaram Educational Trust* is read by removing aforementioned paragraph 5, the ratio in *Sri Jeyaram Educational Trust* does not change because the question in *Sri Jeyaram Educational Trust* was whether a District Court in the State of Tamil Nadu does not have jurisdiction to try a suit under Section 92 of CPC and this question was answered. Absent paragraph 5 also, this question stands answered in the same manner in *Sri Jeyaram Educational Trust*. Let us now apply the test as propounded by Professor Eugene Wambaugh. If this test is applied and if inversion of observation in paragraph 5 of *Sri Jeyaram Educational Trust* is made, it should be read as saying that section 2(4) of CPC while defining the term 'district' does not define the term 'district court'. Assuming paragraph 5 of *Sri Jeyaram Educational Trust* reads in this manner, the conclusion that 'district court has power' to entertain a scheme suit under section 92 would not have changed. Therefore, *Sri Jeyaram Educational Trust* is certainly not an authority for the proposition that CPC while defining the term 'district' in effect defines the term 'district court'. Besides applying the inversion test / Wambaugh test while respectfully looking

at *Sri Jeyaram Educational Trust* as a precedent, I remind myself of the declaration of law made by Hon'ble Constitution Bench in the celebrated *Padma Sundara Rao Vs. State of Tamil Nadu* reported in *(2002) 3 SCC 533* as regards citing precedents. The most significant paragraph in *Padma Sundara Rao* case is paragraph 9 and the same reads as follows:

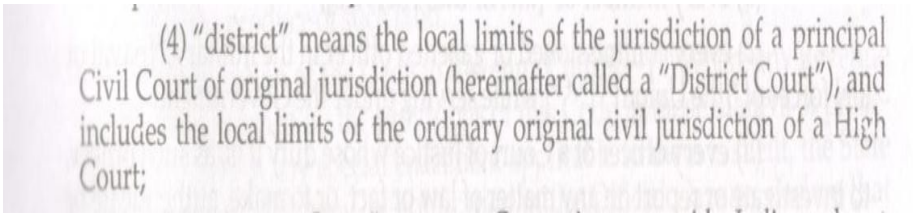
> '9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington* v. *British Railways Board* [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub *nom British Railways Board* v. *Herrington*, (1972) 1 All ER 749 (HL)]]. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

If *Sri Jeyaram Educational Trust* is respectfully looked at by applying the aforementioned celebrated *Padma Sundara Rao* principle, one has to look at the facts. Factual matrix in a nutshell in *Sri Jeyaram Educational Trust* has already been set out elsewhere supra in this order. The sequitur is on both counts, i.e., inversion test / Wambaugh test and celebrated *Padma Sundara Rao*

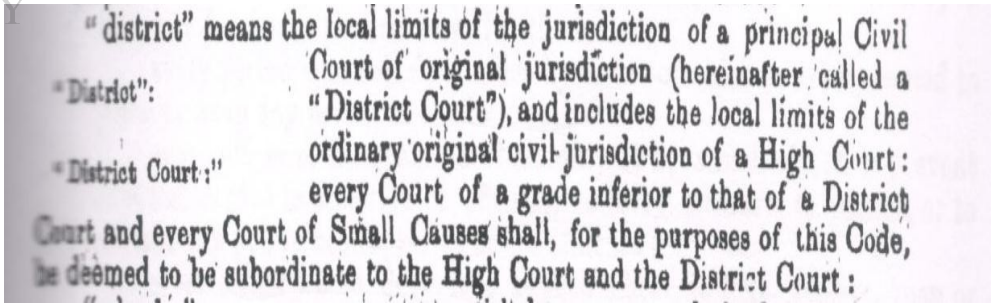
declaration of law qua precedent, paragraph 5 of *Sri Jeyaram Educational Trust* does not serve as a precedent as regards the reference I am grappling with.

42 This takes this discussion and dispositive reasoning to another aspect of the matter which is of relevance. There is a subtle distinction between the relevant definitions in CPC, i.e., the Code of Civil Procedure, 1908 and its predecessor Code, namely 'The Code of Civil Procedure, 1882'. The two read as follows:

Definition in the Code of Civil Procedure, 1908 :


(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court;

Definition in the Code of Civil Procedure, 1882 :



"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court and every Court of Small Causes shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court:

"District":

"District Court:"

43 In my considered view, the above turns on territoriality. A careful perusal of the definition of 'district' will make it clear that in the course of defining 'district', there is a reference to 'District Court'. On a demurrer, even if these were to be construed as definition of 'district court', the definition of 'district' is in two parts. One part talks about local limits of the jurisdiction of a principal Civil Court of original jurisdiction and the other part talks about local limits of the ordinary original civil jurisdiction of a High Court. Therefore, these are two territories, these two territories are clearly distinct and different. The local limits of ordinary original civil jurisdiction of the High Court is geographically described in the Madras High Court (Jurisdictional Limits) Act, 1927 and the Madras High Court (Jurisdictional Limits) Extension Act, 1985. As regards the Principal Civil Court of Original jurisdiction for the city of Madras, it is governed by 'the Madras City Civil Court Act, 1892 (Act No.7 of 1892)' [hereinafter 'City Civil Court Act' for the sake of brevity]. Section 2(2)

of City Civil Court Act defines 'City of Madras' to mean the area within the local limits for the time being qua ordinary original civil jurisdiction of the High Court. This by itself does not obliterate the distinction between a High Court and District Court, which in the constitutional scheme are in different slots in the hierarchy of courts. The District Court gets slotted under Chapter VI captioned 'SUBORDINATE COURTS' of Part VI (captioned 'THE STATES') of the Constitution, whereas High Court is slotted under Chapter V of the same Part VI. The Constitution vests the High Court with power of superintendence and control over District Court and Courts subordinate to District Court.

44 There is one another statute qua District Court and that is 'The Tamil Nadu Civil Courts Act, 1873 (Central Act III of 1873)' [hereinafter 'TN Civil Courts Act' for brevity]. This deals with District Courts in what can be described as 'rest of Tamil Nadu', i.e., Tamil Nadu excluding Chennai. This TN Civil Courts Act vide sections 10 and 11 sets out the local limits of jurisdiction of District Courts, Subordinate Courts and District Munsifs. It is not necessary to dilate on this as that would tantamount to travelling beyond the remit of this reference and in any event, it is not necessary to delve into this for answering the reference on hand. The point is, District Court, more particularly, District Court as occurring in Sections 7 and 8 of Family Courts Act can neither be

equated nor be construed to encompass within it or take under its wings High Court. This is more so as Family Courts Act was enacted in 1984, i.e., on 14.09.1984 to be precise and it came into force as far as State of Tamil Nadu is concerned on and from 02.10.1986. This is mentioned to say that the obtaining Letters Patent is of the year 1865, TN Civil Courts Act is of the year 1873, City Civil Court Act is of the year 1892 and Family Courts Act has been made nearly a century later after these statutes have stood the test of time.

45 Reverting to the two territories, deducing from this and saying that a High Court becomes District court tantamounts to doing violence to constitutional definition of High Court under Article 366(14). If there is a overlap as regards territory over which two courts exercise jurisdiction, that cannot tantamount to disturbing the hierarchy of courts and that too going as far as saying that High Court becomes district court or the High Court exercises jurisdiction as a District Court. It has become necessary to refer to 1882 CPC as section 4(4) of 'The Guardians and Wards Act, 1890 (8 of 1890)' [which shall hereinafter be referred to as 'GAWA' for the sake of brevity, convenience and clarity] talks about 1882 CPC.

46 Before moving on to the other facets of the reference on hand such as the principle that ouster should be explicit, etc., I deem it appropriate to articulate my view on section 4(4) of GAWA as this appears to be contributing to the conundrum of sorts which has been propped up and which I am grappling with. Section 4 of GAWA is an adumbration of definitions and sub-section (4) thereat defines 'District Court'. Section 4(4) of GAWA reads as follows:

> '(4) “District Court” has the meaning assigned to that expression in the Code of Civil Procedure, 1882 and includes a High Court in the exercise of its ordinary original civil jurisdiction.'

47 Section 3 of GAWA makes it clear that the jurisdiction of any High Court is saved as it reads as under:

> '**3.Saving of jurisdiction of Courts of Wards and Chartered High Courts**.-This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [any competent Legislature, authority or person in [any State to which this Act extends]], and nothing in this Act shall be construed to affect, or in any way derogate from, the jurisdiction or authority of any Court of Wards, or to take away any power possessed by [any High Court].'

Therefore, the definition of 'District Court' under GAWA is hardly a guide to clinch the reference on hand. In this regard, it is deemed appropriate to notice a

State amendment to section 4(4) of GAWA, i.e., West Bengal State amendment which reads as follows:

> '**State Amendment--[West Bengal]**.--In its application to the State of West Bengal, in Cl.(4) of S.4, for "a High Court in the exercise of its ordinary original civil jurisdiction", substitute "as respects the city of Calcutta as defined in the City Civil Court Act, 1953, the City Civil Court established under that Act." -- W.B. Act 21 of 1953, S.22 and Sch.II (w.e.f. 23-2-1957).'

The aforementioned amendment adds strength to the theory that these are matters of territoriality.

48 It is also to be noticed that under GAWA, the term 'the Court' has also been explained vide section 4(5) and that inter-alia talks about District Court having jurisdiction to entertain an application under GAWA for appointment of guardian. Therefore, a conjoint reading of sections 4(4), 4(5) and section 3 of GAWA in that order make it clear that the power of the High Court is intact. In this view of the matter, any reliance on section 4(4) of GAWA will be a case of comparing Apples and Oranges. To put it differently, it would be a case of comparing Cheese and Chalk. Therefore, any reference to section 158 of CPC for the purpose of 1882 and 1908 Codes is wholly not

necessary qua reference on hand. Likewise, preamble of the City Civil Court Act is also not of any consequence as far as instant reference is concerned.

49 Now that there is no ambiguity or semantically ambiguous terms or any other reason warranting invocation of reading into principle, the only other facet which requires to be examined is whether ouster should be explicit. In the light of ***P.S.Sathappan Vs. Andhra Bank Ltd***. reported in ***(2004) 11 SCC 672***, ouster has to be necessarily explicit. Therefore, there is no scope for implied ouster and there is no need to resort to implied ouster by reading into section 8 of Family Courts Act 'High Court' also as that would tantamount to thrusting and adding a word into the statute with no basis to do so.

50 One more facet of the matter is concurrent jurisdiction. Concurrent jurisdiction is not alien to Indian Courts. In this scenario, again comparison of Clauses 17 and 35 of Letters Patent tantamounts to comparison of Apples and Oranges as clause 17 deals with jurisdiction of infants and lunatics, whereas Clause 35 pertains to matrimonial jurisdiction but line of authorities under Clause 35 operates in a different realm and there is a specific line of authorities dealing with concurrent jurisdiction in the light of proviso to clause 35. To be noted, there is no such proviso in clause 17. This is another distinguishing

feature and for this reason also, comparison of the two tantamount to comparison of Chalk and Cheese. Be that as it may, it may not be necessary to go into a hypothetical scenario pertaining to guardianship and custody concurrent jurisdiction principle being pressed into service in matrimonial jurisdiction. A reference is an answer to questions which have been formulated with clarity and specificity. In the case on hand, the two reference questions are clear and specific. They deal with guardianship and custody of minors and it has nothing to do with matrimonial matters. The concurrent jurisdiction not being alien to Indian Courts, though it tantamounts to stating the obvious, it will suffice to emphasis that answer to the reference on hand pertains to clause (g) of Explanation to section 7(1) of Family Courts Act qua clause 17 of Letters Patent, nothing more, nothing less.

51 Now, I move on to a pragmatic plane. This is extremely important in the case on hand as this Court is now dealing with the issue of custody, access and guardianship of minors who cannot speak for themselves. This Court is parens patriae qua minors. This is more so as this parens patriae jurisdiction is often invoked in cases where the two parents of a minor are at loggerheads. Therefore, it is imperative that the entire matter is analysed from a

pragmatic plane / perspective also. Almost, all the regular practitioners in the Family Court who were before this Court, namely Senior Counsel Ms.Chitra Sampath, Ms.Geetha Ramaseshan, Ms.B.Poongkhulali, Ms.Arulmozhi submitted in one voice in unison that the ground situation in Family courts is far from the lofty objectives of Family Courts Act and much has to be done for such lofty ideals qua Family Courts Act, i.e., SOR of Family Courts Act to become realisable ideals and to ensure that they do not remain utopian myths. This means that High Court should necessarily come to the rescue of hapless minor children when they need help in some cases even by resorting to unconventional means if warranted. If that is not so, they will be left helpless, high and dry in unique predicaments unfortunate though. In ***C.V.Ananth Padmanabhan Vs. Bindu*** reported in ***(2008) 7 MLJ 22***, authored by Hon'ble Mr.Justice V.Ramasubramanian as single Judge of this Court (as His Lordship then was), it has been held that this Court has jurisdiction to entertain a O.P filed under the GAWA and the fact that the minor children lived in Hyderabad for a brief period of four months, will not take away the jurisdiction of this Court, within whose limits, the minor children ordinarily resided. That was a case where a original petition was filed seeking to declare the petitioner to be the legal guardian of the children and to allow the petitioner to retain the

custody of the minor children and an application seeking an interim order was also filed. The minor children were taken to Hyderabad by the respondent and were brought back subsequently and hence the original petition was filed by the petitioner therein. Learned Single Judge of this Court after an elaborate hearing passed an order holding that this Court has jurisdiction to entertain the original petition. Therefore, the higher judiciary (superior Court), i.e., High Court is certainly in a better position to resort to such unconventional methods and therefore, the exercise of jurisdiction is only a boon and buttressing phenomenon, not a bane if one may say so.

52 The reference by Hon'ble Single Judge talks about dockets of this Constitutional Court being saddled with custody and guardianship matters. The statistical data before this Bench shows that barely 200 to 250 cases are pending as of today as has been observed by Hon'ble Mr.Justice P.N.Prakash. This is not even a drop in the ocean if measured in the light of over all pendency. Therefore, it can be said without any fear of contradiction that High Court exercising this parens patriae jurisdiction does not cause any overload in terms of pendency or arrears. The only other facet qua bane theory is that High Court does not have the benefit of specialised counsellors unlike Family

Courts. Answer to this is two fold. One is, as already delineated supra, learned regular practitioners in Family Courts in Chennai who were before this larger Bench assisting the Bench in response to the notification in this regard said in one voice in unison that the situation in Family Courts is far from lofty SOR (Statement of Objects and Reasons) of Family Courts Act. The second answer is High Court can always requisition services of a counsellor, psychiatrist or any other specialist and for that matter any other professional under the sun.

53 The jurisdiction of this Court under clause 17 of Letters Patent is saved / preserved inter-alia by Article 225 of the Constitution. Article 372 also does not operate in the light of the view that Family Courts Act does not alter or repeal Clause 17 of Letters Patent, 1865. Therefore, the jurisdiction of this Court over matters of guardianship of the person or the custody of or access to any minor is not ousted. The inherent power flows from the Constitution.

54 To visualise the consequence of ouster, let us consider a hypothetical illustration. If a Hon'ble Single Judge sitting on the Original Side of this Court is hearing a partition suit between coparceners / co-owners, he may well be faced with a situation (something akin to what the Hon'ble Single Judge in *Amina Bharatram* case in Delhi High Court noticed) where a claim is

made qua HUF property in a legal tussle between spouses qua one or some of the coparceners {such legal tussle may be dovetailed with custody of a minor} and it may be contended that proceedings are pending in Family Court. There are no plaintiffs and no defendants in a partition suit and the Court has to necessarily take a call absent *dominus litis* theory. The Single Judge on the Original Side of this Court can remove, try and determine the suit in the Family Court along with partition suit. This can be done by learned Single Judge by exercise of powers under Clause 13 of Letters Patent. If it is held that the High court on its Original Side is denuded of powers qua Family Courts Act, this will not be possible and the High Court will have to wait for the verdict of a District Court. This is neither a desirable situation nor does it synchronise with the hierarchy of courts. To be noted, even in cases where the High Court is held to be exercising jurisdiction of District Court, it has been made clear that this is only a matter of territoriality and it does not disturb the hierarchy. If we denude the High Court of powers regarding a suit or proceeding in relation to the guardianship of the person or the custody of or access to any minor, it may not stop with a case of High Court on its Original Side exercising jurisdiction as that of a District Court qua territoriality and it will derail the hierarchy also.

55 I am able to find an illustration even in a case of tribunalisation, where it is transfer of judicial power to a Tribunal in lieu of Articles 323-A, 323-B under Part XIV-A. In the erstwhile 'Intellectual Property Appellate Board' (IPAB) regime between 2003 and 2021, an application for rectification of a trademark would have to be filed in the IPAB. Once an application for rectification is filed, a suit for injunction against infringement of a trademark can be stalled under section 124 of the Trade Marks Act, 1999. Even in this scenario, Hon'ble Supreme Court in oft-quoted *Patel Field Marshal* case being ***Patel Field Marshal Agencies v. P.M. Diesels Ltd.***, reported in **(2018) 2 SCC 112**, held that a defendant should come before a High Court, convince the High Court that the rectification plea is tenable and held this to be imperative for approaching IPAB with a rectification application. This in my considered view is illustrative nay elucidative of a mechanism that was put in place to create a valve so that a defendant in a trademark infringement suit does not file a frivolous rectification application in a Tribunal and stall the suit on the Original Side of a High Court. In any event, the scenario has now changed owing to Rationalisation Act [‘the Tribunal Reforms Act, 2021’]. Therefore, denuding the High Court of powers in the case on hand can lead to situations where the High Court in exercise of its jurisdiction on the Original Side

awaiting orders of District Courts. This is neither desirable nor the intention of Parliament when it made Family Courts Act.

56 As brother Hon'ble Mr.Justice R.Mahadevan has dealt with *Rajah Vizianagaram* case [***The Rajah of Vizianagaram Vs. The Secretary of State for India in Council*** reported in ***(1936) 44 LW 904 (Mad)(DB)***] at length / in detail, I do not want to dilate on the same but it is deemed appropriate to say that the clarity and specificity with which Mr.Sharath Chandran and Ms.B.Poongkhulali, learned counsel articulated diametrically dissimilar / bipolar opposite opinions on this aspect of the matter was of immense assistance in analysing *Rajah Vizianagaram*.

57 In this regard, I also deem it appropriate to refer to ***S.Anand @ Akash Vs. Vanitha Vijaya Kumar*** reported in ***(2011) 4 Mad LJ 494*** penned by Hon'ble Mr.Justice V.Ramasubramanian, as a Single Judge of this Court (as his Lordship then was), which has been alluded to supra elsewhere in this order. *S.Anand @ Akash* is a case where Hon'ble Judge interacted with the child, considered the preference of the child and then went on to the aspect of (a) permissive / indulgent parent; (b) authoritarian parent and decided the issue. In

this case, Hon'ble Judge took the assistance of a Psychiatrist (Head of the Department of Child Guidance Clinic attached to the Government Children Hospital, Chennai, for an assessment) with a team of doctors / professionals, called for scientific reports which were given after interacting with the child as well as parents. It was a case where petitioner and first respondent therein got married and two children were born from the wedlock. Their marriage was dissolved by way of mutual consent and the custody of minor son was given to the petitioner and custody of daughter was given to first respondent. Thereafter some disputes arose and the custody of the minor son was given to first respondent. Some proceedings were initiated before the Courts in Secundrabad and finally the petitioner therein had approached this High Court seeking permanent custody of the minor son. In the course of proceedings, a request was made from one of the parties to have a Psychiatrist assessment of the minor child. Learned Single Judge considering the circumstances of the case acceded to the said request of assessment of the child by a Psychiatrist.

58 This *S.Anand @ Akash* case also serves as an illustration for three reasons. One is, the argument that the High Court in exercise of its Original Side jurisdiction may not have the assistance of counsellors is flattened and it

becomes an argument with no steam in it. The second facet of serving as an illustration is a careful analysis of the trajectory the case has taken which has been captured in paragraphs 33 to 53 would show that the High Court was not bogged down by rules of procedure. An unconventional approach was taken and a scientific decision was arrived at. Significant paragraphs are paragraphs 44 to 53 which read as follows:

> '**44.** Therefore, unable to go solely on the basis of the unwillingness of the child and also with a view to find out the truth, I acceded to the request of the First Respondent-mother and passed an order on 2.2.2011, directing the Applicant to take the child to Dr. V. Jayanthini, Head of the Department of Child Guidance Clinic attached to the Government Childrens Hospital, Chennai, for an assessment. The purpose of the assessment was to find out (i) if the child has any deep rooted problems in going with the Respondents or (ii) if the child was acting under external influences.
>
> **45.** The said order was complied with and the team of professionals headed by Dr. V. Jayanathini submitted an interim report on 17.2.2011. In their report, they expressed a desire to have an interaction with the parents and also requested for a report from the school, to find out the academic performance, peer group interaction and the behaviour of the child in the school. Therefore, I passed an order on 17.2.2011, directing the Applicant and the First Respondent to have an interaction with the team of professionals and also directed the school to send a report.

46. Accordingly, the Applicant and the First Respondent interacted with the team of professionals, after which Dr. V. Jayanthini submitted reports dated 1.3.2011 and 3.3.2011. I do not wish to record here, the entire contents of all the 3 reports, but would just make a reference to a few permissible aspects, so that the right to privacy and the interests of the child are not offended.

47. In the first report dated 17.2.2011, the team of professionals have opined that the child has no deep rooted problems, but that since the Applicant-father is providing a permissive environment, the child is making a preference to stay with the father. They have also opined that the parenting style of the First Respondent-mother is authoritative and that the child relents the disciplinary approach adopted by her. But taking into account the fact that the mother provides an authoritative environment, while the biological father provides a permissive environment, the Experts have opined that it is better to provide a neutral, nurturing, firm, consistent, secure and stable environment for the child's future emotional and social well being.

48. In order to remove any doubt in my mind about what an Authoritative Parent would do, in contrast to a Permissive Parent, the team of Experts have also sent me the extracts from the book "*Child Psychology - A Contemporary View Point*", Third Edition by the authors E. Mavis Hetherington and Ross D. Parke. In the Chapter relating to "Parenting Styles and Children's Behaviour", a permissive indulgent parent is defined by the following characteristics:

> "Rules not enforced
>
> Rules not clearly communicated

Yields to coercion, whining, nagging, crying by the child

Inconsistent discipline

Few demands or expectations for mature, independent behaviour

Ignores or accepts bad behaviour

Hides impatience, anger, and annoyance

Moderate warmth

Glorification of importance of free expression of impulses and desires."

In the same Chapter, an Authoritarian Parent is defined by the following characteristics:

"Rigid enforcement of rules

Confronts and punishes bad behaviour

Shows anger and displeasure

Rules not clearly explained

View of child as dominated by uncontrolled antisocial impulses

Child's desires and opinions not considered or solicited

Persistent in enforcement of rules in the face of opposition and coercion

Harsh, punitive discipline

Low in warmth and positive involvement

No cultural events or mutual activities planned

No educational demands or standards."

In contrast, an Authoritative Parent is defined by the following characteristics:

"Firm enforcement of rules

Does not yield to child coercion

Confronts disobedient child

Shows displeasure and annoyance in response to child's bad behaviour

Shows pleasure and support of child's constructive behaviour

Rules clearly communicated

Considers child's wishes and solicits child's opinions

Alternative offered

Warm, involved, responsive

Expects mature, independent behaviour appropriate for the child's age

Cultural events and joint activities planned

Educational standards set and enforced."

49. The Psychiatrists have made it clear that the First Respondent-mother is only an Authoritative Parent and not an Authoritarian Parent. Since an Authoritative Parent is concerned only with the interest and welfare of the child, I am of the view that the First Respondent-mother will groom the child into a disciplined, focussed and ambitious person. On the other hand, the Applicant who has been found to be a permissive-indulgent parent, may not groom the child as a disciplined child.

50. However, every child needs a combination of both parenting styles *viz.*, an indulgent parenting style and an Authoritative Parenting style, so that they get the best of both. In most of the homes, which are normal, one of the parents is authoritative and the other, permissive. (Thirty years ago, the father used to be authoritative and the mother permissive, but the scenario has got reversed today). Therefore, in an united and normal home, the

children have the best of both, but in broken homes, they have the worst of both.

51. In the second report sent by Dr. V. Jayanthini, on 1.3.2011, she has stated that during his stay in New Zealand from July 2008 to May 2010, the child studied in Milford School, North Shore City and that the school reports show that the child was never under any emotional or physical stress during the said period of 2 years. Based upon the video clippings taken in New Zealand, the Psychiatrist has come to the conclusion that the life of the minor child in New Zealand with his mother and siblings, was happy and cheerful.

52. In their final opinion, they have stated that "given ample time, the child can come to terms with his mother through a systematic and graded approach". The Experts have also stated that because of his preference to a permissive environment, the statements made by the child cannot be taken at face value.

53. The Experts have finally concluded that it is advisable to make the child come to terms with his mother, under professional guidance, to facilitate a smooth transition.'

The third reason is, no elaboration is required to say that the High Court being a superior constitutional Court has vast width and amplitude to adopt such unconventional methods in comparison and contradistinction to the district court.

59 This takes my discussion to *Mary Thomas* case. In the light of the narrative, discussion and dispositive reasoning thus far, it is clear that ***Raja***

Soap Factory Vs. S.P.Shantharaj reported in ***AIR 1965 SC 1449*** or any other case law not being placed before the Full Bench is hardly a ground to disturb *Mary Thomas* ratio. In *Raja Soap Factory*, on facts it was a case where the Mysore High Court did not have original jurisdiction on the date of presentation of the passing off suit therein as already alluded to supra in this order. It was clearly a Court of Appeal, the suit was presented in the High court (Vacation Court) because District Court was closed. Therefore, to compare Mysore High Court (on the date of presentation of the suit in *Raja Soap Factory*) and this Chartered High Court (Madras High Court) tantamounts to comparing Apples and Oranges. Mysore High Court was solely a Court of Appeal and this chartered High Court admittedly has original jurisdiction. As already delineated supra, this is a referral Bench qua *Mary Thomas*. It will suffice to say that this larger Bench is not sitting in appeal in a adversarial litigation. Further more, as already alluded to supra, I agree and concur with the law laid down in *Mary Thomas* by a Hon'ble Full Bench albeit for different reasons inter-alia by taking into account changed present obtaining situation.

60 This takes me to the two questions that have been referred to this Larger Bench. These two questions are so inextricably intertwined and dovetailed that the answer to one is a sequitur to the other.

61 From the narrative, discussion and dispositive reasoning thus far, it is clear that jurisdiction of the High Court is not ousted.

62 Mr.Arvind P. Datar, learned senior counsel made a fervent plea that concurrent jurisdiction is being exercised for more than three and a half decades, i.e., 35 years now and therefore, it has attained the character and sanctity of a convention. It may be appropriate to not to disturb, derail or dislodge such a convention. Mr.N.Jothi, learned counsel besides legal submissions made a poignant but pertinent plea that this Court should not shut the doors on helpless and hapless minor children. These fervent and poignant pleas appeal to my judicial conscience and it synchronizes with legal literature, which if I were to sum up and state in one sequence of fourteen short sentences not as a Sonnet of sorts but in prosaic prose, it runs like this: (a) chronicle is, the Supreme Court of Madras (replacing Recorders Court at Madras) is of the year 1800; (b) Supreme Court of Madras was abolished by the Indian High

Courts Act, 1861; (c) the High Court of Madras succeeded to all the powers and jurisdiction; (d) a new Letters Patent was issued for the High Court of Judicature at Madras on 26.06.1862; (e) on 28.12.1865, this 1862 Letters Patent was replaced with a new Letters Patent dated 28.12.1865; (f) Constitution of India which was adopted by the Constituent Assembly on 26.11.1949 came into force on 26.01.1950; (g) Constitution vide Articles 225 and 372 kept the 1865 Letters Patent intact and it is operating; (h) therefore, it will suffice if the obtaining 1865 Letters Patent more particularly Clause 17 thereat and the question whether there is ouster in the light of Sections 7 and 8 of Family Courts Act is tested without delving into the legal history; (i) in terms of legal history, it will suffice to note that the only difference between 1862 and 1865 Letters Patents is while the 1862 Letters Patent uses the expression 'whether within or without the Presidency of Madras', the 1865 Letters Patent uses the expression 'within the Presidency of Madras', this difference also pales into insignificance as the Tamil Nadu Adaptation of Laws Order, 1970 makes it clear that there is no difficulty in reading 'Presidency of Madras' as 'State of Tamil Nadu' as rightly pointed out with surgical precision and specificity by learned counsel Ms.B.Poongkhulali and as brother Hon'ble Mr.Justice R.Mahadevan has delved into and dealt with this aspect of the matter in detail, I

refrain from dilating on the same to avoid duplication; (j) therefore, we are now concerned with the obtaining Letters Patent, i.e., 1865 Letters Patent; (k) Clause 17 of Letters Patent is a specific provision and exercise of jurisdiction under this provision cannot be compared with exercise of using inherent jurisdiction as a omnibus provision; (l) in 2002, by 86th Amendment to the Constitution, which came into force on and from 01.04.2010, clause (k) was added to Article 51-A which is an adumbration of fundamental duties and this clause (k) makes it a fundamental duty of every parent or guardian to provide an opportunity for education to his child aged between 6 and 14 years; (m) though this clause talks about opportunity for education, the role of parents or guardian qua a ward is a constitutional duty and is therefore sanctus; and (n) when it is so sanctus, it is a certain duty of a Constitutional Court to come to the aid of a child when there is a need and therefore, it would serve no purpose to say that the High Court, a constitutional court, is denuded of such powers.

63 After having set out the pragmatic plane also which cannot be lost sight of, I proceed to answer the reference questions but before I do that, I deem it appropriate to draw from the erudite, profound submissions of learned senior counsel Mr.Arvind P.Datar and give a panoramic adumbration of my conclusions in the form of bullet points which is as follows:

(i) The referral order of Hon'ble Single Judge has sought reconsideration of *Mary Thomas* on two grounds and they are:

(a)The Full Bench did not consider *Raja Soap Factory*;

(b)Section 20 of Family Courts Act has overriding effect.

As delineated supra in this order, Mysore High Court did not have original jurisdiction on the date of presentation of plaint in *Raja Soap Factory*. Section 20 of Family Courts Act has no application as clause 17 of Letters Patent confers substantive power while section 20 is a procedural provision and in any event, there is nothing inconsistent;

(ii) As alluded to supra, Section 2(4) of CPC does not define 'District Court' and therefore, cannot be deemed to automatically include a High Court with Ordinary Original Civil jurisdiction. The only judgment in this regard being *Sri Jeyaram Educational Trust* is clearly no answer in this regard and this becomes clear as day light when Wambaugh and Inversion tests are applied;

(iii) Section 100-A of CPC [brought in by way of Code of Civil Procedure (Amendment) Act, 2002] serves a twin purpose. One is, it makes it clear that the Letters Patent of any High Court cannot be swept away by section 2(4) and another is, if anything contained in the Letters Patent has to be excluded / taken away, it has to be done so expressly;

(iv) In 1990, Hon'ble Full Bench of this Court in *Mary Thomas* addressed itself to the specific question of ouster and answered it in the negative. After 1990, there has been no judgment of Hon'ble Supreme Court or law made by Parliament / competent Legislature which warrants a departure. It is not only a settled but a sanctus principle that a decision that has stood the test of time (in this case over one score and one decade, i.e., over 30 years) ought not to be disturbed lightly as it would have been followed in several cases. The competent law making arms (Parliament and State Legislature) had not legislated in this regard.

(v) On a demurer, if a Letters Patent provision has to be taken away dehors legislation (if at all and if that be so), it can

only be by a self contained code as in paragraph 22 of *P.S.Sathappan*. In my considered view, *P.S.Sathappan* continues to be good law as *Fuerst Day Lawson* deals with 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' (hereinafter referred to as 'A and C Act' for the sake of brevity) and Hon'ble Supreme Court in *Fuerst Day Lawson* after detailed consideration of UNCITRAL model, made it clear that A and C Act covers the whole gamut of law concerning domestic arbitration, international commercial arbitration, domestic awards and foreign awards. It is a self contained code as opposed to Family Courts Act which is not a self contained code as substantive law continues to be statutory provisions or personal laws relating to marriage, maintenance, etc., I opened this point by saying on a demurer. At the risk of repetition, I make it clear that this point is not just on a demurer but on a extreme demurer.

(vi) A conjoint reading of Articles 225 and 372 of the Constitution in the light of *P.S.Sathappan / Fuerst Day Lawson* principles, makes it clear that the jurisdiction of the

High Court (Clause 17 of the Letters Patent in this case) is preserved and it can be altered, repealed or amended only by way of a competent legislature or at the highest, by a self contained code. In the case on hand, there is neither a ouster law made by a competent legislature nor a self contained code.

(vii) When the International scenario in various jurisdictions including pan world papers such as United Nations Convention / Hague Convention make it clear that the world is gravitating from a rights regime to responsibilities regime as far as child custody and guardianship jurisdiction is concerned, it may not be in tune and tandem with world jurisdictions to depart from *Mary Thomas* (which has stood the test of time) and denude the High Court of its jurisdiction.

64 It follows as a sequitur that the two reference questions and answers to the same are as follows:

(i)**Reference** : Whether the jurisdiction of the High Court, on its Original Side, over matters of child custody and

guardianship is ousted, in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984?

Answer : The jurisdiction of the High Court on its Original Side over matters of child custody and guardianship is **not** ousted in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984.

(ii)**Reference** : Whether the decision of a Full Bench of this Court in Mary Thomas Vs. Dr.K.E.Thomas (AIR 1990 Madras 100) is still good law?

Answer : The decision of Hon'ble Full Bench of this Court in ***Mary Thomas Vs. Dr.K.E.Thomas (AIR 1990 Madras 100)*** continues to be good law.

65 I deem it appropriate and necessary to place on record my appreciation to all learned Members of the Bar who responded with spontaneity to the request to assist this Larger Bench. Though I have referred to only those submissions which are contextual qua the view I have taken and mentioned names of counsel who made such submissions, I place on record my gratitude

for their time and effort to all learned Members of the Bar, who have responded to the notification qua this Larger Bench.

66 I have penned this order by commencing with Lord Denning and an English scenario. I deem it appropriate to conclude with a quote in Indian scenario:

> *'The law of love could be best understood and learned (sic) 'learnt' through little children.'*
>
> *- Mahatma Gandhi*

(M.S., J.)
02.09.2022

vvk

N.ANAND VENKATESH. J.,

I have had the advantage of reading thewell-researched and erudite order of my learned brother Mr. Justice P.N.Prakash. I am in complete agreement with all the findings and conclusions therein. By way of this concurring opinion, I proceed to set out my views on certain issues to supplement the reasons given in the lead opinion.

2.My learned brother has exhaustively captured the genesis of this reference and the various submissions made at the Bar. I, therefore, proceed to set out the two issues that I have chosen to address which are as under :

a) Exercise of Prerogative power/inherent jurisdiction in the light of a substantive law occupying the field.

b) Reforms in the Family Courts

A. Exercise of Prerogative power/inherent jurisdiction in the light of a substantive Statute occupying the field

3.The jurisdiction of the High Court under Clause 17 of the Letters Patent extends to three classes of persons viz., infants, idiots, and lunatics. The jurisdiction vested in the High Court traces its origin to the *parens patriae* power that was a part of the prerogative power of the Crown exercised through the judges in the Courts of Chancery. From the earliest charters of this Court, the jurisdiction qua infants, idiots and lunatics has been exercised as a parens patriae. The nature of the jurisdiction has been pointed out by Chief Justice Sir John Beaumont in ***Re:RatanjiRamaji***, AIR 1941 Bom 397, as under:

> "*For the reasons, which I will give later, I have no doubt that the power which this Court exercises over minors is the power derived from the prerogative of the Crown as parens patriae to protect subjects of the Crown who cannot protect themselves; and, if that be the nature of the Court's jurisdiction, it is*

clear that it can only be limited as to subjects within the jurisdiction of the Court by the interest of the person to be protected."

4.The expression "*parens patriae*" has been explained by the Constitution Bench of the Supreme Court in ***Charan Lal Sahu v. Union of India*** [(1990) 1 SCC 613] as follows:

> *"35. … In the 'Words and Phrases' Permanent Edn., Vol. 33 at p. 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on [the] sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability."*

5.The origins of Clause 17 can be traced to the Charter of the Recorders Court at Madras (1798), which contained the following clause:

> *"And We do hereby authorize the said Court of the Recorder of Madras to appoint Guardians and Keepers for Infants, and their Estates, according to the Order and Course observed in that Part of Great-Britain*

called England; and also Guardians and Keepers of the Persons and Estates of natural Fools, and of such as are or shall be deprived of their Understanding or Reason, by the Act of God, so as to be unable to govern themselves and their Estates, which we hereby authorize and empower the said Court of the Recorder of Madras to enquire, hear and determine, by Inspection of the Person, or by such other Ways and Means, by which the Truth may be best discovered and known."

6. It must be noticed that the power given to the Court of the Recorder was to appoint guardians and keepers of infants and their estates "*according to the Order and course observed in that part of Great Britain called England* ". This clause in the Charter was a typical example of how English law was transplanted into Indian soil. In ***Campbell v Hall*** [1774 98 E.R 1045] Lord Mansfield had declared the principle that the common law followed the coloniser and transplanted itself into the conquered territories.

He observed:

"*I will state the propositions at large, and the first is this: A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain."*

7. Thus, the policy of colonial expansion brought with it the application of English legal principles to Indian soil. The *parens patriae* power which was a facet of the prerogative power exercised by the Crown through its Courts conferred on the Recorders Court at Madras was no different. There is a striking pattern in these colonial courts as similar clauses will be found in the Letters Patent for the Supreme Court of Ceylon (1801), the Supreme Court of St Helena and Hong Kong, the Letters Patent for the Civil Court for the Colony of Western Australia (1832), and the Supreme Court of New South Wales, Australia (1823), which were all colonies of the British Empire at one point of time.

8.The Recorders Court at Madras was replaced by the Supreme Court of Madras in 1800. Clause 32 of the Charter of the Supreme Court of Madras contained a verbatim reproduction of the earlier clause in the Letters Patent of the Recorders Court and reads as follows:

> "*And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for Infants, and their Estates, according to the Order and Course observed in that Part of Great Britain called England; and also Guardians and Keepers of the Persons and*

Estates of natural Fools, and of such as are or shall be deprived of their Understanding or Reason, by the Act of God, so as to be unable to govern themselves and their Estates, which we hereby authorize and empower the Supreme Court of Judicature at Madras to enquire, hear, and determine, by inspection of the Person, or by such other Ways and Means, by which the Truth may be best discovered and known."

9. When the Supreme Court of Madras was abolished by the Indian High Courts Act, 1861, the High Court of Madras succeeded to all the powers and jurisdiction of the erstwhile Court by virtue of Section 9 of the said Act. A fresh Letters Patent was issued for the High Court of Judicature at Madras on 26.06.1862. Clause 16 of the said Letters Patent reads as follows:

"*And we do further ordain that the said High Court of Judicature at Madras, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras."*

10. However, on 28.12.1865, the Letters Patent of 1862 was replaced with fresh Letters Patent dated 28.12.1865. Clause 16 of the 1862 Letters Patent found it its place as Clause 17 in the 1865 Letters Patent with one important difference: the words "*within and without the Presidency of Madras*" which

was found in the Letters Patent of 1862 was replaced with the words "*within the Presidency of Madras*". This was a departure from the jurisdiction exercised by the Courts of Chancery in England where the jurisdiction was exercised in respect of a British citizen even if he/she was not residing in England. This principle was explained by Lord Denning ***Re P (GE) (An Infant) [1965] Ch 568***, wherein it was observed:

> *"The Court here always retains a jurisdiction over a British subject wherever he may be, though it will only exercise it abroad where the circumstances clearly warrant it: seeHope v Hope (1854) 4 De GM & G 328; In re Willough by (1885) 30 Ch D 324; R v Sandbach Justices, ex p Smith [1951] 1 KB 62."*

The 1865 Letters Patent also contained a very important addition in the form of Clause 44 which subjected the Letters Patent to any further legislation made by the competent legislature. After the coming into force of the Constitution, the jurisdiction under the Letters Patent is saved and continued by Article 225 of the Constitution.

11. From the aforesaid discussion, it is evident that the power exercised under Clause 17 is not by virtue of any statute but is a facet of the inherent jurisdiction of the High Court. The expression inherent jurisdiction has been

explained by the eminent jurist I.H Jacob, in a seminal essay titled "*Inherent Jurisdiction of the Court*", 1970 Current Legal Problems (CLP) page 23, in the following way:

> "*The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment. The High Court is not subject to supervisory control by any other court except by due process of appeal, and it exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its area. Its general jurisdiction thus includes the exercise of an inherent jurisdiction.*"

12. From the aforesaid, it would be clear that the inherent jurisdiction is a facet of the High Court's general and plenary jurisdiction of the High Court as a Court of Record. The Madras High Court was a Court of Record all along. Under the Constitution the High Court is continued as a Court of Record by virtue of Article 215 and 225 of the Constitution of India. Once this position is clear, it is now necessary to examine the provisions of the Family Courts Act, 1984 to see if this impacts with the inherent jurisdiction of the High Court over infants.

13. A perusal of the statement of objects and reasons appended to the Family Courts Act, 1984 shows that the object of constituting a Family Court was to exclusively provide within the jurisdiction of the Family Courts the matters referred to in the Explanation appended to Section 7(1) therein. One of the contentions raised was that the clauses in the Explanation appended to Section 7(1) was to be read jointly and when so read it would appear that Clause (g) of Section 7(1) which deals with guardianship, custody and control of minors cannot stand independently but must be sought in one or more of the proceedings falling within Clauses (a-f) of Section 7(1).

14. This submission does not hold water as it overlooks the fact that each of the clauses in the explanation is separated by a semi-colon. It is now well established that the use of a semi-colon, purely as a matter of grammar, separates each clause from another showing that they are not inextricably connected (See Jayant Varma v Union of India, 2018 4 SCC 743). Therefore, the contention that the clause in the Explanation to Section 7(1) must be read as being inter-dependent is clearly not sustainable.

15.Section 7(1) vests the Family Court with all the jurisdiction exercisable by any District Court or subordinate civil court under any law for the time being in force in respect of suits and proceedings set out in the Explanation. Clause (g) of the explanation when read with Section 7(1) of the Act would lead to the following conclusion : the jurisdiction exercisable by any District Court or subordinate Civil Court under any law for the time being in force in respect of a suit of proceeding relating to guardianship of the person, custody of or access to any minor shall vest with the Family Court.

16.The primary legislation that deals with matters of guardianship and custody is the Guardianship and Wards Act, 1890. The Act is a secular legislation. In respect of Hindus, Section 2 of the Hindu Minority and Guardianship Act, 1956 specifically states that the Act is in addition to and not in derogation of the Guardians and Wards Act, 1890. The jurisdiction of Courts under the Act is set out in Section 9. An application for guardianship of the person of the minor is to be made to the District Court having jurisdiction where the minor ordinarily resides. Similarly, where the guardianship is with respect to person and property, the application is to be made to a District Court

having jurisdiction in the place where the minor resides or where he has property.

17. Thus, an application under the Guardians and Wards Act, 1890 can be made only to a District Court which for the purposes of the said Act is defined in Section 4(4) to mean as under:

> *"(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882), and* ***includes a High Court in the exercise of its ordinary original civil jurisdiction"***

18. Thus, a High Court exercising ordinary original civil jurisdiction would fall within the net of the aforesaid expression of District Court under the Guardians and Wards Act, 1890. It is on this basis that the High Court exercises statutory jurisdiction and entertains Guardians and Wards Original Petitions in respect of minor children in city of Madras. This is made clear by Order XXI of the Original Side Rules which sets out the procedure to be followed when the High Court is exercising its statutory jurisdiction under the Guardians and Wards Act, 1890.

19. It will be recalled that Section 7(1) read with Explanation (g) of the Family Courts Act speaks of vesting the Family Court with the jurisdiction of a District Court exercising jurisdiction under any law for the time being in force in respect of a suit or proceeding relating to guardianship of the person, custody of or access to any minor. As stated, supra, the High Court, exercising ordinary original civil jurisdiction under the Guardians and Wards Act, 1890 functions as a District Court by virtue of Section 4(4) of the Act, when it deals with the issue of guardianship, custody or access to any minor. Consequently, the conclusion is inescapable that the jurisdiction exercised by the High Court under the Guardians and Wards Act, 1890 would stand transferred to the Family Courts by virtue of Section 7(1).

20. The Full Bench in ***Mary Thomas***, has overlooked the fact that resort to Section 2(e) of the Family Courts Act, 1984 to telescope the definition of "District" into the Family Courts Act, 1984 was unnecessary. Section 7(1) of the Family Courts Act

speaks of "*jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force"* in respect of a suit or

proceeding falling within the scope of the Explanation to Section 7(1). The words "under any law for the time being in force" occurring in Section 7(1) is crucial for it points to the jurisdiction exercised by a District Court under a substantive law and not the CPC. We must, therefore, look to the substantive laws to examine the meaning of a District Court instead of looking to Section 2(e) of the Family Courts Act and attempting to telescope the definition in Section 2(4) of the CPC through that provision.

21. Under the substantive law, the Hindu Marriage Act, 1955 defines a "District Court" in Section 3(b), Section 3 of the Divorce Act, 1869 defines the expression "High Court" "District Judge" and "District Court", and Section 4(4) of the Guardians and Wards Act, 1890 defines the District Court for the purposes of that Act, as already adverted to supra. Thus, for the purposes of Section 7(1) and Explanation (g) of the Family Courts Act, 1984 it is the definition in the substantive law ie., Section 4(4) of the Guardians and Wards Act, 1890 that must be applied and not the definition under Section 2(4) CPC. When so done, the conclusion is inescapable that the High Court is a District Court within the meaning of Section 7(1) of the Family Courts Act, 1984. In

this view of the matter there is no doubt that the decision in Mary Thomas is erroneous and with all due respect mustbe overruled.

22. It now remains to assess the impact of Section 3 of the Guardians and Wards Act, 1890 which saves the jurisdiction of the Chartered High Court, and reads as follows:

> "***Saving of jurisdiction of Courts of Wards and Chartered High Courts.*** —
>
> *This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [any competent legislature, authority or person in [any State to which this Act extends]], and nothing in this Act shall be construed to affect, or in any way derogate from the jurisdiction or authority of any Court of Wards, or to take away any power possessed by any High Court."*

23. The effect of Section 3 is to preserve the inherent jurisdiction of the Chartered High Courts under its respective Charters. Nevertheless, it must also be noted that the legislature had specifically defined the expression "District Court" and included the High Court exercising ordinary original civil jurisdiction within the net of this expression. It is thus clear that there are two types of jurisdiction exercised by the High Court in respect of infants; the first, being its pre-existing inherent parens patriae jurisdiction under the Letters

Patent and secondly, its statutory jurisdiction under the Guardians and Wards Act, 1890.

24. The introduction of Section 3 is capable of creating the impression that the legislature never intended the High Court to be considered a part of the expression "District Court". However, the definition contained in Section 4(4) removes any possible case of doubt. The obvious answer as to why a provision like Section 3 had to be inserted lies in the fact that the Guardians and Wards Act, 1890 is a consolidating and amending Act. As is well known a consolidating and amending act is normally presumed to be a complete code on the subject. In the context of a consolidating and amending Act, the Supreme Court has observed in ***A.S.K. Krishnappa Chettiar v. S.V.V. Somiah*, AIR 1964 SC 227,** as under:

> "*The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to courts and must, therefore, be regarded as an exhaustive Code.*"

25.Thus, once the Guardians and Wards Act, 1890 was a consolidating and amending Act, it would have been regarded as a complete and exhaustive code on the subject. It is now well settled that recourse to inherent powers is not permissible when the matter falls within the province of an exhaustive Code

(See ***Patel Bros v State of Assam***, (2017 2 SCC 350). Thus, to obviate any such result the legislature specifically engrafted Section 3 of the Guardians and Wards Act, 1890 leaving the inherent powers of the Chartered High Courts untouched.

26. It is a well settled principle of law that the inherent jurisdiction of the High Court can be invoked only in cases where there exists no other remedy under any statutory provision. In ***Damodaran Pillai v. South Indian Bank Ltd.*, (2005) 7 SCC 300,** the Supreme Court observed:

> *"It is well settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to."*

27. In the context of guardianship cases, recourse to the inherent power of the High Court was taken in cases of appointment of guardians to the undivided share of the property of minors which was outside the purview of the Guardians and Wards Act, 1890. Thus, in ***RatanjiRamaji,* AIR 1941 Bom 397,** the Full Bench of the Bombay High Court observed:

"Coming to the third head as to whether any alternative relief is available, it has been pointed out that in the mofussil no suit to appoint a guardian is permissible under the Guardians and Wards Act. Besant v. Narayaniah [(1914) L.R. 41 I.A. 314.] decided that. The jurisdiction of the mofussil Courts in respect of minors' property and person is limited by the Guardians and Wards Act, and, therefore, so far as the mofussil Courts are concerned, there is no alternative remedy. It was urged by the learned Advocate General that this may be a ground for bringing in fresh legislation, but is not a ground for this Court extending its jurisdiction. In my opinion we are not however extending the Court's jurisdiction. This point is considered only to meet the argument that an alternative relief exists in the mofussil Court and the applicant should be asked to apply to that Court rather than invoke the inherent jurisdiction of the High Court."

28. In A.T. Vasudevan, In re, AIR 1949 Mad 260**,** a learned single judge of this Court had entertained an application under Clause 17 to appoint a guardian for the joint family property of certain minors which was outside the purview of the Guardians and Wards Act, 1890. These cases, therefore, establish that recourse to the inherent power of the Court is permissible in cases where there is no express remedy provided under a statute.

29. The aforesaid conclusion is strengthened by another vital consideration. As pointed out, supra, in Re:RatanjiRamaji, and Re: Lovejoy

Patel, AIR 1944 Cal 433 the power under Clause 17 is historically traceable to the prerogative powers of the Crown which were exercised by the Court of Chancery in England. From the establishment of the Recorders Court in 1798, followed by the establishment of the Supreme Court of Madras in 1800 and the High Court of Madras in 1862 there was no substantive law governing the subject of appointment of guardians and wards of minor children. This was the position when the present Letters Patent came into force in 1865. However, the position was altered by the enactment of the Guardians and Wards Act, 1890.

30. It is a settled principle that the exercise of a prerogative power is permissible only in cases where the law is silent. In 1765 Sir William Blackstone in his "*Commentaries on the Laws of England*" vol. I, p. 252, observed:

> "*For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.*"

31. In Attorney General v De Keyser's Royal Hotel, [1920] AC 508, the House of Lords firmly established what is now known as the "*De Keyser principle*" that the exercise of prerogative power can be done only in conformity with the provisions of a statute. It was held as under:

> "*Whichever mode of expression be used, the result intended to be Indicated is, I think, the same — namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.*"

In Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75, it was observed "*The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.*"

32. Thus, the exercise of inherent power under Clause 17, which flows from the prerogative power of the sovereign cannot be exercised in a manner contrary to the provisions of a statute. It was pointed out by the Chancery Division in Re G (Infant), [1963] 1 WLR 1169 as under:

> "*When considering what form the order should take in this case where section 1 operates, two general propositions are to be borne in mind: first, that statute can override the prerogative and, secondly, that the prerogative remains effective in so far as it is not overridden by statute, and, therefore, may act in aid of and as supplemental to it.*"

33. This is also clear from the decision of the Privy Council in ***Annie Besant v G. Narayaniah***, AIR 1914 PC 41, where the Privy Council disapproved of the exercise of inherent power under Clause 17 of the Letters Patent in a manner inconsistent with Section 19 of the Guardians and Wards Act and held that :

> *"It is alleged, however, that when once the suit had been transferred to the High Court, the High Court had a general jurisdiction over pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the Respondent's life, unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."*

34. It is also not possible to subscribe to the view expressed by a learned single judge of this Court in Gautam Menon v Sucharita Gautam, 1992 2 LW 478 that Clause 17 can be exercised by the High Court even if the minors were not ordinarily resident within the ordinary original civil jurisdiction of the High Court which is the requirement under Section 9 of the Guardians and Wards Act, 1890. The jurisdictional requirement under Section 9 cannot be

circumvented by recourse to the inherent power under Clause 17 for that would tantamount to subverting the requirement of the statute rather than aiding it.

35. It is settled law that the law laid down by the Privy Council is existing law within the meaning of Article 372 of the Constitution and binds the High Court until and unless a contrary view is taken by the Supreme Court. In Pandurang Kalu Patil v. State of Maharashtra, (2002) 2 SCC 490, the Supreme Court observed:

> "*A Division Bench of the High Court of Bombay has ventured to disagree with a ratio which has become locus classicus and well stood the long period of half a century. That ratio is the one laid down in the celebrated decision in PulukuriKottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533] . In that exercise the Division Bench of the Bombay High Court had unwittingly overlooked another legal guideline delineated by a Full Bench of the Bombay High Court itself in State of Bombay v. ChhaganlalGangaramLavar [AIR 1955 Bom1 : 55 Bom LR 670] wherein Chief Justice Chagla speaking for the Full Bench had said thus : (AIR p. 6, para 10)*
>
> "*[S]o long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon us, and when we say that the decisions of the Privy Council are binding upon us, what is binding is not merely the point*

actually decided but an opinion expressed by the Privy Council, which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

36.For all the aforesaid reasons, the inherent power under Clause 17 of the Letters Patent is saved under Section 3 of the Guardians and Wards Act, 1890 to be exercised only to provide relief in cases which are not covered by any express provision of the Act.

37. Another consideration that leans in support of the aforesaid view is that the power under Clause 17, which is traceable to Clause 32 of the Charter of the Supreme Court is to be exercised "*in accordance with the Order and Course observed in that Part of Great Britain called England".* If the clauses of these Charters are to be interpreted literally, the Court would be required to apply the laws of England which as on date is governed by the Children Act, 1989. Obviously, post the coming into force of the Constitution it would be wholly impermissible for the Court to draw inspiration from a British law to determine the scope of its own powers in India. Such a position would be inconsistent with the status of this country as a sovereign, democratic republic

as was pointed out by the Supreme Court in ***State of Madras v. C.G. Menon*, AIR 1954 SC 517.** Thus, the only possible way to save Clause 17 is to construe the expression ""*in accordance with the Order and Course observed in that Part of Great Britain called England"* to mean "*in accordance with the Order and Course observed in India"* which, in other words, would mean that the inherent jurisdiction under Clause 17 must be exercised in consonance with the laws of this country. This position is consistent with the principle that prerogative powers/inherent powers must be exercised to supplement the substantive provisions of law and not to supplant it.

38.The contention that the High Court can concurrently exercise its powers with the Family Court is clearly without substance. The Family Court is, no doubt, a court of limited jurisdiction ie., its jurisdiction is confined to suits and proceedings falling within the scope of the Explanation to Section 7(1). Nevertheless, in respect of those matters which fall within the scope of the explanation, the Family Court is a Court of exclusive jurisdiction as was held by the Supreme Court in ***Balram Yadav v. Fulmaniya Yadav*, (2016) 13 SCC 308,** wherein it was observed as under:

> *"Under Section 7(1) Explanation (b), a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws."*

Once guardianship cases would fall within the scope of the Explanation (g) to Section 7(1), it follows that the Family Court would have exclusive jurisdiction in the matter.

39. There is yet another vital consideration that must weigh with the Court while interpreting the provisions of the Family Court Act, 1984. One of the principal reasons that led to the establishment of the Family Court was the desire of Parliament to establish a Court that was not hidebound by the provisions of the Evidence Act, and other formal procedures while adjudicating

the matter before it. It was a conscious decision on the part of Parliament to do away with the rigor of the procedure followed by a regular civil court. The Status of Women in India Report (1974) of the Government of India drew the attention of the law makers to the urgent need to establish Family Courts in India. In particular, one of the reasons spelt out was as follows:

> "*The statutory law in all matrimonial matters follows the adversary principle for giving relief ie, the petitioner seeking relief alleges certain facts and the respondent in his own interest refutes them. In addition to this, as we have already noticed, most of the grounds in these statutes are based on the 'fault principle' instead of the breakdown theory. The combined result of these two factors is that strong advocacy is often the determining factor in these cases. This is particularly unfortunate in the field of custody and guardianship where the welfare of the child is often relegated to the background and the decision arrived at is based on the well-argued points of the lawyer. In the present system, the judge has no option but to give his decision on the points raised and argued. If he were to base his decision on social needs or in the interest of one of the parties, it may be considered as biased and hence reversed in the appellate court.*"

40.Thus, while enacting the Family Courts Act, Parliament consciously included a provision to free these Courts from the procedural rigors of regular civil courts. This finds expression in Section 14 which reads as follows:

> "*14. Application of Indian Evidence Act, 1872.—A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).*"

41. Thus, if two sets of jurisdictions: one in the Family Court and the other in the High Court were to exist it would mean that one set of cases would be governed by the OS Rules and Evidence Act whereas the Family Court would function with the procedural flexibility given by Section 14. This would clearly run contrary to the express intent of Parliament, and is, therefore, another consideration that must weigh with the Court while accepting or rejecting the argument in favor of concurrent jurisdiction.

42. The upshot of the above discussion is that the statutory jurisdiction under the Guardians and Wards Act, 1890 is now exclusively vested with the Family Court and resort to the inherent jurisdiction under Clause 17 can be had only in cases where there is no statutory remedy before any court for redress.

B.Reforms in the Family Courts

43. It is a stark reality that many of the Family Courts suffer from procedural delays which completely defeats the purpose of the legislation. These issues have been noticed by Justice V. Parthiban in his order of reference. These concerns were also reiterated and highlighted by practitioners from the Family Court before this Bench. While acknowledging the existence of a problem in the Family Court, there is an urgent need to reform the existing system. There is a grave danger that inefficiency would erode the ability of these Courts to deliver justice to the relevant stake holders who come before it. The High Court cannot throw up its hands and turn a blind eye when there exists a problem that cries out for solution.

44. A similar situation arose before the Kerala High Court in Shiju Joy v Nisha (OP FC 352 of 2020), which highlighted the pendency of over one lakh

cases in various Family Courts in the State of Kerala. A Division Bench of MuhamedMustaque and C.S Dias, JJ, vide order dated 23.03.2021, noted that the Family Courts in the State of Kerala were on the brink of collapse. Exercising its supervisory jurisdiction, the High Court issued a slew of directions to ensure that the procedure before the Family Court is streamlined to ensure that proceedings are expedited so as to ensure timely justice. It is clear from the order of reference, and the submissions made before us that the time has now come for a similar exercise to be carried out in this State so as to ensure that the object of the legislation is not frustrated. For this purpose, it is necessary that the matter be placed before the Hon'ble Chief Justice, on the administrative side, to consider whether *suo motu* proceedings can be initiated for issuing directions to reform the working of Family Courts in the State of Tamil Nadu.

45. Before I draw the curtains, we must acknowledge the fact that this Bench had the distinct advantage of hearing the best of brains in this Chartered High Court. It was a delight to hear the counsel, as they addressed the issues from various perspectives. We could not have achieved clarity and arrived at our conclusions on the issues referred to us, if not for the able assistance we

had from the Bar. We do not have any hesitation in saying that it was a momentous occasion both for the Bar and Bench.

(N.A.V., J.)

KP

A.A.NAKKIRAN, J.

I have the privilege of reading the orders of the Honourable Mr.Justice P.N.Prakash, the Honourable Mr.Justice R.Mahadevan, the Honourable Mr.Justice M.Sundar and the Honourable Mr.Justice N.Anand Venkatesh. After giving my anxious consideration to the issues raised before this larger Bench in the reference made to it, and noting the submissions made by the members at the bar and after having perused the individual judgments of all my learned brother Judges, I concur with the views taken by my learned brothers, Justice R.Mahadevan and Justice M.Sundar.

2. I concur with their views on the nature of the jurisdiction of the High Court under clause – 17 of the letters patent, and importantly that letters patent can be taken away only by express repeal. I also concur and agree with them that in the absence of an express repeal, and in view of the fact that the Family Court Act, 1984 is only a procedural legislation, it

cannot take away the power of the High Court under clause-17 of the letters patent which is in the nature of plenary power of the High Court, and also that the High Court is not a 'District Court' as the jurisdiction exercised by it under clause-17 of the letters patent extends to the entire state of Tamil Nadu. I agree with the reasoning employed by my learned brothers, Justice R.Mahadevan and Justice M.Sundar, in their judgments. I am therefore of the considered view that the full Bench of this court in Mary Thomas has laid down the correct law and as such it is still good law as such, the jurisdiction of the High Court on its original side in guardianship and custody matters, is not ousted by explanation (g) to Section (7) (1) read with Sections 8 and 20 of the Family Courts Act, 1984.

(A.A.N.,J.)

.09.2022

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(*per majority* **R.MAHADEVAN, J., M.SUNDAR, J.,**
and **A.A.NAKKIRAN, J**.)

Though we have written / penned separate orders, for the purpose of clarity and specificity, we deem it appropriate to set out in one voice that the reference is answered per majority in the following manner:

(i)**Reference** : Whether the jurisdiction of the High Court, on its Original Side, over matters of child custody and guardianship is ousted, in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984?

Answer : The jurisdiction of the High Court on its Original Side over matters of child custody and guardianship is **not** ousted in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984.

(ii)**Reference** : Whether the decision of a Full Bench of this Court in Mary Thomas Vs. Dr.K.E.Thomas (AIR 1990 Madras 100) is still good law?

Answer : The decision of Hon'ble Full Bench of this Court in ***Mary Thomas Vs. Dr.K.E.Thomas (AIR 1990 Madras 100)*** continues to be good law.

(R.M.D., J.) (M.S., J.) (A.A.N., J.)

02.09.2022

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P.N. PRAKASH, J.

R. MAHADEVAN, J.

M. SUNDAR, J.

N. ANAND VENKATESH, J.

and

A.A. NAKKIRAN, J.

A.No.5445 of 2018
in
O.A. Nos.539 and 540 of 2021
in
G.W.O.P. No.599 of 2018

02.09.2022