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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.109 OF 2014

WITH

CIVIL APPLICATION NO.452 OF 2014

WITH

FAMILY COURT APPEAL NO.112 OF 2014

WITH

CIVIL APPLICATION NO.155 OF 2014

Mrs.Mahalaxmi Joginder Singh Kahaan	]	
Age 38 years, Residing at 1702-B,	]	
Great Eastern Garden, L.B.C. Marg,	]	
Kanjur Marg (W), Mumbai – 400 078.	]	..Appellant.

V/s.

1.	Mr.Johind Sing @ Joginder	]	
	Gurbachan Singh Kahan,	]	
	Age 52 years,	]	
		]	
2.	Ms.Harcharan Kaur,	]	
	Residing at 17/19A, Shiv Sagar	]	
	CHS, Shiv Puri Estate, Sion-	]	
	Trombay Road, Opp. Akbarllays,	]	
	Chembur, Mumbai-400 071.	]	..Respondents.

Mr.G.S.Godbole with Jui Kanade i/b. Praveen L. Singh for the Appellant.

Mr.R.T.Lalwani i/b. Jignesh Shah for the Respondents.

CORAM : SMT.V.K.TAHILRAMANI AND A.K. MENON, JJ.**RESERVED ON : 24TH DECEMBER, 2014.****PRONOUNCED ON : 30TH JANUARY, 2015.**

JUDGMENT (PER A.K. MENON, J.)

1. By this common judgment, we dispose off the above two family court appeals along with civil applications therein. The two appeals arise out of two petitions filed by the Appellant. Petition No.A-397 of 2003 (A-petition) was filed seeking a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. The Appellant and Respondent No.1 have two children. Both the parties have accepted the children were born to them out of their relationship. The Appellant / original petitioner has also sought maintenance from the Respondent No.1 for herself and for their two children apart from permanent alimony and costs of the litigation.

2. In the second petition namely Petition No.B-51 of 2004, the Appellant sought a declaration that she has equal share in the properties standing in the name of Respondent No.1 and permanent and temporary injunctions restraining the Respondent No.1 or any person acting on behalf his behalf from selling, disposing, transferring or creating any third party rights or interest of creating encumbrances in the properties without the express written consent of the Appellant. Lastly, the Appellant prays for appointment of Court Receiver in respect of the properties.

3. Both the petitions have been dismissed by a common order. The Respondent No.1 denied the fact of marriage between him and the Appellant. According to Respondent No.1, there was no marriage

between the Appellant and Respondent No.1 since Respondent No.1 was already married to Respondent No.2. According to the Appellant, he was living in adultery with Respondent No.2. Respondents claim that they were married on 27th March, 1974. It is in this background that the Family Court by the common impugned judgment and order rejected both the petitions.

4. Respondent No.1 in his written statement to the A-petition contended that he and the Appellant were not married but had lived together without getting married. Respondent No.1 claims the Appellant was working with him as a clerk and the Appellant was fully aware of the fact that Respondent No.1 was married. According to Respondent No.1, although two children were born out of the relationship, the parties were never married to each other. According to Respondent No.1, he had married Respondent No.2 on or about 27th March, 1974 and as they were unable to have a child till 1985, a male child was adopted under a deed of adoption.

5. As far as the second petition is concerned. It is the case of the Appellant that the properties were purchased in the name of Respondent No.1 with the funds of the Company, wherein Respondent No.1 and she were Directors. According to her, due to her contribution, the business resulted in substantial profits which in turn enabled Respondent No.1 to purchase the properties. She, therefore, claims that she had a equal right in the said properties listed in the scheduled A to the petition. It is the case of the Appellant that the properties were

purchased in the name of Respondent No.1 with the funds of the Company, wherein Respondent No.1 and she were Directors. According to her, due to her contribution, the business resulted in substantial profits which in turn enabled Respondent No.1 to purchase the properties. She, therefore, claims that she had a equal right in the said properties listed in the scheduled A to the petition.

6. Respondent No.1 denies the Appellant's entitlement to any reliefs. He contended that there is a specific prohibition against filing of any such proceedings under the Benami Transactions (Prohibition) Act, 1988. According to him, some of the properties have already been sold or otherwise dealt with prior to the date of filing the proceeding and in any event, the claim of the Appellant was unsustainable on her own showing since none of the properties were purchased in her name or showed her as a co-owner. He has also contended that the Family Court did not have jurisdiction to entertain Petition B since the properties were situate in different jurisdictions.

THE EVIDENCE

7. Evidence led is common in both the matters. The Appellant has deposed that she was married with Respondent No.1 then a bachelor, on 17th May, 1985 at Chakala, Andheri (E), Mumbai but the marriage was not registered. Both their children are now majors, the daughter is 24 years of age and the son is 22 years of age. According to the Appellant, her marriage, was performed in haste and hence only three friends attended their marriage while none of her relatives attended the

marriage, as they were against it. The Appellant has deposed about co-habitation initially at Kurla and then at Bangalore. On 8th April, 1986 a daughter was born and it was only thereafter, that the Respondent No.1 informed his parents about the marriage, who then visited Bangalore and took the Appellant to their house at Jhansi, U.P. where she stayed for four months. She then co-habited with Respondent No.1 in Mumbai where the second child was born to them on 1st July, 1988.

8. The Appellant has participated in the business of Respondent No.1 sharing his burden at office. According to her, she was a Director of the company holding 50% shares. She has deposed that there were immovable properties at various places in India and they had created a large stock of investments. She deposed that one of the house at Munjal Nagar, Chembur was purchased exclusively in her name particularly from the funds of the company. She deposed that till June, 2000 the relationship was proceeding smoothly. Respondent No.1 then met with an accident which resulted in hospitalization and surgery. At the relevant time she signed the consent for the surgery form as his wife. She deposed that she was single handedly looking after the business for more than three months when Respondent No.1 was hospitalized.

9. While the first Respondent was hospitalized, the second Respondent started visiting him and on one such visit, she questioned her identity and Respondent No.2 claimed to be the wife of first Respondent. The Appellant then confronted Respondent No.1 who started harassing the Appellant. Various instances have been cited.

Meanwhile, the Appellant and Respondent No.1 shifted to a new house in August, 2000, but differences arose between them as a result of which, the relationship between them was strained. The Appellant has further deposed that despite the differences, the first Respondent had taken her to Nagpur when his mother had taken ill and subsequently expired. Respondent No.2 was nowhere in the picture at that time. Appellant further deposed that no sooner her mother-in-law expired, Respondent No.1 told the Appellant that she should not attend the office in future.

10. The alleged harassment at the hands of Respondent No.1 resulted in her causing an Advocate's notice to be issued to Respondent No.1 on 15th November, 2002, in which she contended that she was abused and threatened by Respondent No.1. She also deposed of the fact that the property purchased was purchased from her funds as well and that she funded her daughter's marriage from her own earnings.

11. The Appellant has also examined Mrs.Ujjwala Vijay Chavan, Mr.Ganesh @ Rajan Sitaram Mathonkar and Mrs.Vidya Krishna Shastri, one of the sisters of Appellant. These witnesses have deposed in support of the Appellant's case. Mrs. Chavan deposed that the Appellant came to her house before marriage and gave her an invitation card and requested her to attend the marriage. The said witness accompanied by one Rajan Matondkar attended the wedding and according to her about 15/20 persons were present on behalf of Respondent No.1. The second witness Ganesh also deposed that he attended the wedding of the Appellant after he received the invitation card and he along with three other friends were

present at the wedding. The Appellant's sister has deposed that she came to know through a common friend that the Appellant was married on 17th May, 1985. She does not claim any personal knowledge.

12. The Appellant has also examined one Mrs.Varsha Dhumal employee of the Respondent No.1, who deposed to the fact that she was working in the office of Respondent No.1. She also deposed that the Appellant and Respondent No.1 purchased a new house at Great Eastern Gardens and that when Respondent No.1 was hospitalized, the Appellant handled the entire business alone. The Appellant's daughter has also deposed to the effect that the Appellant and Respondent No.1 were doing business together. The Appellant also used to take care of their studies and also used to attend to Respondent No.1 including when he was hospitalized. Later, she has deposed that they all shifted to the new house. The disputes started between the Appellant and Respondent No.1 with regard to his illicit relations with Respondent No.2. She also deposed to the effect that Respondent No.1 started beating the Appellant. According to her, Respondent No.1 had never bothered to help them or even bothered to enquire about the welfare of the said witness and her brother, both of whom are admittedly the children of Respondent No.1.

13. Respondent No.1 has also filed his affidavit of evidence in which he has deposed that there has been no marriage between the Appellant and him. He has deposed that there are no "Sikh Hindu Vedic rites" and no such marriage has been performed either under Hindu Vedic

rites or Sikh rites. He further deposed that no marriage was solemnized in a Gurudwara. The Gurudwara maintains records which shows the names entries of the name of bride and bridegroom and there is no such record of the marriage between Respondent No.1 and the Appellant on 17th May, 1985. He further deposed that he was running a proprietary concern. He contended that the invitation card filed by the Appellant is fabricated and no card has been prepared. He further deposed that he was married to Respondent No.2 on 24th March, 1974 at Orcha, Dist. Jhansi (U.P.). On his request, Pandit Chandrakant Tiwari has issued a letter dated 16th March, 2003 that the marriage was solemnized between him and Respondent No.2.

14. He further deposed that at the time of marriage, he was in service in the police department and was posted at Jhansi and Respondent No.2 was in service with Central Railway. He deposed that Respondent No.2 joined services on 5th March, 1973 and continued to be in service till 30th November, 2002. He relied upon some documentary evidence in support of his contention that his name is shown as husband of Respondent No.2 in the railway medical identity card and in the pension payment order of Respondent No.2, Respondent No.1 is shown as the nominee. He deposed that he went to Mumbai along with his wife Respondent No.2 and was accommodated by one Suhash Kolbekar, who is his brother-in-law (sister's husband) at Naik Nagar CHS, Flat No.22, Barve Marg, Mumbai. His name and the name of Respondent No.2 were recorded in the ration card of his brother-in-law's family. He then rented a accommodation where he, his wife and adopted son were residing. He

has deposed that he had taken out insurance policies in the year 1987 and 1988 and the nominee in the policy was Respondent No.2 and Respondent Nos.1 & 2 resided at the address shown in the policies. He further deposed that he alone had paid for various properties purchased in his name, including the flat at Kanjur Marg, Mumbai which was purchased in the name of Appellant. Respondent No.1 has been extensively cross examined running into 886 questions and answers.

15. Respondent No.2 has also deposed to the above and she was cross examined. Respondent No.2 in her evidence has deposed that she is living as wife of Respondent No.1. Her marriage was solemnized at Orchha, Dist. Jhansi, U.P. at Ram Raja Mandir by Pandit Chandrakant Tiwari. She has deposed that at the time of the marriage, Respondent himself, her uncle, close relatives and friends were present. The marriage was performed by her uncle since her parents were no more. Respondent No.2 has further deposed that at the time of her wedding, the invitation cards were printed but the copies were not preserved. The photographs of the marriage were taken but none were available. She contends that marriage between her and Respondent No.1 was performed by taking seven steps around the sacred fire as per Hindu rituals although both the Respondents were following Sikh religion. She was in the employment of Central Railway from 5th March, 1973 till she retired on 30th November, 2011. She has also stated that she was provided railway medical attendance identity card and the certificate was issued by the Railway medical Department, C.S.T., Mumbai. She also relied upon the document known as family identity card. She has relied

on the Railway Employees Liberalized Health Scheme, which according to her entitles her, her husband, her adopted son for medical treatment. Furthermore, she has deposed that in the Pension Order, Respondent No.1 is shown as the nominee to receive the pension in case of her death. She also relied upon the document known as family identity card. She has relied on the Railway Employees Furthermore, she has deposed that in the Pension Order, Respondent No.1 is shown as the nominee to receive the pension in case of her death. These documents were marked and exhibited in evidence since according to the Family court, they were public document. We are not in agreement with the view that the documents admitted in evidence was public document and merely because it is issued by a public body, it does not constitute them public documents. Respondent No.2 has relied on the first class railway pass issued to Respondent No.1 which according to her, he was entitled to get free being her husband.

16. She deposed that she has purchased a flat at Building No.17, B-wing, Flat No.19, Ground floor, Shivsagar CHS, Shivpuri Colony, Sion-Trombay Road, Chembur, Mumbai and along with her husband and son has been residing at the aforesaid address. She has also deposed that there is no marriage between the Appellant and her husband and that the allegations of the Appellant that Respondent No.1 married her is false. She has deposed that the Appellant was aware of the fact that as on the date of filing the petition, Respondent Nos.1 & 2 were husband and wife though she has adopted a son by name Paramjeetsingh who was the natural son of the sister of Respondent No.1.

17. In the cross-examination of Respondent No.2, she admitted that her marriage was an arranged marriage and contended that the marriage was conducted according to the Hindu rites and rituals. She has admitted that both she and Respondent No.1 were Sikh by birth and they have not converted from Sikh to Hinduism. Since her parents had died a year before the marriage, her aunt and uncle decided that their marriage is to be solemnized as per Hindu rites. Documentary evidence is sought to be adduced in the form of a certificate of marriage. She deposed that Respondent No.1 had an adopted son. Strangely, she has deposed that she could not identify the sisters of Respondent No.1. She has deposed that Respondent No.1 was suffering from heart disease. She was unable to produce any documentary evidence to show that in the span of 1995-2000, Respondent No.1 was treated at the hands of any doctor.

18. She has deposed that she held a passport but was not willing to produce the same even if she was called upon to produce it. When confronted with the interpolation in the identify card, she denied the suggestion that the handwriting and ink in which her surname is written are totally different. She denies that at the time of issuance of the certificate, her surname Kahan was not there. She deposed that she had changed her name from Kaur to Kahan in the year 1974-75.

19. She has further deposed that she is not holding any documentary evidence to show that between 1974 to 1987 she had made Respondent No.1 as his nominee. She admitted that she is holding

property at Mankhurd and Dhankawadi, Pune. She has further deposed that although, she herself has admitted Respondent No.1 to Lilawati hospital, she had not filed any documentary evidence to show that she had admitted Respondent No.1 in the hospital. She admitted that she has no receipt to show that at the time of admission, she had deposited ₹50,000/- in the hospital. She admitted that she has no documents to show that she had paid the hospital charges for the treatment of Respondent No.1. She admitted that entire hospital charges was ₹2,65,000/-. She admits that at the time of the accident, Respondent No.1 was residing at Kanjur Marg, Mumbai. She has denied the suggestion that during the course of treatment at Lilavati Hospital, the Appellant's children had taken care of Respondent no.1. She has not described the business of Respondent No.1 and she is also not aware of her share holding in the business of Respondent No.1.

SUBMISSIONS

20. Mr.Godbole, learned counsel appearing for the Appellant submitted that his first endeavour would be to establish that Respondent No.1 was not married to Respondent No.2. He contended that once this aspect was established, the Impugned judgment cannot be sustained since learned Judge of the Family Court had proceeded to reject the claim of the Appellant only on the basis that the first Respondent and the second Respondent were married and as a result, there could not be any valid marriage between Respondent No.1 and the Appellant. He contended that there is no place known as Orchha in Dist. Jhansi in Uttar Pradesh. According to him, Orchha is a place in Madhya Pradesh.

Referring to the certificate of registration of marriage, he submitted that the registration has allegedly taken place 30 years and one month after the date of the alleged marriage and the said registration is alleged to have been recorded at Jhansi in U.P. after the matrimonial petition was filed and after the service of notice.

21. This aspect, according to Mr. Godbole speaks volumes about the validity of the marriage. He submitted with reference to the certificate of marriage that it does not have any official seal/emblem of the State. He submitted that though the Registrar is described as a Registrar of Hindu Marriages, Jhansi Region, there is no way of identifying the signatory. We have perused the record and find that the so called certificate of marriage appears to be a photocopy of a blank certificate on a white sheet of A-4 size paper which has been filled in by hand. Having perused the evidence on record, we are not impressed with the same. It is highly unlikely that such a certificate would be issued on a photocopy of white paper. Moreover the document was not proved. He submitted that although a certificate has been produced, the certificate it has not been proved and there is no basis for exhibiting it. He questioned the trial Court decision in exhibiting the document. The document had not even been proved and it not ought to have been admitted in evidence. We agree. Having examined the original produced before us, we believe it to be a got up document, lacking authenticity.

22. He then invited our attention to the answer to question No.800 in the cross examination wherein Respondent No.1 has stated

that he joined the police department in the year 1972 and left in the year 1978. He admitted that he did not incorporate the name of Respondent No.2 as his nominee in his service record and he could not provide any reason as to why her name was not incorporated. Mr. Godbole submitted that although Respondent No.1 relied upon the ration card issued to the Kolbekar family in support of his contention that he along with Respondent No.2 resided as husband and wife, no attempt has been made to examine the members of the Suhash Kolbekar family in whose ration card, Respondents name is said to have been entered.

23. With specific reference to the cross-examination of Respondent No.2. Mr. Godbole submitted that there are only a few documents which the Respondents rely upon in support of the factum of marriage, viz. (i) the Service Certificate issued to Respondent No.2 dated 30th November, 2002 by the Divisional Manager, Mumbai CST; (ii) the certificate dated 19th November, 2002 issued by the Central Railway, (iii) copies of the Medical Identity Card (Exhibits-pages 236, 237 & 150] and (iv) the copies of two LIC policy issued to Respondent No.1 which shows the name of Respondent No.2 as the wife and nominee of Respondent No.1. Mr.Godbole submits that there is also Exhibit B-86 which is a part of the record and proceedings which reveals that in the seniority list of the Central Railway, the surname of Respondent No.2 is not mentioned as 'Kahan' but 'Kaur'. He submitted that in the cross-examination of Respondent No.2, she has deposed that her name was shown as Kahan in the year 1974-75. Mr.Godbole submitted that the aforesaid documents did not establish the fact the wedding in the year 1974-75. He reiterated

that the Marriage Certificate Exhibit-239 is clearly a got up document. As far as the two certificates issued by the Railways are concerned, they were issued on 30th November, 2002 and 19th December, 2002 i.e. after the filing of the divorce petition in the Family Court and is, therefore, of no consequence. He has further submitted that Exhibit-237 being a medical attendance identity card, the word '*Kahan*' has been inserted by way of interpolation as evident from the document itself.

24. We have perused the evidence and are of the opinion that the surname in the medical attendance identity card as originally issued by the Central Railway appears to be "*Harcharan Kaur*" and the word "*Kahan*" seems to be inserted subsequently. As far as Exhibit 160 and 161 are concerned, it is a policy taken out in the year 1987 and it seems to have matured in the year 2007. Even in this policy, the name of Respondent No.2 is mentioned as Harcharan Kaur. However, we observe that Smt. Harcharan Kaur has been referred to as wife. The endorsement that the sister of Respondent No.2 has witnessed the endorsement on the policy has not been denied but this document does not appear to have been proved. The evidence is not sufficient to attribute knowledge of Respondent No.1's marriage to the sister of the Appellant or to be treated as evidence of marriage between Respondent Nos.1 and 2.

25. Mr.Godbole submitted that there is absolutely no evidence of marriage having taken place in 1974 between Respondent Nos.1 & 2. He submits that neither the priest nor any witness to the wedding were examined. He submitted that Respondent No.1 was unaware of the

demise of the mother-in-law of Respondent No.2, failed and refused to produce her passport, Respondent No.2 failed to produce the ration card, there is no photograph or any document wherein the factum of marriage could be established. As a result, he submitted that an adverse inference ought to be drawn on account of such failure. Mr.Godbole further submitted that that there is no evidence of any co-habitation between the two. He then made a reference to the examination-in-chief of the Appellant wherein she deposed that the brother and sister were also not knowing about the marriage as on the date of marriage and no relatives of Respondent No.1 were present. Mr.Godbole also pointed out to the examination-in-chief of one Ujwala Chavan, who is a friend of the Appellant and she has deposed that in the year 1985 the Appellant started working with Respondent No.1 and was planning to get marriage but the parents of the Appellant were not approved of the marriage. She further deposed that she was invited for the marriage and she had been along with Rajan Matondkar and Diana Periera had attended the marriage. That in the year 2000 the Appellant had once visited her and informed her that Respondent No.1 was having an affair with one Harcharan Kaur, Respondent No.2 and also complained that Respondent No.1 was physically assaulting her.

26. On the issue of cruelty, Mr.Godbole submitted that the Appellant has led considerable amount of evidence on the aspect of cruelty, but the same has been discarded by the Family Court on the basis that the marriage itself was void. In this view of the matter, there was no finding by the Family Court on the aspect of cruelty. Mr.Godbole

then adverted to the issue of jurisdiction. He submitted that the Family Court did have jurisdiction to entertain the try the petition by virtue of section 7 of the Family Court and Section 7 of the C.P.C. Mr. Godbole submitted that the averments in the petition make it clear that both the Appellant and Respondent No.1 are Hindu / Sikh by birth and they are domiciled in the State of Maharashtra. Apropos, the issue of jurisdiction, he submitted most of the properties were in Mumbai and Respondent No.1 was in Mumbai and the application was, therefore, maintainable in the Family Court at Mumbai and the relief sought for is in the nature of personal obedience. He relied upon the averments of jurisdiction in the petition filed by the Appellant in particular paragraph 37 of the petition, wherein the Appellant has averred that the marriage between the Appellant and Respondent No.1 was solemnized at Mumbai and the marriage was consummated and the parties co-habited in Mumbai only where they stayed under one roof as husband and wife. Similarly, in the petition for divorce also in paragraph 36, identical averments has been made by the Appellant.

27. Mr. Godbole then submitted that the only challenge to the jurisdiction of the Family Court is seen in the written statement wherein Respondent No.1 contended that the Court has no jurisdiction and that the application did not fall into any category of inquiry provided under the provisions of the Hindu Marriage Act, 1955. Mr. Godbole then relied upon the provisions of section 16 of the C.P.C. and the proviso therein and submitted that no relief was sought in respect of the property under Section 16(a) to (f) so as to require the proceedings to be instituted

before a local Court within whose jurisdiction the property is situated. In the present case, reliefs sought was by way of personal obedience of respondent No.1.

28. Mr. Godbole further submitted that in the Family Court, by virtue of the provisions of section 7 and 20 of the Family Courts Act, the Family Court can decide all issues pertaining to the properties, existing and acquired after the marriage. Mr. Godbole then invited our attention to the decision of the Supreme Court in the matter of **Piya Mutyalamma @ Satyavathi V/s. Pyla Suri Demudu & Anr.** reported in **(2001) 12 Supreme Court Cases 189** and submitted that as far as maintenance is concerned, cohabitation continuously for a long number of years leads to the presumption that marriage between two persons and not concubinage. Referring to the paragraphs 1, 2, 11, 12 & 19 of the judgment, Mr. Godbole submitted that even assuming while denying that there was a marriage between the Respondents inter se and the second marriage is void, the law presumes in favour of the marriage and against the concubinage when a man and woman have cohabited continuously for a long number of years. He submitted that the Appellant and Respondent No.1 had also two children in the course of their relations. He further submitted that as laid down in the said judgment, when attempt is made by Respondent No.1 to negative the claim of the Appellant on the plea that he was married, the Court would insist on strict proof of the earlier marriage and it is intended to protect the women and children from living as destitute.

29. He submitted that in paragraphs 11 & 12, the Apex Court refers to the decision of *Vimala V/s. Veeraswamy* wherein the learned the judges of the Supreme Court held that when a husband takes a plea that the marriage was void due to subsistence of an earlier marriage, the same requires clear and strict proof and the burden of proof of earlier marriage is on the husband to discharge. The Apex Court further held that proof and evidence of subsistence of an earlier marriage has to be adduced by the husband taking the plea of subsistence of an earlier marriage and when a plea of a subsisting marriage is raised by the husband, it has to be satisfactorily proved by tendering evidence. Hence Mr.Godbole submitted that in the present case, the Respondent No.1 has failed to establish his plea that an earlier marriage was subsisting as made in the case before the Supreme Court.

30. Mr.Godbole then referred to the judgment of the Apex Court in **Deoki Panjhiyara V/s. Shashi Bhushan Narayan Azad & Anr.** reported in **(2013) 3 Supreme Court Cases 137**. In that case, the Supreme Court held that until the invalidation of the marriage between the parties is made by a competent Court, it would be only correct to proceed on the basis that the the Appellant continues to be the wife of the Respondent so as to entitled her to claim all benefits and protection available under the D.V. Act, 2005. He submitted that determination of the validity of marriage between the parties could have been made only by a competent Court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under section 13 of the Special

Marriage Act, 1954 in support of the claim first marriage was not sufficient to for any of the Courts including the High Court to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance.

31. Mr.Godbole then referred to the decision of **Tulsa & Ors. V/s. Durghatiya & Ors.** reported in **(2008) 4 Supreme Court Cases 520** and submitted that by virtue of section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have occurred. In the instant case it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of the parties as they are borne out by the facts of this particular case. The Supreme Court in the judgment also referred to a case of *Mohabbat Ali Khan V. Mohd. Ibrahim Khan* wherein it was held that where the partners lived together for long spell as husband man wife, there would be presumption in favour of wedlock. The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. The Supreme Court also referred to the judgment of *Gokul Chand V. Pravin Kumari [A.I.R. 1952 SC 231]* and observed that continuous cohabitation of man and woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

32. Mr.Godbole, then referred to the decision of **M. Yogendra & Ors. V/s. Leelama N & Ors.** reported in **(2009) 15 Supreme Court Cases, 184** which once again referred to the decision of of *Tulsa V/s. Durghatiya* (supra). The Court held that evidence in different forms may be adduced. Information evidence may be one of them but for the purpose of arriving at a conclusion as to whether a valid marriage has been performed or not, the Court would be entitled to consider the circumstances thereof. There maybe a case where witnesses to the marriage are not available or documentary evidence to prove the marriage is not available. Thus, in these circumstances, the information of those persons who had the occasion to see the conduct of the parties, they may testify with regard to the opinion they form probably from the conduct the persons concerned. It is submitted that in this case none of this was done.

33. Mr.Godbole then relied on the decision of the Apoex Court in the case of **S.P.S.Balasubramanyam V/s. Suruttayan @ Andali Padyachi & Ors.** reported in **(1994) 1 Supreme Court Cases, 460** and submitted that in the said judgment also, the Supreme Court has said that such presumption is rebuttable in law of legality of marriage existing between the parties and referred to *Gokal Chand* (supra).

34. In support of his case under section 7 of the Family Courts Act, he relied upon the decision of this Court in **Romila Jaidev Shroff V/s. Jaidev Rajnikant Shroff** reported in **2000(4) Bom. C.R. 122** and submitted that the litigation before the Family Court is a mixture of

inquisitorial trial, participatory form of grievance redressal and adversarial trial and the Family Court has to decide mixture of all three of them with the power to proceed under any one of them. He then relied upon the decision of **Sangeeta B. Kadam V/s. Balkrishna Ramchandra Kadam** reported in **2005 (2) Bom C.R. 515** wherein the High Court has remanded the matter to the Family Court to deal with the issue under section 27 of the Hindu Marriage Act about the disposal of property. He once again submitted that under section 27 of the Hindu Marriage Act, the Court may bring in the properties presented at the time of marriage which belongs to both husband and wife. Mr. Godbole submitted that the Family Court is vested with wider jurisdiction and even the properties which would fall under Explanation (c) of section 7(1) (c) of the Family Courts Act, 1984.

35. Mr. Godbole then relied upon the judgment of a single Judge of this Court in the case of **Sudipta Sanjee b Chakraborty V/s. Sanjeeb Chakraborty** reported in **2009 (2) Bom. C.R. 647** in which it is held that no injunction or relief as prayed in interim application to immovable property situated at Pune can be granted by a Family Court at Bandra, Mumbai.

36. He then relied upon the decision of the **Shabana Bano V/s. Imran Khan** reported in **(2010)1 Supreme Court Cases, 666** and relied upon the said objections to the effect that the Family Court Act, 1984 is enacted with effect from 14th September, 1984 a view to promote conciliation in and secure speedy settlement of disputes relating to

marriage and family affairs and matters connected with it. The purpose of the enactment was essentially to set up Family Courts for the settlement family disputes, emphasising on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. It is submitted that a bare perusal of section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have an overriding effect over all other enactments. He, therefore, submitted that there may be no doubt of the fact that the jurisdiction of the Family Court is all pervasive in the instant case.

37. Lastly, Mr. Godbole relied upon the judgment of **Jaishree Mohan Otavnekar V/s. Mohan Govind Otavnekar** reported in **1987 MH. L.J. 160** in which he pointed out that the Court had the occasion to consider whether the allegation resulted in the mental agony to the wife, the Court held that although such form of mental agony is not the subject matter of the pleadings, such allegations from the very nature of the things could not have been raised in the petition since it is the form of cruelty which is not imperative in such matters. In that case, the Court was referring to the allegations of adultery by the petitioner-wife. In the present case, the contention of the respondent No.1 that the appellant and he were merely living together they were not married. Thus, the imputation was alluding to immoral behaviour.

38. Mr. Lalwani on behalf of Respondents submitted that the properties which are the subject matter of the petition being outside the jurisdiction of the Family Court, the Family Court at Bandra was not

competent to adjudicate upon the same. He then submitted that the Family Court Act is silent on the territorial jurisdiction and we have to read section 7 along with section 10 and that if we go only by section 7, we will need to include the provision of section 16 of the C.P.C.

39. According to Mr.Lalwani, section 27 of the Hindu Marriage Act is the only substantive provision of law under which the right of the parties could be determined. He submitted that the Family Court Act is only procedural and in fact demonstrated that the Appellant is entitled to file and seek relief by filing a suit under substantive law. He further submitted that in the facts of the present case only the Specific Relief Act would apply and the Appellant cannot take recourse to the Family Court for seeking the reliefs sought. He submitted that only if the reliefs are restricted to the personal obedience of the parties, the proviso to Section 16 of the C.P.C. would apply. He further submitted that the contention of the Appellant was unsustainable since they were also impacted by sections 3 & 4 of the Benami Transactions Act. In his next submission, Mr.Lalwani contended that the claim of the Appellant was clearly barred by the law of limitation it being filed after three years from the date of cause of action which according to him arose in 1999.

40. In his next line of argument, Mr. Lalwani submitted that the trial court had correctly observed that the marriage between Respondent Nos.1 & 2 would have taken place in a Gurudwara only under the Anand Marriage Act which applied only to Sikhs. The Appellant should not have married Respondent No.1 at a Gurudwara since she was admittedly a Tamil

Brahmin. On the fact of marriage, Mr.Lalwani submitted that the Respondents have marriage certificate and submitted in support thereof but there is no requirement of the scheme of law to validate the marriage certificate. According to him, the marriage certificate was genuine and valid. He also sought to dispel all doubts about location Orchha in Jhansi. He submitted that Orchha was in Dist. Jhansi and Jhansi was border District of U.P. and M.P. He further submitted that presumption if any is in favour of the Respondents and it is for the Appellant to prove the fact of their marriage. He makes a specific reference to paragraph 26 the cross-examination which reveals the following deposition *"I know the respondent No.2 i.e. Harcharan Kaur since the year 2000. For the first time in my life, I saw the respondent No.2 in the year 2000 at Leelawati Hospital, Mumbai. For the first time, I heard about respondent No.2 in the hospital itself."* Making reference to the documents, he submitted that the documents in Exhibits 235, 236 and 237 all have been proved and the claim of marriage was genuine. He was now retired and at that time, service record shows that the Respondent No.2 was the wife of Respondent No.1. He then relied upon Exhibits-160 and 161 being copies of the LIC policies where the name of Respondent No.2 is shown as the nominee and described as the wife. He then relied upon the documents at Exhibit 240, 241, 243 and 251 in support of the contentions that there was a valid and subsisting marriage between the Respondents inter se. He then relies upon the railway medical identity card, ration card of the Kolbekar family and photographs in respect of his contention that the marriage is subsisting.

41. He further relied on paragraphs 17 and 18 of the petition for divorce in support of his contention that the Appellant's case is unbelievable. According to the Appellant, it was a shock to the Appellant when she learnt that Respondent No.2 claimed to be the wife of Respondent No.1 which she had never known earlier. Learned counsel further submitted that the marriage of the first Appellant and the first Respondent never took place. The pleadings and the deposition of the Appellant reveals that the marriage is said to have taken place in haste and, therefore, no photographs were taken and no relatives were present but only friends from both the sides and some relatives of Respondent No.1 attended the marriage.

42. In such circumstances according to Mr. Lalwani, it is difficult to believe that the Appellant and Respondent No.1 had printed wedding invitation cards. According to Mr.Lalwani, the invitation card relied upon by the Appellant is fabricated only for creating evidence of marriage, otherwise, there is no reason why invitation card was printed but not distributed. He further submitted that the telephone number printed on the invitation card is also not correct inasmuch as, at the time of the marriage, the number had changed. He then referred to the letter written in respect of the letter dated 30th November, 2011 sent by Respondent No.1 to Gurudwara Sri Guru Nanak enquiring whether the date of the alleged married solemnized on 17th May, 1985 is reflected in their record. He also relied upon the reply dated 16th December, 2011 said to be received by Respondent No.1 wherein it is set out that the religious marriage conducted at the Gurdwara as per Sikh Hindu Vedic Rites that

they have started solemnizing marriages only from 1st January, 1990. Relying upon these letters, it is submitted that there is no possibility of marriage having taken place at the said Gurdwara on 17th May, 1985. He, therefore, contended that the entire case of the Appellant based on the marriage is a figment of her imagination. Mr. Lalwani further submitted that it is pertinent to that the Appellant did not make any efforts to summon anybody from the Gurudwara to establish her claim of marriage on 17th May, 1985. He submitted that the Appellant has failed to prove that marriage took place at Guru Nanak Gurudwara, Shere-e-Punjab Colony, Mahakali Caves, Andheri (E), Mumbai.

43. He referred to the examination-in-chief of the Appellant and submitted that there is no evidence whatsoever in the affidavit of the endure of the nature of ceremonies that were conducted at the time of marriage. He referred to the cross-examination of the Appellant in particular para 28 of her deposition. She has deposed that she is aware of the ceremonies to be performed for a marriage amongst the Hindus and it is true that for a marriage in Hindu religion, '*saptapadi*' has to be undergone and there is also necessity of '*Kanyadaan*' to be performed by the parents of the bride. She has further admitted in her cross examination at para 33 that no '*kanyadaan*' has taken place at the time of her marriage. She further deposed that her parents were not knowing about the marriage. Although her brother and sister were available in Mumbai at the time of marriage, they were also not knowing about the marriage. No relative of Respondent No.1 was present. Mr. Lalwani submitted that her evidence cannot be believed in view of the fact that in

her examination-in-chief, she has clearly stated that only the relatives of Respondent No.1 had attended the marriage. Mr. Lalwani then referred to the cross-examination of Mrs.Ganesh Matondkar and others, none of whom have proved the marriage. In fact, the only proof of marriage being produced by the Appellant is the wedding invitation card, a highly questionable document.

44. Mr.Lalwani stressed upon the fact that the Appellant was always aware that Respondent Nos.1 & 2 were married. Even assuming that the marriage between Respondent Nos.1 & 2 is not proved, cohabitation of Respondent Nos.1 & 2 clearly establishes that there is a presumption in favour of the marriage rather than against it. He then referred to the Appellant's cross-examination at para 50 wherein the Appellant admits that after 1985 she opened a bank account showing her status as unmarried. She admits that she does not recollect the name of the bank and the said account was closed some time in the year 1986-87. She further admits that to have raised a loan in October, 2006 in her maiden name and cheques for repayment issued by her in her maiden name. On the aspect of maintenance, Mr.Lalwani submitted that although no marriage took place between Respondent No.1 and the Appellant, Respondent No.1 has sufficiently provided for the Appellant by transferring the property a Vallabh Baug Lane, Ghatkopar (E), Mumbai in her name. She has admitted in para 39 of her cross -examination that she was receiving rent from the said premises. She also admits that she was doing business and having income from the business. She also has a property at Nagpur which she claims to have purchased from her own

income from the company in which she and Respondent No.1 were working. She denies that Respondent No.1 has any share in the Nagpur property which is purchased by her out of her own income, therefore, Mr.Lalwani submits that she is not entitled to maintenance.

45. Mr.Lalwani submitted that marriage of Respondent Nos. 1 & 2 had been proved beyond reasonable doubt, there was no question of granting any relief to the Appellant in the divorce petition. He, therefore, supported the impugned order as being correct. As regards the claim in respect of the properties, the Appellant has claimed reliefs in respect of the properties. He submitted that the Appellant has properties which were purchased from the company where she was working. However, there is no evidence to show that she has a share in the company owned properties. He submitted that there is no dispute regarding the fact that the properties were owned by the company and the company had paid for it. He submitted that the Appellant has no evidence on the basis of which she could claim that the properties were bought out of the funds that she contributed. Mr.Lalwani referred to para 63 of her cross-examination wherein she has stated regarding the company's affairs, there was a dispute between the Appellant and Respondent No.1 pending before the Company Law Board. Similarly, a dispute is pending regarding the Nagpur property in Civil Court at Nagpur. He, therefore, submitted that there was a serious dispute as to the entitlement of the Appellant in her individual capacity to the said properties. In any event, Mr.Lalwani submitted that the properties were purchased from the company's account. Admittedly, the properties are not bought in the name of the

Appellant. She only claimed equal share in the properties by virtue of her own unestablished claim that consideration was paid by the company from the accounts of the company and she had equally contributed to the company.

46. Mr. Lalwani then invited our attention to the title of the petition and submitted that the petition was filed under section 27 of the Hindu Marriage Act and section 7(1)(d) of the Family Courts Act, 1984, therefore, according to him, it is inter alia evident of the fact that the Appellant has substantively filed the petition under Hindu Marriage Act. According to him, the Family Court Act is a mere procedural legislation. He disagreed with the submission of Mr. Godbole to the effect that the Appellant's case would not fall under section 27 of the Hindu Marriage Act but only section 7 of the Family Courts Act.

47. He refers to the judgment of the Supreme Court in the case of Balkrishna Ramchandra Kadam V/s. Sangeeta Balkrishna Kadam reported in (1997) 7 Supreme Court Cases, 500 wherein the Supreme Court had the occasion to deal with the scope of section 27 by observing that under the provisions of section 27 jurisdiction with respect to the claim regarding the property presented at or about the time of marriage which may belong jointly to the husband and the wife. It includes the property given to the parties before or after marriage, so long as it is relatable to the marriage. According to learned counsel for the Respondents, since the Appellant's case is for a claim under section 27 of the Hindu Marriage Act, it can only be in respect of properties presented

to the Appellant and Respondent No.1 at the time of marriage. Whereas the admitted position is that consideration by way of purchase was paid by the company. Moreover since third party interest namely that of the company were involved, the company ought to have been a party to the proceeding and therefore, the petition could not have been filed under section 7 of the Family Courts Act. He further contended that once the title deeds of the properties were taken into consideration, those title deeds will prove that the properties were not owned by the Appellant but by Respondent No.1. No other proof is required. In this behalf, he relied upon the decision of the Supreme Court in the case of Pawan Kumar Gupta V/s. Rochiram Nagdeo reported in A.I.R. 1999 Supreme Court 1823. He submitted that although Mr.Godbole, learned counsel for the Appellant referred to the judgment in the case of 2009 (2) M.J. L.J. 255, the same was not tendered.

48. Mr.Lalwani further submits that the claim in the B-petition was beyond the jurisdiction of the Court. Mr.Lalwani referred to the deposition of the Appellant in the cross-examination particularly paragraphs 46, 47 & 48. According to him, several portions of the evidence are beyond the pleadings and not ought to be considered. He cited other instances for disbelieving the testimony of the Appellant. He submitted that in the cross-examination, the Appellant deposed as that she learnt of Respondent No.2 i.e. Harcharan Kaur only in the year 2000 when for the first time in her life, she saw the Respondent No.2 at Leelawati Hospital, Mumbai. Whereas, in the legal notice addressed to Respondent No.1 she has contended in para 6 that he has stopped

cohabitation with the Appellant for the past one year on account of his affairs with Harcharan Kaur. That Respondent No.1 has decided to live with said Harcharan Kaur at Chembur and made arrangements for the Appellant at Kanjur Marg. In para 7 of the legal notice, it is pointed out that right from 1997 the Appellant had knowledge of the first Respondent's affairs and wanted to initiate criminal proceedings but had refrained from doing so.

49. In the second notice dated 15th November, 2002, the Appellant has contended that some time in the year 1997, Respondent No.2 came in contact with Respondent No.1 an "unmarried woman with a suspicious character". In paragraph 3, the Appellant alleged that in between the year 1998 and till the date of this letter, in 2002, Respondent No.1 had on several occasions admitted to the Appellant about his clandestine affair Respondent No.2. Mr.Lalwani, therefore, submits that on this ground alone the endura of the Appellant is not worthy of trust the petition is barred by law of limitation. He further submitted that the second instance which clearly renders the testimony of the Appellant untrustworthy is that the telephone was installed in 1986 and Respondent No.1 in his evidence clearly mentioned the fact that the telephone numbers in the wedding invitation card is said to have been printed before the alleged marriage on 17th May,1985 whereas the telephone itself was applied for only in December, 1985 and installed in March, 1986 which clearly indicates that the Appellant had indulged in fabrication of documents and her testimony cannot be believed.

50. He then submitted that the petition is hit by section 58 of the Limitation Act as the Appellant has failed to provide proof beyond reasonable doubt and Respondent No.1 submitted proof in order to establish his marriage with Respondent No.2. On the issue of limitation, he submits that even assuming the marriage is not proved, the long period of cohabitation leads to a presumption of marriage and, therefore, the impugned order correctly holds that the marriage if any between the Appellant and Respondent No.1 is a nullity. He submitted that as far as the presumption of cohabitation is concerned, it will not work in favour of the Appellant since she was disqualified in the first place by virtue of the fact that Respondent No.1 was married. Therefore, he submitted that the Appellant was not entitled to any relief in the petition. Mr.Lalwani further submitted that since there was no marriage between the Appellant and Respondent No.1, there is no question of paying any alimony.

51. Without prejudice to the submission, Mr.Lalwani submitted that even though the Appellant was not entitled to alimony, Respondent No.1 has provided for the Appellant sufficiently, having provided a residential premises at Ghatkopar, Mumbai and Nagpur which were admittedly transferred by Respondent No.1 to the Appellant. He submitted that the Appellant is currently engaged in business and was not entitled to any claim any maintenance from Respondent No.1.

52. Mr.Godbole in rejoinder submitted that in the judgment of the learned Single Judge of this Court in the case of Sudipta Sanjeeb Chakraborty (supra), the learned single Judge dealt with the Special

Marriage Act and there was no provision similar to the Hindu Marriage Act and para 3 of the judgment clearly refers to the property which was outside the jurisdiction of the Court. Furthermore, he sought to differentiate the judgment on the fact that it did not pertain to the claim of any co-ownership. He submitted that the proviso to sections 16 of the C.P.C. had not been considered in the said judgment. Mr. Godbole further submitted that section 7 of the Family Court Act read with section 20 of C.P.C. will be a complete answer and there nomenclature and the title of the petition is of no relevance. He submitted that the jurisdictional aspect was specifically pleaded in paras 29 of the petition and yet the same has not been specifically dealt with by the Respondents. Moreover, he submitted that section 27 was not exhaustive whereas section 7 of the Family Court Act is exhaustive in particular 7(1) Explanations (c) & (d) and reiterated his submission that section 7 and 4 read with section 20 of the C.P.C. conferred jurisdiction both pecuniary and territorial upon the Family Court.

53. Mr. Godbole further submitted that the issue of jurisdiction is in sections 16 and 20 for an application assuming that section 7 does not apply to section 16 of the C.P.C. and its proviso were clearly applicable. He submitted that in a suit to obtain relief in respect of the properties, what was sought was personal obedience of Respondent No.1. There is no relief sought in respect of the properties itself that would have entailed passing of any preliminary decree in the Family Court. In the present case, he submits that the Family Court alone will have the jurisdiction and, therefore, there was no question of returning the plaint. The

impugned order is clearly fallacious.

54. With specific reference to the rule pertaining to the registration of marriage under section 8 of the Hindu Marriage Act, he submitted that the State Governments may make rules providing that the parties to a marriage may have particulars of the marriages entered in the Hindu Marriage Register kept for the purpose, subject to such condition as may be prescribed by the State Government. Such register shall be kept open at all times will be taken into consideration in evidence. He sought to rely upon the rules in this behalf which were apparently prevalent in the State of U.P. at the material time. However, since this was not canvassed before the trial Court, we do not consider it appropriate to deal with them at this stage. Suffice to state that Mr. Godbole has challenged the genuineness of the documents purporting the marriage certificate. He submitted that the marriage is not registered in accordance with the rule provided therefor. He further submitted that the presumptions under sections 79 & 74 were against Respondent No.1. He further submitted that respondents have not come with irrefutable presumptions as to the specification of the Hindu Marriage.

55. He submitted that the allegations of cohabitation, proof of ration card, certificate of the Co-operative Society relied upon by the respondents were not proved at all. He submitted that it is an admitted position that the Respondents are unable to show that even the medical attendance identify card is a public document and have failed to prove it. He submitted that document should not be read in evidence.

Furthermore, no finding under section 73 of the Evidence Act is required. He submitted that the preponderance of probabilities and series of documents relied upon by the Appellant leads to the conclusion of that she was the wife of Respondent No.1. Whereas respondent No.1 has produced only copies of LIC policies wherein respondent No.2 is shown as wife which again is not admissible document.

56. We have considered the facts of the case, the evidence led by the parties in support of their respective contentions and submissions of the counsel. It is the Respondents' case that they were married prior to the alleged marriage between the Appellant and Respondent No.1. In fact, Respondent No.1 has contended that there was no marriage between the Appellant and Respondent No.1. The second leg of the argument is that in the event we disagree with the finding of the Family Court that there was a valid marriage between the respondents inter se, then in such event Respondent No.1 is still entitled to contend that there is a strong presumption of marriage from the fact that respondent Nos.1 & 2 have cohabited for a long period of time prior to the alleged marriage between the appellant and respondent No.1 and therefore the Appellant must be non suited.

57. On this aspect, we are unable to agree that there was a long period of cohabitation that has been established by the Respondents in the facts of the case. The evidence of respondents does not reveal any such long period of cohabitation. On the other hand, the evidence of respondent No.1 is to the effect that he and respondent No.2 were

married on 24th February, 1974 at Orcha, Dist. Jhansi, which marriage was conducted by one Pandit Tiwari who has stated to have issued a letter dated 15th March, 2003 confirming that marriage between respondent Nos.1 & 2 was solemnized. The said Tiwari was never examined. It is not possible today to ascertain on what basis Tiwari could have confirmed that he had performed the marriage almost 30 years ago. Furthermore, one wonders how Respondent No.1 has identified the handwriting and signature of Pandit Tiwari. Respondent No.1 does not lead any evidence alluding to long standing acquaintance with the said Tiwari. He deposed that a number of witnesses were present, however, apart from respondent No.2, none of them has been examined (even though the witnesses are named by respondent No.1 in his deposition paragraph 7 as Bhagwat Narayan Trivedi and Pravesh Kumar Saigal). In the light of the fact that Tiwari was not examined, it is not possible to place reliance on that document. There is absolutely no evidence to suggest that said Pandit Tiwari was in fact at Jhansi and was a Pandit in Ram Raje Mandir. Furthermore, the evidence clearly suggests that the marriage was performed as per Hindu ritual which is surprising since both were admittedly Sikhs. In his cross-examination on 2nd June, 2007 the witness has admitted that Hindu Law is not applicable to Sikhs. There is nothing in the evidence of Respondent No.1 to suggest that being Sikh, why the parties decided to marry under Hindu rites. Respondent No.1 has also not been able to justify on what basis he had identified the handwriting and signature of Pandit Tiwari. We are of the view that no reliance can be placed on the certificate either. As observed earlier, the so called certificate of Registrar of Marriage is a highly questionable document.

We need not elaborate further.

58. The next document in support of the contention of marriage between respondent Nos.1 & 2 inter se is the service record said to have been issued by the Central Railway to respondent No.2 which is issued in the name of Harcharan Kaur Kahaan. In the column which provides s/o, wife/of, daughter/of, the name of first respondent is entered which is surprising since the column does not even provide for a name of husband. We do not know on what basis, this certificate is issued. The evidence of respondent No.2 does not throw any light on this aspect. Although the certificate could have come from respondent No.2 as a part of evidence, it does not form part of her evidence, yet Exhibit 236 is said to be a public document. It appears to be issued on the basis of an application which mentions the particulars. No attempt is made to examine the concerned officer of the Railways. The certificate is not even signed by the employee (Respondent No.2) when a provision therefor has been made.

59. It is not understood on which basis this document has been exhibited describing it as a public document. The public document has been defined under section 74 of the Indian Evidence Act and it is specific inasmuch as document forming acts or records of sovereign authority, official body or a public officer's legislative, judicial and executive or of foreign country and public records kept in any state of private documents alone are said to be public document all other are private documents. In the present case certificate of marriage in our view is not a public

document nor are certificate and identity cards is public document.

60. The next document is the certificate dated 19th December, 2002 which is once again issued as per the request of Respondent No.2. It does not state when the name is changed although the certificate gives the specific date. The second respondent has then relied upon the Medical Attendance Identity Card issued to her. In this it is clearly seen that the name of Kahaan has been inserted subsequently. There is serious doubt as to these documents as well. Respondents also rely upon the Pension Payment order wherein the nominee of the family members include, the name Johind Singh Kahaan. The other documents such as Ration Card, L.I.C. Policies have no relevance since they were of later date. Document Exhibit-237 is railway attendance identity card No.31437 is also a photocopy which has been notarized. The original was not seen to be produced. The pension payment order Exhibit 241 is also seen to be a photocopy which bears the name of respondent No.2 as Harcharan Kaur Kahaan. This document is also issued in the year 2003 and cannot be read in evidence as at the relevant time the date of the alleged marriage took place in 27th March, 1974. The only original document to be found is the letter from the Secretary, Vijay Lenyadri Co-operative Housing Society Ltd. at Nehru Managar, Kurla (E), Mumbai which certified that Johind Singh was shown as resident in the building with along wife Harcharan Kaur. This document is issued on 21st October, 2004. It certified that they lived together in that building in flat No.63 till February, 1989. This letter was not proved. The signatory of the letter has not been examined. These documents, therefore, cannot be

accepted as evidence of marriage. It is interesting to note from the record that in March, 1996, five LIC 20 Year Money Back Policies are seen to be taken out by the first respondent and proposed life assured showing his address as 62/2, Vallabhbaug Lane Extn., Ghatkopar (E), Mumbai wherein the nominee is shown shown as "Mrs.Kahaan Mahalaxmi".

61. These policies were cancelled and they also bear the signature of Vidya Shastri, sister of the present appellant. It appears that the sister of the appellant Vidya Krishna Shastri was also closely connected with the business of the Appellant and Respondent No.1 since her name appears on the Standing Committee of M/s. Garuda Keepers. From Exhibit-30 it is seen that an agreement of sale dated 18th January, 2001 was entered by which Prakash K. Bapanna agreed to sell to respondent no.1 and Mrs. Mahalaxmi immovable property. This document bears the name of both the appellant and respondent No.1. In the recitals paragraph it is stated that "*Johind Singh Kahaan, son of Govind Sing Kahaan, aged about 38 years and Mrs.Mahalaxmi Kahaan, aged about 35 years, wife of Johind Singh Kahaan*". Thus, there is evidence on record which shows that respondent No.1 has shown appellant as his wife, included in the agreement to purchase immovable property as well as records of the LIC policies.

62. On perusal of Exhibit-299 which is a certificate of marriage and is said to have been issued by the Registrar, Hindu Marriage Registrar (U.P.) dated 15th March, 2004 appears to be a photocopy of the format of a marriage certificate with rubber stamp of Registrar of Hindu

Marriages of Jhansi (U.P.). The signature of the Registrar is also illegible and the document does not inspire confidence.

63. The evidence of Respondent No.2 does not inspire confidence either. In her examination-in-chief, she has deposed that the marriage between the respondents were performed by taking 7 steps around the sacred fire as per Hindu rituals. She then deposed that marriage was registered with the Registrar Office at Jhansi. Although, she referred to the inclusion of first respondent as nominee in some of the service record, we have already dealt this aspect above. The second respondent's evidence does not carry the matter any further, whereas all these records are also issued after the commencement of litigation between the parties. In respect of the L.I.C. policies which are taken in the year 1989, Respondent No.2 was not the nominee. In the cross-examination of respondent No.2, she admits to the fact that she is Sikh by birth and has not converted into Hinduism. She has admitted that she follows Hindu rites. She also deposed that in Orcha, Dist. Jhansi, there are several Gurdwaras. In reply to a specific question as to why the alleged marriage is performed as per Hindu Rites, although both the respondents were of Sikh religion, she replied that her parents had died and her aunt and uncle had decided that her marriage would be performed as per Hindu rites, a most unconvincing reason. She did not produce any evidence to show the existence of Pandit Chandrakant Tiwari. The said Tiwari is not examined. Although the certificate of marriage is said to be issued on 15th April, 2004, Respondent No.2 categorically stated that she is not going to adduce evidence of the

Marriage Registrar. Although she claims to be married to respondent No.1, she states that she could not identify Respondent No.1's sister Sushnita Kolbekar even if shown to her. She admits that she is holding a passport but the same even if she was called upon to produce it, all of which clearly leads us to drawing an adverse inference about the marriage of respondent No.2.

64. Respondent No.2 was called upon to produce the original medical identity card, however, the same is not produced. In paragraph 98 of her the cross-examination, the witness states that she does not know whether respondent No.1 has two children from the appellant. Although she claims on the day the respondent No.1 met with an accident she had admitted him to the hospital, she could not produce any evidence to show that she had admitted respondent No.1 to the hospital. She admitted that she did not know respondent No.1 was admitted to the hospital, nor could she produce any evidence that she had paid Rs.60,000/- in the hospital. In the circumstances, we are of the view from the evidence on record, it is not possible to hold that respondent No.2 was the legally wedded wife of respondent No.1.

65. Having reached to the conclusion, we proceed to consider the consequence of this finding. At this stage, it will be appropriate to refer to the submissions of Mr.Lalwani that even assuming that respondent No.1 has failed to prove their marriage, a presumption of marriage should operate in their favour, based on a preponderance of probabilities.

66. Coming to the case of the appellant, as far as the evidence of the appellant is concerned, she has deposed that she married respondent No.1 on 17th May, 1985 at Chakala, Andheri, Mumbai as per Sikh religious rites. She admits that the marriage is not registered and she was a spinster and respondent No.1 was a bachelor. Her first daughter was of aged 24 years and she is married and son, aged 22 years pursuing higher studies. The appellant claims to have been cohabiting with respondent No.1 at a house of respondent No.1's sister at Kurla. She contends that she tried to get the marriage registered but respondent No.1 avoided the same for reasons best known to respondent No.1. Admittedly, the first respondent has two children from the Appellant, a fact that is not disputed by the first respondent.

67. There is obvious evidence to suggest long and continuous cohabitation, initially, at Kurla and thereafter at Bangalore and then Mulund in Mumbai. During their stay at Mulund, a son was born in the year 1988. It is thereafter that she once again attended the office of respondent No.1 to share the burden of work in the office. She has deposed that a proprietary concern was converted to a private limited company wherein she and respondent No.1 were Directors holding equal shares. She has deposed that her role in the business was to look after the office administration, operations of the business and assist the respondent No.1 and due to their joint efforts, earned substantial income to buy landed properties at various places. She changed her name to Manjeet after the marriage initially as suggested by her father-in-law. The

business income was used to purchase properties at Nasik, Nagpur albeit in the name of the first respondent but the payment thereof was made from the company's account. She has deposed that various properties were purchased in Goa and other places around in Khalapur, Dist. Raigad etc.

68. She has served dutifully as his wife. She has relied upon the documentary evidence such as passport and driving licence which shows that respondent No.1 has been shown as her husband in these documents. Her daughter completed training in *Bharat Natyam* and a *Arangetram* was arranged for the invitations have been printed which bears the name of the Appellant as the first Respondents. Even the school record of the children show the name of respondent No.1 as their father. None of those have been challenged by Respondent No.1.

69. She had further deposed that respondent No.1 then met with an accident in June, 2000 after which he had undergone surgery. She has admitted him to the hospital and looked after him throughout the period he was convalescing. While respondent No.1 was in the hospital, she was respondent No.2 coming every day to meet and on one such visit, she learnt about her claim to be wife of respondent No.1. According to the Appellant, Respondent No.2 was having adulterous relationship with the first respondent. Thereafter upon being questioned about the relationship, it appears that the first respondent was enraged and ever since has been harassing and torturing the appellant. When Respondent No.1's mother was in serious condition, the appellant and respondent

No.1 visited her. She expired on 29th January, 2002 and they stayed at Nagpur and completed the last rites of her mother-in-law, during which period respondent No.2 was not present.

70. She has accused the second respondent as instigating the first respondent. The relations between the parties deteriorated and the appellant issued a legal notice. The cross-examination of the appellant has already been dealt earlier by us.

71. The fact remains that the marriage has not been registered. The genuineness of the marriage invitation card relied upon by the appellant has been questioned. Looking at the inconsistency in the evidence of the appellant, in cross-examination, as to the fact of marriage, it is not possible to arrive at a positive finding that there is a marriage between the appellant and respondent No.1. At best, there is an admitted period of continuous cohabitation at least till 2000. Much is sought to be made by the respondents as to the veracity of the evidence of the appellant. However, the evidence will have to be viewed as a whole and merely picking and choosing portions thereof, cannot be justified. There cannot be any doubt of the fact that there is a long period of cohabitation and in the process two children were born out of the relations.

72. It is well settled that law that when in doubt, legitimacy is preferred over illegitimacy. We, therefore, proceed on the presumption that the children were born out of the relationship between the appellant

and respondent No.1 which would entitle her to claim relief including by way of maintenance respondent No.1. The question that remains is as to the nature of relief that can be granted. The daughter is major and married, there can be no question of awarding any maintenance as far as daughter is concerned. The son is also a major and undergoing higher studies till the time he is gainfully employed, the appellant would be entitled to claim maintenance for herself and her son. It is well settled that merely because the appellant is engaged in business, it is no ground that she will be disentitled to maintenance. It is equally settled that maintenance can be claimed and awarded even though the appellant has an independent source of income. The question to be considered is whether the income is of such as would enable her to sustain a standard of living that she has been accustomed to while she was living with respondent No.1.

73. Although the Appellant has not been able to establish that there was a marriage solemnized between them on 17th May, 1985, she has succeeded in establishing the long cohabitation and, therefore, the presumption of marriage must operate in her favour leading to her right to claim maintenance.

74. As far as the relief in second petition is concerned, namely the B-petition, it proceeds on the basis that the properties were purchased in the name of respondent No.1 out of the funds belonging to both the parties. We are not satisfied with the evidence on this aspect. All the properties in schedule-A is in the name of the appellant and

respondent No.1. The pleadings is that the source of funds was joint income but the properties have been standing in the name of respondent No.1. This was also hit by the provisions of section 4 of the Benami Transactions Act to the extent that it relates to 50% share of the claim. Across the bar, it was submitted that the respondent has also initiated proceedings with the Company Law Board in relation to Guardian Keepers (I) Pvt. Ltd. and an order has been passed in the said petition declining relief in favour of the appellant to allot 50% share in the company. Likewise, in the second petition in Company petition No.49 of 2012, the Company Law Board has negated her claim but has recorded an undertaking of the respondents that he will allot 50% more share of the company in Industrial Security & Fire Services. We referred to the orders merely because we were made aware that the Company Law Board has passed the order after the order is impugned in the present appeal and we made reference to them for the purpose to bring into perspective the case of the appellant.

75. Since the order of the Company Law Board was not before the Family Court at the time of passing the order, no further reliance need be placed upon these by us in this Appeal. Be that as it may, given the nature of evidence led before the Family Court, we are of the view that it would be appropriate to have on all the issues decided on merits rather than mere only on the basis that the marriage between respondent Nos.1 & 2 being proved and, therefore, there is no question of granting relief to the appellant under the provisions of order 41 Rule 33. We are also conscious of the submissions made by Mr.Lawlani on the aspect of

jurisdiction, we are of the view that in view of proviso to section 16 of C.P.C. read with section 7 of the Family Courts Act are reproduced below, the Family Court will have jurisdiction in the facts of the present case for reasons set out hereafter:-

“16. *Suits to be instituted where subject-matter situate-subject to the pecuniary or other limitations prescribed by any law, suits-*

- (a) For the recovery of immovable property with or without rent or profits,*
- (b) For the partition of immovable property,*
- (c) For foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property.*
- (d) For the determination of any other right to or interest in immovable property,*
- (e) For compensation for wrong to immovable property.*
- (f) For the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. “*

“7. (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;*
- (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.*

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

- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as*

the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;*
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;*
- (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship; to" (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;"*
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;*
- (f) a suit or proceeding for maintenance;*
- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor."*

76. In view of the fact that the reliefs in B-petition is inter alia of permanent injunction restraining respondent No.1 from disposing of the properties, it clearly seeks the personal obedience of respondent No.1 who carries out the business within the jurisdiction of the Family Court. We cannot lose sight of the submission of Mr.Lalwani that in the title of B-petition, the dispute is shown as falling within the ambit of Section of the 27 of the Hindu Marriages Act and 7(1)(d) of the Family Courts Act. However, in the body of the petition, there is no such averment and the mere mention of Section 27 cannot change the character of the proceedings seeking relief in respect of the properties which cannot form subject matter of any application under section 27 of the Hindu Marriage Act since none of the properties in Schedule-A were "presented" at the time of marriage or after the marriage. These are the properties which are expressly stated to have been acquired jointly by the parties from the

funds generated in the company. Section 27, therefore, cannot be invoked.

77. In the circumstances and it cannot be said that the Appellant was required to approach multiple jurisdictions to seek relief against each of these properties in various jurisdictions where the property is situated. Furthermore, Mr.Lalwani also submitted that the Appellant seeks that the Courts may pass orders dividing the properties equally. However, there is no such prayer seeking such direction in respect of the properties. Since there are no reliefs of such nature, sought it would not be hit by the provisions of section 16 (a) to (f) of the CPC. The appellant is seeking declaration that she has an equal share. This is a relief which can be enforced through personal obedience of the Respondent No.1 and is not directly relief in respect of property. In our view, the appellant's case falls within the proviso to the Section 16 of the CPC. This can be seen from the pleadings read as a whole. Furthermore, section 7 of the Family Courts Act does contemplate separate suits or proceedings in order to order to govern some circumstances arising out of marital relationship. The Family Court is vested with the jurisdiction in our view and in the facts and circumstances, is competent to grant the relief of declaration and injunction. The relief of declaration though not specifically mentioned in Section 7 will be covered when it is read with the proviso to Section 16 of the C.P.C. In the circumstances, we are of the view that the matter deserves to be remanded back to the Family Court for re-consideration.

78. On the aspect limitation, we are unable to agree with the

submission of Mr.Lalwani's that the appeal is clearly barred by limitation. In our view, the cause of action would have arisen after issuance of legal notice on 7th October, 2002 by the appellant. Before parting with this judgement we advert to the submission made by Mr.Godbole that this Court should consider granting the relief sought in the petitions before the Family Court in these appeals under the provisions of Order 41 Rule 33 of the C.P.C. In some cases it may be desirable and even appropriate. We are not inclined to do so in the facts of the present case.

79. In the result we hold that Respondent No.1 has failed to prove that there is a valid and subsisting marriage between him and Respondent No.2. In view of the indisputable fact of cohabitation for considerable period of time and the fact that the Appellant and the Respondent no.1 had children, there is a presumption of legitimacy of the children. The impugned judgment and order is, therefore, set aside and Petition Nos.A-397-2003 and B-51/2004 are remanded to the Family Court, Bandra.

80. The appeals are disposed of in the above terms. In view of the disposal of the appeals, the Civil Applications do not survive and hence, they are disposed of as such. No order as to costs.

81. The parties to appear before the Family Court on 23rd February, 2015 at 11 am. All concerned to act on an authenticated copy of this judgment.

(A.K.MENON, J.)

(SMT.V.K.TAHILRAMANI, J.)