

**(2013) 03 BOM CK 0272**

**Bombay High Court**

**Case No:** Family Court Appeal Nos. 33 and 79 of 2005

Shri Shivanand Damodar  
Shanbhag

APPELLANT

Vs

Smt. Sujata Shivanand Shanbhag

RESPONDENT

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**Date of Decision:** March 8, 2013

**Citation:** (2013) 3 ABR 1 : (2013) 3 ALLMR 81 : (2013) 5 BomCR 198 : (2013) 3 DMC 263 :  
(2013) 3 MhLj 193

**Hon'ble Judges:** N.H. Patil, J; A.R. Joshi, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

A.R. Joshi, J.

Both the appeals are preferred by the appellant-husband challenging the judgment and order passed on 30.12.2004 by the learned Judge of Family Court No. 4, Mumbai at Bandra. The said impugned judgment and order was passed as a common judgment disposing off two petitions filed by the present respondent-wife. Hereinafter for the sake of clarity, present appellant is referred to as husband and present respondent is referred to as wife. Respondent-wife had preferred Petition No. B-63/2001 asking for declaration that she is entitled to possessory right over her matrimonial home situated at Flat No. 15, 5th floor, Sawant Bhavan, 18/A, 76, Gokuldas Pasta Road, Dadar (E), Mumbai - 400 014. She also prayed for permanent injunction restraining appellant-husband from obstructing and/or preventing her entry in the said matrimonial home/flat and also prayed for permanent injunction restraining her forcible dispossession from the said flat. Respondent-wife also filed another Petition No. C-224/2002 asking for maintenance to herself u/s 18 of the Hindu Adoption and Maintenance Act. 1956. Both the said Petitions were respectively filed on 22.10.2001 and 17.9.2002 and were taken before the same Family Court and were disposed of by a common judgment and order, which is impugned in present appeals. This being the factual position and as the evidence of

both the parties was recorded in common in both the petitions, both the present appeals are being disposed of by this common judgment and order.

2. Heard rival submissions at length on earlier dates. Perused the record and proceedings and also the substantive evidence of witnesses examined by rival parties. Also perused various documents including photographs produced on record before the trial Court.

3. Prior to discussing the main thrust of arguments advanced on behalf of appellant-husband, certain background of the matter, as to relations interse between the parties, is required to be narrated in order to have proper perspective of the case and in order to ascertain the merits of the present appeals.

According to the case of respondent-wife, the marriage between the parties took place on 22.12.2000 according to Hindu Vedic rites at the residential flat situated on the 5th floor of the building situated at Gokuldas Pasta Road, Dadar (East), Mumbai. It was an arranged marriage between them and attended by about seven relatives from husband side and six relatives from the wife side. No marriage invitation cards were printed and no big ceremony was performed by calling various persons and friends etc. as it was the second marriage of respondent-wife and apparently third marriage of appellant-husband. At this juncture, it must be mentioned that admittedly it was the second marriage of respondent-wife and as per the record and as accepted by the husband, it was his second marriage and there was no material brought on record by respondent-wife that it was his third marriage. But the fact remains that the present appellant-husband was widower as his first wife had apparently committed suicide and the present respondent-wife was a divorcee as she had taken divorce from her husband from first marriage. Again at this juncture, it must be mentioned that the said dissolution of the first marriage of respondent-wife has been vehemently denied by the present appellant-husband and in fact it is one of his main defences that her first marriage is still in existence and as such there was nothing like she being his legally wedded wife though claimed by her in her both the petitions before the Family Court.

4. Prior to the marriage of respondent-wife, her maiden name was Miss. Sujata Namdeo Ankam. Her first marriage was with one Ravindra Chitta. It was performed on 19.5.1989 and there was customary divorce by execution of divorce deed on 11.7.1993.

5. According to respondent-wife, after her marriage with the present appellant-husband on 22.12.2000 both started residing together at the flat situated at 5th floor, Sawant Bhavan, Gokuldas Pasta Road, Dadar, Mumbai. They stayed together for about ten months. There was no issue from the said marriage. However, out of the said wedlock respondent-wife became pregnant, but, the fetus was aborted on 30.4.2001 at the behest of appellant-husband. Said abortion was conducted at the hospital of Gynecologist one Dr. Surendranath Upadhyay (witness

No. 7). According to respondent-wife she was taken to the hospital by appellant-husband and he gave his consent on the relevant medical papers for performing the abortion. The couple was introduced and referred to said Dr. Surendranath Upadhyay by one Dr. Kiran Kamat, a relative of appellant-husband. At the time of marriage between the parties, the appellant-husband was having two children out of his first wedlock. He had elder son by name Vignesh and younger son by name Vijay and they were of the ages about 20 years and 14 years. Respondent-wife was looking after the house of the appellant-husband and was also looking after his two sons and was doing all the house work including preparation of meals, cleaning and maintaining the flat etc... however, there used to be some quarrel between the parties after about two months of initial cordial relations. Appellant-husband was abusing respondent-wife on various grounds as probably his said recent marriage was not liked by his sons from his earlier marriage. Also according to respondent-wife, appellant-husband had by that time developed some intimacy with one another woman by name Yamini who was residing on the fourth floor of the same building. In her neighbourhood there was one flat which was also belonging to appellant-husband and on occasions he used to visit said woman Yamini and allegedly had developed illicit relations with her and this was also the cause for discord between the couple and ultimately from 6.10.2001, respondent-wife was denied entry in the matrimonial home i.e. a flat situated at 5th floor of the said building at Dadar. According to respondent-wife, on that day she had been to the Holy Spirit Hospital at Andheri in the afternoon to see her brother-in-law who was admitted in the hospital for some illness. Appellant-husband allegedly assured that he will visit the hospital by 4:00 p.m. during visiting hours. However, he did not turn up even till late night and as such respondent-wife came back to her matrimonial home and found that the door was locked by some other lock as apparently husband has changed the lock. The keys of the earlier lock, which she was having, were not of any use for getting entry in the flat. She waited near the building and ultimately made telephone call to appellant-husband at his hotel business premises of hotel "Guru Vihar" at Dadar, however, the Manager of the hotel informed that appellant-husband had not turned up in the hotel. After sometime, appellant-husband along with his two friends came to the building. They had arrived in one car. Appellant-husband asked respondent-wife to get in the car as he wanted her to drive her back to her mother's place at Andheri. Sensing ill-intention of appellant-husband, she refused to enter in the car and remained in the building sitting on the staircase. After sometime, husband and his two friends went away. Overnight she remained near the building and on the next day morning approached the police station and lodged a complaint. Appellant-husband was called to the police station and there was some talk between the parties wherein appellant-husband had assured to take respondent-wife to her mother's place for about a day or two and then to bring her back to matrimonial home. However, though respondent-wife was taken to her mother's place, she was never taken back to her matrimonial home by appellant-husband. Even after a week or so,

appellant-husband did not turn up and as such again police complaint was lodged. This is the cause for filing the Petition No. B-63-2001 on 22.10.2001 asking for relief specifically under Sections 6, 38 and 39 of the Specific Relief Act.

6. During pendency of Petition No. B-63/2001, respondent-wife filed another petition on 17.9.2002 bearing C-224/2002 for permanent alimony and litigation expenses. She claimed Rs. 30,000/- per month from the appellant-husband and also claimed Rs. 15,000/- towards the litigation expenses. This petition for maintenance was filed on the premise that though she was legally wedded wife, was denied entry in the matrimonial house and infact appellant-husband had withdrawn himself from her company without there being any sufficient cause or reason. According to respondent-wife, appellant-husband is having a running hotel business by name hotel "Guru Vihar" at Dadar area and also having two flats - one on the 4th floor leased out on rent of Rs. 25,000/- per month & second one being the matrimonial home situated on the 5th floor of the same building Sawant Bhavan, Gokuldas Pasta road, Dadar (East), Mumbai.

7. The appellant-husband strongly contested both the petitions and took various defences as under:

[a] Firstly, that the marriage of the respondent-wife with one Ravindra Chatta is still existing and not dissolved by any divorce deed, much less, there being any custom of customary divorce in the Bhanushali caste - to which the wife belong.

[b] Secondly, that there was no marriage solemnized between the parties, as alleged by respondent-wife, and what was the occasion at flat on 5th floor of the building on 22.10.2001 was only the ceremony of 'Gruha pravesh' i.e. inaugural ceremony for starting residing in the said flat.

[c] Thirdly, that there was no cohabitation between the parties as husband and wife or in any other manner as two individuals and the respondent never stayed in flat No. 15 as wife of the appellant, and as such not entitled for any relief as claimed in both the petitions.

8. Prior to analyzing the above three main defences raised by the appellant-husband, certain factual and admitted position can be narrated in order to ascertain scope of the evidence brought on record by rival parties. Said admitted position is as under:-

(i) There was a ceremony in the flat at 5th floor - owned by the appellant-husband. Said ceremony was performed on 22.10.2001 wherein respondent-wife and her relatives i.e. her mother, brother, wife of brother etc. were present.

(ii) There was a pooja performed at the said flat and in which only appellant-husband and respondent-wife were wearing garlands around their neck. Whereas all other gathered relatives had no such garlands, though, it is allegedly case of appellant-husband that it was his practice to honour his guests on the

occasions of ceremony by garlanding them.

(iii) A priest was present to perform some rituals during the religious ceremony on 22.10.2001 in the flat.

(iv) Some photographs were taken of the ceremony performed on 22.10.2001.

(v) after the said ceremony, as mentioned above, all the rival parties and their relatives had been to the office of Registrar of Marriage at Bandra, admittedly for Registration of Marriage. However, registration of marriage was not done and the parties left the office.

9. The above admitted position is relevant so far as the defence raised on behalf of the appellant-husband that there was no marriage taken place between the parties on 22.10.2001 as alleged. Again on this aspect, there is substantive evidence of wife (witness No. 1), one Smt. Sarita Ankam sister-in-law of respondent-wife (witness No. 2), mother of respondent-wife (witness No. 3), one Raveendranath Ankam brother of respondent-wife (witness No. 4), one Smt. Bulaxmi Jadal paternal aunt of respondent-wife (witness No. 6). Evidence of these witnesses shall be discussed in detail hereunder at the appropriate place.

10. So far as the defence as to first marriage of respondent-wife still subsisting and not ended by a customary divorce, there is substantive evidence of respondent-wife herself, witness No. 5 one Jilla Purshottam and witness No. 8 Ramlingam Inzapuri.

11. So far as the third objection raised on behalf of the husband as to there was no cohabitation between the parties at any time as husband and wife or in any other manner, what is placed before the trial Court on behalf of the present respondent-wife is the substantive evidence of herself and also the evidence of her relatives. Much emphasis was placed on the aspect that respondent-wife was legally wedded wife of appellant-husband. She stayed in the matrimonial home i.e. flat at 5th floor of the building at Dadar and that she had keys of the said flat and that she has lodged complaints with the local police station when the lock on the main-door of the flat was changed by appellant-husband thus denying entry to respondent-wife in the said flat. On this aspect, in order to substantiate the argument of no cohabitation, appellant-husband examined himself and also examined two other witnesses i.e. one milkman Sanjay Dubey, one neighbour Rajesh Solanki. This evidence led before the trial Court by the rival parties shall be dealt in detail at the appropriate place.

12. Now coming back to the first point of defence (a) mentioned earlier, much is argued on the acceptance of a custom prevalent in the society of Padmashali community. It is argued that there was no dissolution of first marriage of respondent-wife and it is submitted that the divorce deed which was produced before the trial Court was not proved in the strict sense inasmuch as the signatory to the said divorce deed i.e. Ravindra Chitta has not been examined by the wife. It is

further submitted that the trial Court had erred in placing reliance on the said divorce deed for coming to the conclusion of dissolution of marriage between respondent-wife and her first husband Ravindra. It is also brought to our notice by going through the detail contents of the said divorce deed that it is allegedly signed by said Ravindra Chitta, however, it does not bear the signature of respondent-wife as executor of the said document. It is further argued that though allegedly signature of respondent-wife is appearing on the said document as mentioned by her in her substantive evidence, said signature is appearing as one of the witnesses to the said deed. Much emphasis was placed by learned Advocate for appellant-husband that the signature of wife is appearing as a witness and not as one of the executants of the divorce deed. On this aspect, it will be worthwhile to refer to the contents of the said divorce deed.

13. We have gone through the contents of the said divorce deed on record and on which signature of witness No. 8 Ramlingam, who is President of the Padamshali Panchayat, is at Exh.124. So also it bears the signature of respondent-wife made at two places and said respective signatures are at Exh.103 and Exh.104. We have seen that the said document is having the title in Marathi language as i.e. a divorce agreement. Said document is executed on a general stamp paper of Rs. 50/- and it is in vernacular Marathi typewriting and purported to have been executed on 11.7.1993. The signatures of Ravindra Chitta, first husband of respondent-wife, is at two places with date 11.7.1993. Firstly it is appearing at the end of the typewritten contents. The contents in the document, mention regarding the earlier marriage between the parties taken place on 19.5.1989. It is also recording the mutual understanding between the parties as not to continue with the marital relations as there were disputes and quarrels between them. At the end of the said typewritten contents, there are signatures of five persons being the witnesses and signature at Sr. No. 5 is that of the present respondent-wife. At the end, this document contains handwritten paragraph mentioning the terms as to the custody of the small child Abhishek to remain with Ravindra Chitta and consent to that effect given by present respondent-wife before the panchayat committee. This handwritten paragraph is also suffixed by the signature of Ravindra Chitta with date 11.7.1993 and also signature of present respondent-wife with the same date. Apart from the said document, authenticity of which has been strongly assailed by the appellant-husband, we have gone through the other material brought before the trial Court. Said material is regarding the substantive evidence of witness No. 5 Jilla Purushottam and witness No. 8 Ramlingam, apart from the evidence of respondent-wife being witness No. 1. As per the evidence of witness No. 5, he was the Secretary of Padamshali Samaj, Vikroli. Said Samaj was registered having registration No. F-15092 situate at 112/3222, Kannamwar Nagar, Vikroli (E), Mumbai - 400 083. According to the said witness, customary divorce is prevalent in the Padamshali samaj from the time immemorial. According to him, respondent-wife was a divorcee and there was customary divorce dated 11.7.1993 in presence of the

Community Panchayat and it was a valid customary divorce according to the customs of Padamshali samaj. According to this witness, a certificate regarding customary divorce, prevalent in the community, was also issued by him and the President of the Samaj i.e. witness No. 8. We have seen the said letter, which is at Exh.135 in the record and proceedings, - it is in vernacular Marathi and on the letter-head of the Padamshali samaj, Vikroli bearing registration number and address of the samaj. It is signed by witness No. 5 and witness No. 8 and it speaks regarding the factum of customary divorce entered into between Ravindra Chitta and present respondent-wife. We have also gone through the substantive evidence of witness No. 8 Ramlingam, President of the samaj. He also reiterated the evidence as given by witness No. 5 and supported the case of respondent-wife on the aspect of customary divorce effected between respondent-wife and her first husband Ravindra Chitta by way of divorce deed. Evidence of these witnesses is required to be viewed in juxtaposition of the contents of the document of customary divorce and the certificate issued by the Padamshali Samaj which is at Exh.135 as mentioned above.

14. On the above aspect so far as the admissibility of the contents of the divorce deed, it is submitted on behalf of appellant-husband that the said document is not proved in the strict sense of proof of any document by way of examining the executor. It is further submitted that it was must for respondent-wife to examine her first husband in order to put rest the said dispute whether there was valid divorce between those parties. On this, we have gone through the reasoning given by the trial Court and also we have ascertained the import of Section 14 of the Family Courts Act, 1984. Said Section 14 of the Family Courts Act, 1984 reads thus:

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).

Section 14 of the Family Courts Act provides for exception to the general rule of evidence regarding admissibility of statements and documents if permissible by the Court etc It has been so provided looking to the nature of the cases which are decided by the Family Courts. The Court should not go into technicality and should take a decision on the material before it in a broad based manner. The parties appear before the Court personally and advocates are not allowed, hence the technical aspect is to be ignored and whatever material is placed before the Court, which it considers necessary to assist it and to deal it effectively can be looked into. Section 14 of the Family Courts Act is a special legislation and the principles of admissibility of documents as provided under the Evidence Act are not relevant in such cases.

15. In view of the above legal provision, there is no doubt that the Family Court is competent to receive the document though not proved as per the strict proof as per

the Evidence Act.

16. Now coming to the aspect of customary divorce and as to acceptance of any custom having the effect of law, following authorities are cited before the Court on behalf of appellant-husband:

[i] [Salekh Chand \(Dead\) by Lrs. Vs. Satya Gupta and Others,](#)

[ii] [Subramani and Others Vs. M. Chandralekha,](#)

[iii] [Bhimashya and Others Vs. Smt. Janabi @ Janawwa,](#)

B. Custom - Nature and status of - proof of - when can override statutory law - validity of a custom - Aspect of reasonableness - Invalidity on ground of unreasonableness - Custom compared with manners and fashion - Also compared with practice - Words and Phrases - "Custom"

C. Hindu Adoptions and Maintenance Act, 1956 - S.3(a) - Custom - Proof of - It must be proved that the custom or usage is in practice since long period of time with invariability and continuity - In the tribe, community or family it has to be certain and reasonable - It must not be opposed to public policy.

[iv] [Salig Ram Vs. Munshi Ram and Another,](#)

[v] [Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others,](#)

(C) Hindu law - Family custom - Proof.

The specific family custom pleaded in a particular case should be proved. The initial onus lies on the plaintiffs to prove the special custom. It must be proved that the custom has been acted upon in practice for such a long period and with such invariability, as to show that it has, by common consent been submitted to as the established governing rule of the particular family.

[vi] [Thakur Gokalchand Vs. Parvin Kumari,](#)

[vii] [Shiromani and Others Vs. Hem Kumar and Others,](#)

(C) Hindu Law - Custom - Validity - Essentials - Held on facts that custom of "Jethansi" or "Jeshtbhagam" said to be prevalent in the caste of Agharias was not satisfactorily proved. Second Appeals Nos. 569 and 568 of 1960, D/- 8-11-1963 (Madh.Pra.), Reversed.

A custom must be proved to be ancient, certain and reasonable if it is to be recognised and acted upon by Courts of law. A custom of "Jethansi" or "Jeshthbhagam" being in derogation of the general rules of law must be construed strictly. Held on facts that the custom of Jethansi alleged to be prevalent in the Agharia community to which the parties belonged was not established by proper evidence. Second Appeals Nos. 569 and 568 of 1960, D/- 8-11-1963 (Madh.Pra), Reversed; (1876-77) 3 Ind App 259 (PC), Rel. on.



[viii] [Saraswathi Ammal Vs. Jagadambal and Another,](#)

[ix] [Yamanaji H. Jadhav Vs. Nirmala,](#)

17. After carefully going through the ratios propounded by the above authorities, it must be said that in the present matter, the customary divorce has been propagated in the Padamshali samaj and there is substantive evidence of witness No. 5 & witness No. 8 as mentioned above. Though during the cross-examination of these witnesses it is brought on behalf of appellant-husband that there is no document to show that there was a custom of taking divorce by executing deed by mutual understanding, in all probabilities the said evidence is required to be taken to accept that there was dissolution of first marriage of respondent-wife and that she was divorcee when she registered her name with the Marriage Bureau and when appellant-husband approached her and her mother for getting married with her.

18. Otherwise also the defence on behalf of appellant-husband that the alleged divorce deed was a concocted one and that the evidence of witness Nos. 5 & 8 is partisan evidence, if accepted for the time being then it is to be presumed that a clever and indigenous methods were adopted by the wife, first to create the document of divorce deed with signatures of her first husband and of witness No. 8 and also to create a concocted document Exh.155 on the letter-head of the Padamshali Samaj, Vikroli and obtain signatures of witness Nos. 5 & 8. Otherwise also if a party wants to create a full proof concoction then the documents would be made without any lacunae. But this is not the case in the present matter considering the tenor of the divorce deed brought on record. Again considering the effect of these documents in the light of the substantive evidence of witness No. 1 i.e. wife and witness Nos. 5 & 8, in our considered view the defence as to concoction cannot sustain. In other words, it cannot be said that there was any error and illegality committed by the trial Court in arriving at the conclusion as to dissolution of the first marriage of respondent-wife.

19. Now coming to the second defence as to marriage between the parties to the present appeal not performed and not solemnized as per the Hindu Vedic rites, as mentioned earlier the substantive evidence of witness Nos. 1, 2, 3, 4 & 6 is required to be construed in detail.

20. At the cost of repetition, it must be mentioned that witness No. 1 is respondent-wife. Witness No. 2 is one Sarita Ankam, wife of brother of present respondent. Witness No. 3 is Smt. Nagmani Ankam, mother of present respondent. Witness No. 4 is Ravindra Ankam, brother of present respondent and witness No. 6 is the paternal aunt of respondent-wife. All these witnesses participated in the ceremony performed on 22.12.2000 at the flat on 5th floor at Dadar and according to them the marriage was performed between appellant-husband and respondent-wife in the presence of a priest and various photographs were taken,

some of them by witness No. 2, witness No. 4 and also by one Dr. Kiran Kamat - a relative of appellant-husband. All these witnesses have identified the said photographs which are nineteen in number which were produced during the trial. According to witness Nos. 1 & 4, after the marriage ceremony, they all family members along with appellant-husband and his relatives went to the Registrar of Marriage at Bandra. However, at the last moment, appellant-husband changed his mind that he will register the marriage later and thereafter they went to one hotel at Bandra and had meals and thereafter appellant-husband and respondent-wife came back to Dadar at their matrimonial home and rest other relatives of respondent-wife went to Andheri. Also according to the substantive evidence of witness No. 4, after the marriage he visited his sister at matrimonial home at Dadar on 2-3 occasions. As such, the substantive evidence of all these above referred witnesses go to show that there was performance of marriage as per the Hindu vedic rites. However, the marriage was not registered with the Sub-Registrar of Marriages but various photographs of the said ceremony were taken. On this aspect, much is argued on behalf of appellant-husband and the production of said photographs and showing of the same was vehemently objected during the trial except photograph at Sr. No. 1 - in which the present appellant-husband is shown along with respondent-wife and both having garlands around their necks, rest other photographs were denied mentioning that all these are the doctored photographs inasmuch as they have been got up by way of advance techniques. At this juncture itself, it must be mentioned that said photographs were produced before the trial Court along with the negatives and, in fact, out of 19 photographs one photograph has been accepted as depicting the presence of the parties. It is at Exhibit 178 in the record and proceedings. One more person is seen in the said photograph and he was apparently an electrician. According to appellant-husband this photograph was taken at the relevant day and time when there was only the ceremony of Gruha pravesha i.e. entering the new flat and nothing more than that. This defence of appellant-husband is required to be construed in juxtaposition of the situation that appellant-husband and respondent-wife are having garlands around their neck and even few other photographs, which are strongly objected, also show both the parties having garlands around their neck and also show various other relatives even including son of appellant-husband. Another factual position is also required to be construed, as mentioned earlier that, one electrician is seen in the admitted photograph Exh.178. However, to substantiate the defence said electrician has not been examined by appellant-husband in order to show that it was the ceremony of entering into the new house and nothing more than that, much less, ceremony of a marriage. Even at this juncture, it must be mentioned that said Dr. Kiran Kamat has also not been examined by appellant-husband to show that it was not at all a marriage performed between the parties on the relevant day and time. On this aspect, it is the defence of appellant-husband that said Dr. Kiran Kamat was never present at the said ceremony and had not taken said photographs as alleged by respondent-wife and her other relatives. Again non-examination of said Dr. Kiran

Kamat is definitely a mitigating circumstance to the defence of appellant-husband more so when it is brought on record during the evidence led on behalf of respondent-wife that said Dr. Kiran Kamat was instrumental in introducing the parties to witness No. 7 Dr. Surendranath Upadhyay. It must be mentioned at the cost of repetition that in the said hospital of Dr. Surendranath Upadhyay, there was a procedure adopted for medical termination of pregnancy and the parties were introduced to Dr. Surendranath Upadhyay by Dr. Kiran Kamat and apparently his name is appearing in the admission form and in the record of the said hospital. When these documents were brought before the Court being medical papers (Exh.129, 130 & 131), it was must for appellant-husband to examine said Dr. Kiran Kamat to negate the case of respondent-wife on both the counts i.e. on the presence of Dr. Kiran Kamat at the marriage ceremony and taking the photographs and also on the aspect as to introducing the parties to witness No. 7 Dr. Surendranath Upadhyay. Failure on the part of appellant-husband is definitely a circumstance against his defence.

21. Again on the aspect as to solemnization of the marriage between the parties, we have carefully gone through the reasoning given by the trial Court in arriving at the conclusion that whatever ceremony performed on the flat on relevant day and time was nothing but solemnization of the marriage between the parties. Accepting the evidence of admitted photograph and also the other photographs which are identified by the witnesses on behalf of wife, there is much substance in the arguments advanced on behalf of the wife that it was performance of the marriage as per Hindu vedic rites. On this aspect, we are not oblivious of the position that the actual photographs of the performance of the saptapadi around the sacred fire are not on record. In spite of such factual position, equally we cannot ignore the circumstances that in many of the photographs appellant-husband is shown feeding, probably some sweets, in the mouth of respondent-wife by his own hand. Moreover, there is a photograph of offering what is called as "oti" to respondent-wife. By any stretch of imagination it cannot be accepted that all these rituals were only for the purpose of "gruha pravesha" i.e. entering in the new residential premises. Also at the cost of repetition, it must be mentioned that in those photographs other persons, relatives from the side of respondent-wife are not seen having any garlands around their necks though it is categorical admission of appellant-husband that it was his custom to offer garland to every invitee on religious functions. In other words, it must be accepted that there was something special so far as appellant and respondent were concerned on that relevant day and we do not find any error in the finding arrived at by the trial Court that said occasion was the marriage and nothing else. Again on this aspect, it is significant to note that it is not the defence of appellant-husband that it was the ceremony of engagement between the parties and in that event garlanding each other, giving "oti" to respondent and giving sweets to her by appellant, could have been acceptable. Moreover this material is required to be viewed along with other circumstances that

admittedly after the said function of marriage, both the parties and their relatives had been to the office of the Registrar of Marriage at Bandra. Non-registration and backing off by appellant at the last moment will not be of such a significance so as to negate the case of respondent-wife as to solemnization of marriage between the parties.

22. Again on this aspect, admittedly a priest was present at the flat of appellant-husband on 22.12.2000. However, he has not been examined by appellant-husband and definitely it is one of the mitigating circumstances to his defence more so when said priest could have been brought before the trial Court by appellant-husband to substantiate his plea that said ceremony was only "gruha pravesh" and nothing more. Considering the material as available and as discussed above, it must be said that there is no substance in the said second defence that there was no marriage solemnized between the parties.

23. Now coming to the third defence as to no cohabitation between the parties as husband and wife and as to respondent never staying in the flat No. 15 as wife of appellant, there is substantive evidence of respondent-wife herself and that of witness No. 7 Dr. Surendranath Upadhyay. As discussed earlier, the substantive evidence of respondent-wife is pretty clear regarding her residing in the matrimonial home at flat No. 15 and was doing all the household work. Her other evidence is also discussed earlier regarding under which circumstances she was denied entry in flat No. 15 on 6.10.2001. Apart from this material on record, there is substantive evidence of witness No. 7 Dr. Upadhyay. It must be observed that said Dr. Upadhyay is an independent witness and admittedly there is nothing brought on record that he is a partisan witness to either party to the litigation. This witness a qualified gynecologist and M.D. Degree holder has also produced his registration certificate for doing the medical practice. Said certificate is Exh.126 before the Court. He had additional qualification as M.D.DGO and also produced certificate towards the same being Exh.127. He was running Navnirman Maternity and Surgical Hospital which was established in March, 2000. He had also produced the registration certificate of the hospital in original. The original was given back to him and xerox copy of the certificate of registration was marked as Exh.128 during the trial. He identified appellant as well as respondent as the persons attended his hospital together. According to him respondent had come to his hospital with a history of two months amenorrhea with bleeding per vaginum. He personally examined her and found that it was non-viable pregnancy. Said witness produced the medical case papers as mentioned above being Exh.129, 130, 131 and also produced the register of indoor patients of indoor admissions and also identified the relevant entry in respect of the respondent which was of the date 28.5.2001 at Sr. No. 1 with reference No. 01128. In the said register, the telephone number was mentioned under the column where patient's contact no is required to be mentioned. According to said witness in column No. 10, name of the referring doctor was mentioned and the said name is Dr. Kiran Kamat. According to said witness the

entries in the register were written by his staff. Said relevant page was taken on record as "Article 1" along with the first page of register as "Article 2" during the trial. This witness has also identified the discharge card given to the patient which is Exh.131 and admittedly in the handwriting of the said witness No. 7. We have observed that on very crucial aspect as to the appellant accompanying the respondent to the hospital and giving his consent for conducting the operating procedures under anesthesia, there is substantive evidence of said witness No. 7 which is reproduced hereunder with advantage:

6. On 28.5.2001 the petitioner was admitted in my hospital, at 8:15 a.m.. The husband of the petitioner accompanied her to my hospital. The respondent standing in the court is the same person who had accompanied the petitioner. The name and the signature of the petitioner is on the first page of examination record. I use to take signature as well as the thumb impression on the examination papers of the patient as well as the person accompanying the patient. Both the thumb impression and the signature of the petitioner are taken on this examination papers in my hospital. The second signature and thumb impression are of Shivanand Shanbag, who was accompanied with the petitioner. These signatures and thumb impressions of the patient and the person accompanying the patient on examination papers are taken in my presence. The address of the patient is written in the medical case record is as "7, Sawant Bhuvan, Gokuldas Pasta Road, Dadar (East), Mumbai - 400 014.

24. The contents of the above paragraph are self-explanatory and are clinching so far as the issue is concerned though this witness has been cross-examined on behalf of appellant-husband, it must be said that the above evidence has not been shaken in any manner thus resulting in the factual position that appellant-husband had accompanied the respondent-wife to hospital of witness No. 7 and he had given consent for the operative procedures to be done. This position is substantiated by another material available on record regarding opinion of the hand writing expert being Exh.160, which show that the questioned signatures i.e. Q1 to Q3 were of appellant-husband and which are appearing on the consent form. On this aspect, the contents of the handwriting expert's opinion can be reproduced with advantage as under:-

:: O P I N I O N ::

Resultant upon a careful examination, I am of the opinion that:

The Red-encircled signatures marked as Exhs.Q-1 to Q-3 when compared with those on the Exhs.S-1 to S-7 & N-1 to N-5 shows similarities which are indicating the common authorship of the Red-encircled signatures marked as Exhs.Q-1 to Q-3 with those on the Exhs.S-1 to S-7 & N-1 to N-5.

DT: 22/6/2004

Sd/-

(D.P. Ahiwale)

Addl. Chief State Examiner

of Documents, C.I.D., Maharashtra

State, Mumbai

25. In view of the above, though the trial Court had not placed reliance on such handwriting expert's opinion, in our considered view, the said opinion being the opinion given by an scientific expert was required to have been considered, more so in view of Section 14 of the Family Courts Act, 1984. All the same, it must be said that definitely there was marriage between the parties and respondent-wife was residing at the matrimonial home and was denied access to the same since 6.10.2001.

26. There is another reason for coming to the conclusion, as mentioned in the foregoing paragraphs, as though appellant-husband could have produced a better evidence to substantiate that respondent-wife was not his legally wedded wife, he could produce only the substantive evidence of witnesses on his side i.e. one milkman Sanjay Dubey and one neighbour Rajesh Solanki. So far as the milkman Sanjay Dubey is concerned, according to him he was supplying milk at the hotel of appellant-husband since last 15 years of his giving evidence and according to him in the flat only appellant and his two sons were residing and had never seen any woman in the said flat, more particularly by name Sujata. This witness has been cross-examined and certain discrepancies were brought on record on behalf of respondent-wife as to how long this witness was visiting the flat of appellant-husband for giving milk. Still accepting the evidence of this witness as truthful, still it cannot clinchingly lead us to the conclusion that no any woman was residing in the said flat as he had not seen her while giving milk daily in the morning. It is significant to note that the better evidence, as mentioned above, of any other person and mainly of the watchman of the building, could have been available to appellant-husband. Even on this aspect it was strongly argued on behalf of appellant-husband that respondent-wife failed to produce any such evidence as to anybody seeing her actually residing in the said flat. In order to appreciate this argument, it may not be lost sight of the fact that the marriage between the parties subsisted only for few months i.e. December, 2000 till October, 2001 and in fact she could not have been well-acquainted with any neighbours or watchman of the said building. As such, non-examination of any such witnesses by respondent-wife cannot be considered as a deficiency in her case to establish her stay in the house.

27. Apart from the above, as discussed earlier, regarding the substantive evidence of witness No. 7 Dr. Surendranath Upadhyay coupled with factual position of non-examination of Dr. Kiran Kamat, it must be said that the conduct of appellant-husband must be construed as that of husband accompanying his wife for the purpose of getting termination of pregnancy. Again on this aspect, it is argued on behalf of appellant-husband that the cause of such termination of pregnancy,

according to the respondent, was out of compulsion as appellant-husband allegedly told her not to have any issue as he had two sons from his earlier marriage. As against this, further argued that according to the substantive evidence of Dr. Surendranath Upadhyay, there was medical necessity for medical termination of pregnancy. Though this is an apparent position, still this aspect in itself is not sufficient to entertain doubt on the case of respondent-wife.

28. So far as the second witness examined by appellant-husband i.e. one neighbour Rajesh Solanki, his evidence is required to be viewed with much circumspection and caution. According to him, he had never seen any woman in the house of appellant-husband and, more particularly, a woman by name Sujata. This witness was cross-examined at length on behalf of respondent-wife. In paragraph No. 9 in the notes of evidence during cross-examination, he has admitted that he used to visit appellant-husband during night time after 10:00 p.m. and also used to visit alone and never visited the said house with his family. This answer is significant enough and when such a neighbour visiting at late night hours alone without any female member with him, hardly it can be expected that he would see presence of a female member from the family of appellant-husband. Again evidence of this witness cannot be a clinching evidence to accept that no woman was staying in the house of appellant-husband. Considering the above circumstances and the material available on record, we are of the considered view that the trial Court had not at all erred in appreciating the said evidence and coming to the conclusion as to desertion of respondent-wife from the matrimonial home from 6th October, 2001. Consequently, we hold that appellant-husband has failed in establishing his defences and there is no error committed by the trial Court in coming to the conclusion that the first divorce of respondent-wife was established, second marriage of respondent-wife with appellant-husband was established and stay of respondent-wife in the matrimonial home till 6th October, 2001 also established and since then she was denied access in the matrimonial home. In the result, there is no merit in both the appeals and the same are accordingly dismissed with costs.