

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.108 OF 1993

1.Kashibai Namdeo Jadhav)
Age 57 years, Occ. Agriculture)
(since deceased through her LRs.))

2. Baban @ Rama Namdeo Jadhav)
Age 34 years, Occ. Agriculture)

3. Madhukar Namdeo Jadhav)
Age 31 years, Occ. Agriculture)
All r/o. Waphale, Taluka Mohol,)
District Solapur.)

.. Appellants
(Original Defendants)

Versus

1. Yamunabai w/o Namdeo Jadhav)
Age 52 years, Occ. Agriculture)

2. Hanmant Namdeo Jadhav)
Age 33 years, Occ. Agriculture)

3. Maruti Namdeo Jadhav)
Age 29 years, Occ. Agriculture)

4. Chaya Brahmadeo Chavan)
Age 28 years, Occ. Agriculture)
All r/o. Waphale, Taluka Mohol,)
District Solapur.)

.. Respondents
(Original Plaintiffs)

**ALONG WITH
CIVIL APPLICATION NO.593 OF 2007
IN
SECOND APPEAL NO.108 OF 1993**

1. Yamunabai w/o Namdeo Jadhav)
Age 52 years, Occ. Agriculture)

2. Hanmant Namdeo Jadhav)
 Age 33 years, Occ. Agriculture)
 3. Maruti Namdeo Jadhav)
 Age 29 years, Occ. Agriculture)
 4. Chaya Brahmadeo Chavan)
 Age 28 years, Occ. Agriculture)
 All r/o. Waphale, Taluka Mohol,)
 District Solapur.) .. Applicants

Versus

1. Kashibai Namdeo Jadhav & ors)
 Age 57 years, Occ. Agriculture)
 (since deceased through her LRs.))
 2. Baban @ Rama Namdeo Jadhav)
 Age 34 years, Occ. Agriculture)
 3. Madhukar Namdeo Jadhav)
 Age 31 years, Occ. Agriculture)
 All r/o. Waphale, Taluka Mohol,)
 District Solapur.) .. Respondents

Mr.T.D. Deshmukh a/w Mr.Samrat Shinde for the appellants.
 Mr.K.Y. Mandlik for the respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 28th January, 2016
PRONOUNCED ON : 25th February 2016

Judgment :-

. By this second appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellants (original defendants) have impugned the order and judgment dated 3rd September 1992 passed by the III Additional District Judge, Solapur allowing the appeal filed by

the original plaintiffs and setting aside the decree passed by the learned trial Judge dismissing the suit for a decree for partition and separate possession.

2. The original plaintiffs had filed a suit for declaration and perpetual injunction and in the alternative for partition and separate possession of share in certain agricultural lands. For the sake of convenience, the parties to the present proceedings are described as they were described in the proceedings before the learned trial Judge in the later part of the judgment. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

3. The present dispute pertains to the lands 783, 789, 790/1, 792/2, 855, 906, 911/1, 911/2 and 777 all situated at Waphale, Taluka Mohol, District Solapur. It was the case of the plaintiffs that the suit lands were ancestral properties of late Namdeo Sambha Jadhav. It was alleged by the plaintiffs that the plaintiff no.1-Yamunabai was the legally wedded wife of Namdeo Sambha Jadhav. It was alleged that the plaintiff nos.2 to 4 are the children begotten to the said Yamunabai from Namdeo S. Jadhav. It was the case of the plaintiffs that the defendant no.1-Kashibai was the first wife of Namdeo S. Jadhav and divorce took place between Namdeo S. Jadhav and Kashibai, defendant no.1 herein on 7th September 1963 under an alleged Deed of Divorce. The defendant nos.2 and 3 are the children of Namdeo Sambha Jadhav begotten from his first wife Kashibai Namdeo Jadhav. It was the case of the plaintiffs that the defendant no.1 was suffering from black leprosy. In the result, Namdeo divorced the defendant no.1 in the year 1963 according to the customs prevailing in Maratha community to which the parties belonged

to. It was the case of the plaintiffs that such type of divorce by mutual consent was permissible according to the customs prevailing in Maratha community at the relevant time.

4. It was the case of the plaintiffs that after taking divorce from the defendant no.1, the said Namdeo S. Jadhav married with plaintiff no.1 Yamunabai. According to the plaintiffs, there was a partition effected between the plaintiffs and the defendants and the lands described in para 1B of the plaint were given to the plaintiffs. Rest of the suit lands were given to the defendant nos.2 and 3. It was the case of the plaintiffs that since Kashibai had already taken divorce from the said Namdeo S. Jadhav, she could not get any share in the suit properties.

5. The plaintiffs accordingly filed a suit for declaration and perpetual injunction and in the alternative for partition and separate possession. The said suit was resisted by the defendants by filing a written statement. The defendants denied that the plaintiff no.1 was married with late Namdeo Jadhav and also denied that the plaintiff nos.2 to 4 were the legitimate children of late Namdeo Jadhav. The defendants also denied that there was any divorce between the defendant no.1 and late Namdeo Jadhav or that the plaintiffs lived with the said late Namdeo Jadhav. It was denied that the said Namdeo Jadhav effected any partition of the suit lands between the plaintiffs and defendants in or about 1967 or that the suit lands as described in paragraph 1(b) of the plaint were allotted by the said Namdeo Jadhav to the plaintiffs. The defendants also made various allegations about the character of the plaintiff no.1 in the written statement. Insofar as the plaintiff nos.2 to 4 are concerned, it was alleged that they were born to the plaintiff no1 from one Waman Chavan

and some other person. The defendants denied that the plaintiffs had any interest of any nature whatsoever in the suit lands and opposed the reliefs prayed by the plaintiffs.

6. The learned trial Judge framed seven issues which are extracted as under with concluding finding recorded of each of the issue. They are as under :-

<u>Issues</u>	<u>Findings</u>
1. Do plaintiffs prove that, they got suit property mentioned in Para 1-B of plaint in the petition in the year 1967 ?	No
2. Do plaintiffs prove that, plaintiff no.1 is legally wedded wife of Deceased Namdeo and plaintiff nos.2 to 4 are the legitimate children of plaintiff No.1 from deceased Namdeo ?	No
3. Do plaintiffs prove their title to suit property mentioned in Para 1-B of plaint ?	No
4. Do they further prove their lawful possession over the suit property on the date of institution of suit ?	No
5. Whether it is just to grant discretionary relief of declaration and injunction in favour of plaintiffs ?	No
6. Are plaintiffs entitled in the alternative to claim partition of the suit property mentioned	

in Para 1(A) and 1(B) of plaint ?

No

If yes, what is their share ?

7. What decree and order ?

See order below

7. On behalf of the plaintiffs, the plaintiff no.1 examined herself as one of the witness as PW-1. The plaintiffs also examined other four witnesses viz. Dattatraya Atre (PW-2), Ambadas Jagdale (PW-3), Namdeo Chavan (PW-4), and Babu Parve (PW-5). The plaintiffs also produced various documentary evidence before the learned trial Judge. On behalf of the defendants, the defendant no.1 examined herself as (DW-1) and also produced various documentary evidence.

8. The learned trial Judge recorded that it was an admitted position that the suit lands were ancestral properties of late Namdeo Jadhav. The said Namdeo Jadhav died on or before 3rd December, 1974. The plaintiff no.1 was admittedly the mother of the plaintiff nos.2 to 4 and was admittedly married to one late Waman Chavan, who earlier resided at the same village. It was also an admitted position that the defendant no.1 was the first wife of late Namdeo Jadhav and was the mother of the defendant nos.2 & 3.

9. Insofar as the issue whether the plaintiff no.1 was a legally wedded wife of late Namdeo Jadhav or not is concerned, the learned trial Judge held that the plaintiffs had not pleaded that there was divorce between the plaintiff no.1 and her first husband Waman Chavan in the plaint. The learned trial Judge held that the plaintiffs had tried to suppress relevant facts in their plaint so far as the status of the plaintiff no.1 was

concerned. It is held that since the plaintiffs had not pleaded that the plaintiff no.1 had divorced her first wife before marrying with Namdeo Jadhav, the plaintiffs could not be allowed to prove that there was a divorce between the plaintiff no.1 and her first husband in absence of any such pleading.

10. The learned trial Judge also held that the plaintiffs had not given any particulars of the day, date of month, season or even the year when she had alleged to have divorced her first husband. The divorce deed was not placed on record. It was the case of the plaintiffs that the said alleged divorce deed between the plaintiff no.1 and Waman Chavan was lost before about 10 to 20 years. The learned trial Judge held that the said stand of the plaintiffs appeared to be unnatural and unreliable.

11. Before the learned trial Judge the plaintiffs produced certified copies of the deposition of the plaintiff no.1 in R.C.S. No.121 of 1966 at Exhibit 69. The learned trial Judge held that in the said evidence marked at Exhibit C-69, the plaintiffs had deposed on oath that the divorce deed was in her possession. The said deposition was recorded on 20th January, 1975. The learned trial Judge has accordingly held that the plaintiff no.1 had contradicted herself on the point of loss of the divorce deed before the learned trial Judge and was not stating the truth about the alleged divorce with Waman Chavan. The learned trial Judge accordingly recorded a finding that the evidence of the plaintiff no.1 about the divorce between herself and Waman Chavan appearing highly unnatural and improbable. It is also held that the evidence of the plaintiff no.1 was not wholly reliable evidence and her evidence could not be relied unless there was substantial corroboration.

12. Insofar as the evidence of PW-2, who had alleged to have sold the stamp papers to the plaintiff no.1 and to Waman Chavan on 12th June, 1963 is concerned, it is held by the learned trial Judge that the evidence of the said witness PW-2 did not show that the plaintiff no.1 and Waman Chavan had divorced each other even if it was assumed that they had purchased the stamp paper on 12th June, 1963. The said witness had clearly admitted that he did not know the purchaser of the stamps personally. It is held that the identity of the purchaser of the stamp paper was thus not established by the evidence of Mr.Dattatraya Atre (PW-2). It is held that the evidence of the said witness PW-2 thus did not assist the case of the plaintiff no.1.

13. Insofar as the evidence of Mr.Babu Parve (PW-5) is concerned, the said witness had deposed that he was the witness to the divorce deed between the plaintiff no.1 and Waman Chavan. He further stated that one Mr.Gaffar Saheb was subscriber of the divorce deed. The learned trial Judge held that if Mr.Babu Parve was the attesting witness to the divorce deed in question, the plaintiff no.1 should have stated that fact in her evidence which crucial part of evidence which she failed to state.

14. The Lower Appellate Court has held that even if the children were born in view of the fact that the man and woman had lived together as husband and wife for sufficiently long time and were treated as husband and wife by friends, relatives and neighbors and there is presumption in favour of their marriage as per Sections 50 and 114 of the Indian Evidence Act, 1872, such presumption of law in favour of marriage and legitimacy is not to be repelled lightly by mere

circumstance of probabilities. The evidence should be strong, satisfactory and conclusive.

15. In so far as the Divorce Deed dated 7th September 1963 alleged to have been executed between Namdeo and his first wife Kashibai is concerned, it is held by the Lower Appellate Court that the said Namdeo as well as Kashibai were illiterate and it was thus the duty of the scribe to read over the contents to both of them which was not done and thus the said divorce deed is not proved as per law. The Lower Appellate Court also disbelieved the evidence of Mr.Ambadas (PW-3). In so far as the issue as to whether there was a custom in the Maratha Community to take such type of divorce in presence of panchas is concerned, the Lower Appellate Court considered the oral evidence of both the parties and held that Mr.Kasture, who was one of the witnesses examined by the plaintiffs, in his cross-examination admitted that he did not witness any other divorce of Maratha Community. The Lower Appellate Court has held that the presumption of marriage in favour of the plaintiff no.1 as well as the presumption of legitimacy in favour of the plaintiff nos. 2 to 4 is also strengthened on account of evidence led by Mr.Babu Parve (PW-5) who was alleged to be a witness to the marriage between the plaintiff no.1 and Namdeo.

16. The Lower Appellate Court has held that there was a divorce between the plaintiff no.1 and her first husband Waman Chavan. The Lower Appellate Court has held that it was not mentioned by the plaintiffs in their plaint about the first marriage of the plaintiff no.1 with Waman Chavan and that Waman Chavan had given her divorce. The Lower Appellate Court has held that the plaintiff no.1 had proved

her divorce from her first husband Waman Chavan. Accordingly, it is held that there was a presumption of marriage in favour of the plaintiff no.1 with Namdeo Jadhav and also presumption of legitimacy in favour of plaintiff nos.2 to 4.

17. In so far as the issue whether there was any pleading in the plaint filed by the plaintiffs about the first marriage of the plaintiff no.1 with Waman Chavan and whether Waman Chavan had given her divorce or not is concerned, it is held by the Lower Appellate Court that it was stated in the plaint that the marriage of the plaintiff no.1 with Namdeo Jadhav was legal and proper and out of the said wedlock, the plaintiff nos.2 to 4 were born and it was sufficient to decree the suit based on such facts pleaded by her. It is held that merely because the plaintiff no.1 did not state about her first marriage with Waman Chavan and that Waman Chavan had given her divorce, in absence of such statement in the plaint, the suit should not be dismissed, as otherwise the defendants would have brought on record about such marriage of Yamunabai with Waman Chavan. It is held that the plaintiff no.1 had proved her marriage with her first husband.

18. The Lower Appellate Court has held that there was ample evidence to show that Namdeo Jadhav had divorced his first wife Kashibai and there was no reason to discard the evidence of an independent person. It is held that the divorce deed between the plaintiff no.1 Yamunabai and Waman Chavan was lost. The Lower Appellate Court accordingly allowed the appeal filed by the original plaintiffs and has set aside the order passed by the learned trial Judge and decreed the suit filed by the original plaintiffs.

19. Mr.Deshmukh, learned counsel appearing for the appellants (original defendants) invited my attention to the pleadings, oral evidence led by the parties and also the findings recorded by both the Courts below. It is submitted by the learned counsel that there was no pleading in the plaint filed by the plaintiff no.1 about her marriage with Waman Chavan and that Waman Chavan had divorced her before she had alleged to have married with Namdeo Jadhav. He submits that the plaintiffs thus could not have been permitted to lead oral evidence without any pleadings to that effect. He submits that the plaintiffs also did not prove that Namdeo Jadhav had divorced his first wife Kashibai and after such divorce between Namdeo and Kashibai, the plaintiff no.1 had married with Namdeo Jadhav.

20. It is submitted that merely because three children were begotten out of the relationship between the plaintiff no.1 and Namdeo, there cannot be a presumption drawn that there was a divorce between the plaintiff no.1 and Waman Chavan and also that there was a divorce between Namdeo and Kashibai. He submits that in such a situation, plaintiff nos.2 to 4 could have claimed share only in case of self-acquired properties of Namdeo and could not make any claim in the ancestral properties of the said Namdeo. He submits that admittedly, the properties which were subject matter of the suit were ancestral properties as pleaded in the plaint itself. He submits that both the Courts below have not accepted that there was a partition of the properties.

21. It is submitted by the learned counsel for the defendants that under the provisions of the Hindu Marriage Act, 1955, the divorce can be granted only by a decree of a competent Court unless the customary

divorce is proved. He submits that unless a specific case about prevailing customary divorce is pleaded and proved, no presumption can be drawn that there was a divorce between the man and woman. In support of this submission, learned counsel for the appellants placed reliance on the judgment of the Supreme Court in the case of ***Yamunaji H. Jadhav Vs. Nirmala***, reported in ***(2002) 2 SCC 637*** and in particular paragraph 7 thereof. In support of this submission, learned counsel also invited my attention to the averments made in the plaint and also to the oral evidence of five witnesses examined by the plaintiffs on the issue of customary divorce. He submits that the plaintiffs have failed to plead and prove the customary divorce alleged to have been prevailed in Maratha Community.

22. It is submitted that the plaintiffs had failed to prove the marriage of plaintiff no.1 with Waman Chavan and also alleged divorce with him. The plaintiffs had neither pleaded about the divorce of the plaintiff no.1 with Waman Chavan nor proved the same. The plaintiffs had also neither pleaded about the divorce between the Namdeo and Kashibai nor proved whether the same was according to any alleged prevailing customs in the Maratha Community or otherwise. He submits that admittedly, in the written statement filed by the defendants, the defendants had denied the divorce of the defendant no.1 with Namdeo Jadhav. The onus was thus on the plaintiffs to prove that there was a divorce between Namdeo and the defendant no.1 before the plaintiff no.1 had alleged to have married with Namdeo Jadhav.

23. In so far as various findings recorded by the Lower Appellate Court are concerned, it is submitted by the learned counsel for

the defendants that the findings recorded by the Lower Appellate Court in favour of the original plaintiffs are totally contrary to the pleadings filed by the plaintiffs and the evidence led. The Lower Appellate Court also overlooked the fact that the evidence led by the plaintiffs could not have been considered since the same was beyond the pleadings filed by the plaintiffs.

24. Learned counsel for the appellants also placed reliance on the judgment of this Court in the case of ***Shantaram Tukaram Patil & Anr. Vs Dagubai Tukaram Patil & Ors.***, reported in (1987) *Mh L.J.* 179 and in particular paragraph 27 thereof in support of the submission that legitimate children could claim share only in the self-acquired properties and not in the ancestral properties. Reliance is also placed on the judgment of the Supreme Court in the case of ***Revanasiddapa & Anr.Vs.Mallikarjun & Ors.***, reported in (2011) 11 *SCC* 1 and more particularly paragraphs 12 to 14, 29, 37 and 38 thereof.

25. Learned counsel for the defendants also placed reliance on the judgment of the Supreme Court in the case of ***Subramani Vs. M.Chandralekha***, reported in (2005) 9 *SCC* 407 and more particularly paragraphs 9, 10, 15 and 29 thereof. Reliance is also placed on the judgment of the Supreme Court in the case of ***Shakuntalabai and Anr. vs. L.V. Kulkarni and Anr.***, reported in (1989) 2 *SCC* 526 and more particularly paragraphs 5, 19 to 21 and 26 thereof.

26. It is submitted that even the witnesses examined by the plaintiffs were not eye-witnesses and had failed to give any other instance of alleged customary divorce or that admittedly similar divorce had

taken place in the same community in the same village. He submits that each of the witnesses examined by the plaintiffs were totally unreliable and had no personal knowledge.

27. Mr.Mandlik, learned counsel appearing for the respondents (original plaintiffs), on the other hand, invited my attention to various pleadings, oral evidence and the findings recorded by both the Courts below. He submits that the learned trial Judge has totally overlooked the evidence of the witnesses led by the plaintiffs and rendered erroneous findings. He heavily placed reliance on the findings of the Lower Appellate Court on each of the issues in support of his submission that the plaintiffs had not only proved the divorce of the plaintiff no.1 with Waman Chavan but also proved the divorce of defendant no.1 with Mr.Namdeo and thereafter, the marriage of the plaintiff no.1 with Namdeo. He submits that the plaintiffs had also proved with the assistance of five witnesses examined by them about prevailing customs in the Maratha Community which permitted divorce by executing a divorce deed in writing before panchas.

28. Learned counsel for the plaintiffs also invited my attention to some portion of the oral evidence of the witnesses examined by the plaintiffs. Learned counsel for the plaintiffs placed reliance on the judgment of the Supreme Court in the case of **Badri Prasad vs. Dy. Director of Consolidation and Ors.**, reported in **AIR 1978 SC 1557**, judgment of this Court in the case of **Ningu Vithu Bamane & Ors. Vs. Sadashiv Ningu Bamane & Ors.**, reported in **(1986) Mh.L.J. 186** and the judgment of the Supreme Court in the case of **Union of India (UOI) vs. Moksh Builders and Financiers Ltd. and Ors.**, reported in **AIR 1977**

SC 409 and would submit that since the plaintiff no.1 had stayed with Namdeo Jadhav for a longer period and three children were begotten out of the said relationship, it was proved that the plaintiff no.1 was married to Namdeo Jadhav.

29. It is submitted that the presumption of marriage between Namdeo and the plaintiff no.1 would presuppose that there was a valid divorce between the plaintiff no.1 and Waman Chavan and also that there was a divorce between Namdeo and defendant no.1 Kashibai. He submits that the Court has to draw a presumption about the valid divorce between the earlier spouse with the party contracting a marriage before drawing a presumption of valid marriage between those parties based on their cohabitation for long time. It is submitted that the defendants had admitted that the plaintiff nos.2 to 4 were step brothers and sisters of the defendant nos.2 & 3, and thus there was no need to lead additional evidence by the plaintiffs to prove their status as legitimate children of Namdeo Jadhav.

30. Mr.Deshmukh, learned counsel for the defendants in rejoinder submits that the presumption of marriage cannot be extended to the factum of divorce according to the alleged customs prevailing on the date of divorce. He submits that the plea of divorce has to be specific and has to be strictly proved and no presumption can be drawn in respect of the factum of divorce. He submits that even if, divorce deed was executed, unless prevailing custom of obtaining divorce by execution of divorce deed in presence of panchas was proved, there cannot be a valid divorce. Learned counsel for the defendants distinguishes the

judgments referred to and relied upon by the learned counsel for the plaintiffs.

31. This Court while admitting this second appeal on 15th March 1993, has formulated the following substantial questions of law :-

- (i) Whether under Section 65 of the Indian Evidence Act, 1872 secondary evidence in the form of oral evidence can be led or can be considered, to prove the contents of a document allegedly lost ?
- (ii) Whether there is a presumption under Sections 50 and 114 of the Evidence Act, 1872 as to legality as well as factum of second marriage of respondent no.1 with deceased Namdeo in view of the admitted first marriage of respondent no.1 ?

32. During the course of hearing of this second appeal, learned counsel appearing for the parties agreed that the following additional questions may be formulated as substantial questions of law in addition to aforesaid two questions already formulated at the time of admission of the second appeal. By consent of the parties, this Court has formulated following additional substantial questions of law on 27th January 2016 :-

- (iii) Whether there is a recognized custom in Maratha community to dissolve a marriage by giving divorce to each other, privately before panchas ?
- (iv) Whether the oral evidence led by the plaintiff no.1, in respect of alleged dissolution of her first marriage with Waman Chavan, can be considered in absence of even a whisper about the same in her pleadings i.e. Plaint ?

- (v) Whether there was actual and legal dissolution of the marriage of the plaintiff no.1 and her first husband Waman Chavan ?
- (vi) Whether there was actual and legal dissolution of the marriage of the defendant no.1 and deceased Namdeo Jadhav ?
- (vii) Whether the alleged divorce deed Exhibit 79 is sufficient to prove the dissolution of marriage of plaintiff no.1 and Waman Chavan, in view of the admitted fact that both of them belong to Maratha Community and in absence of proof of any custom to that effect ?
- (viii) Whether plaintiff no.1 not being legally wedded wife of Namdeo, the original owner of suit property, has any right, title or interest whatsoever in the suit property ?

REASONS AND CONCLUSIONS:-

33. I shall first decide the issue whether there was a recognized custom in Maratha community to dissolve a marriage by giving divorce to each other, privately before panchas and if so, whether there was any averment in the plaint filed by the plaintiffs alleging such custom and whether such custom had been proved by the plaintiffs.

34. This Court also will simultaneously deal with the issue whether there was any actual and legal dissolution of the marriage of the plaintiff no.1 with her first husband Waman Chavan. Unless the plaintiffs would have pleaded and proved the divorce of plaintiff no.1 with her husband Waman Chavan before contracting the marriage with Namdeo Jadhav and unless it was proved that the defendant no.1 also had taken divorce from Namdeo Jadhav according to the recognized custom in

Maratha community privately, whether the presumption could be drawn about the valid marriage between the plaintiff no.1 with Namdeo Jadhav.

35. Before this court deals with this issue in the later part of the judgment, it is necessary to summarize the law laid down by the Supreme Court in case of *Yamanaji H.Jadhav vs. Nirmala (supra)*. It has been held that as per the Hindu law administered by Courts in India, divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom, public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. It is held that such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Supreme Court has held that there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the Court. Supreme Court has held that even if the plaintiff might not have questioned the validity of the customary divorce, the Court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognizable by a Court unless specifically permitted by law.

36. Supreme Court in case of **Jairam Somaji More vs. Sindhubai w/o. Jairam More and others**, reported in **1999(3) Mh.L.J. 872** after considering section 4 and section 29(2) of Hindu Marriage Act, 1955 has held that custom cannot be only pleaded but it has to be proved that the parties were entitled for a customary divorce. It is held that unless and until the marriage between the petitioner and the respondent wife was dissolved legally the husband had no right to contract a second marriage and since the earlier divorce was not recognized by law, the parties continued to be under marital bond. Supreme Court in case of **Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga**, reported in **(2005) 2 SCC 33** has taken a similar view.

37. Supreme Court in case of **Subramani & Ors. Vs. M. Chandralekha**, reported in **(2005) 9 SCC 407** has held that in the absence of any pleadings that marriage between the husband and wife could be dissolved in their community under custom and in the absence of any satisfactory evidence let in to prove the custom prevalent in the community or the procedure to be followed for dissolving the marriage, it cannot be held that marriage between the respondent and her husband stood dissolved by executing the marriage dissolution deed. It is held that the parties alleging the customary divorce had not proved that the document was in conformity with the custom applicable to divorce in the community to which the parties belonged. Supreme Court in the said judgment also adverted to its earlier judgment in case of **Yamanaji H.Jadhav (supra)** and has taken the similar view.

38. Supreme Court in case of **Shakuntalabai and another vs. L.V.Kulkarni and another**, reported in **(1989) 2 SCC 526** has held that a

custom cannot be extended by logical process. Supreme Court adverted to its earlier judgment in case of ***Saraswati vs. Jagadambai***, reported in ***AIR 1953 SC 201*** in which it has been held that the oral evidence as to instances which can be proved by documentary evidence cannot be fairly relied upon to establish custom when no satisfactory explanation for withholding the best evidence is given. It is held that custom cannot be extended by analogy and it cannot be established by a priori method. It is held that the custom must be proved and the burden of proof is on the person who asserts it.

39. A perusal of the plaint filed by the original plaintiffs clearly indicates that it was not disclosed in the plaint that the plaintiff no.1 was married to Waman Chavan and her marriage with Waman Chavan was dissolved by a decree of divorce or by customary divorce. It was only alleged that in view of the defendant no.1 suffering from black leprosy, her husband Namdeo Jadhav had got a writing executed from her according to the custom prevailing in their community in Hindu community in presence of panchas and thus she did not have any right in any of the properties of the said deceased. Except pleadings to this effect, there was no other averments made in the plaint by the original plaintiffs.

40. Insofar as oral evidence is concerned, the plaintiffs examined plaintiff no.1 herself. In her examination-in-chief, she deposed that she was married with Namdeo Jadhav 25 years back which marriage took place at Waphale. It was deposed that there was a divorce between the defendant no.1 and Namdeo Jadhav. She deposed that the plaintiff no.1 belonged to Maratha community and in her community, there was a

custom for taking divorce in presence of panchas. It was deposed that the defendant no.1 was suffering from black leprosy and thus the said Namdeo had given divorce to the defendant no.1 which divorce was taken in the Court building premises at Madha. The divorce was in writing. She deposed that she lived with Namdeo as his wife and had produced the divorce deed. She deposed that she was married with Namdeo six months after Namdeo divorced defendant no.1.

41. The plaintiff no.1 in her examination-in-chief deposed that Waman Chavan was her first husband who died 15-16 years back. One Guljarbai was the first wife of Waman Chavan and the plaintiff no.1 was his second wife. She deposed that she had obtained divorce before 25 years. The divorce had taken place in presence of two panchas. The said divorce deed was executed on a stamp paper which which was purchased by Waman Chavan and the plaintiff no.1 from Dattatraya Atre at Madha. She deposed that the said divorce deed was however lost. She deposed that she had obtained divorce from Waman Chavan three months before Namdeo Jadhav divorced the defendant no.1. She admitted that the suit land was ancestral property of Namdeo. It is deposed that there was oral partition effected by Namdeo.

42. In the cross examination of plaintiff no.1, the said witness however deposed that she could not tell in which year she was married with Waman Chavan. She deposed that the divorce deed obtained by her from Waman Chavan was lost before 10-20 years and she did not remember the names of two panchas who were present at the time of execution of divorce deed. She deposed that the divorce deed was lost

before she gave evidence (R.C.S.No. 121 of 1966). She deposed that she did not remember the date, year or season of divorce with Waman Chavan. In her cross examination, she admitted that she could not tell any instance of any one remarrying after giving divorce to first husband. Namdeo did not show her divorce deed obtained by the defendant no.1. She also did not make any inquiry before marrying with Namdeo as to whether he had given divorce to the defendant no.1. She came to know about such alleged divorce from her father. She was not witness to the divorce deed between the Namdeo and the defendant no.1.

43. Insofar as partition is concerned, the plaintiff no.1 deposed that she could not tell how many years ago Namdeo effected partition of the properties.

44. Insofar as the second witness Mr.Dattatraya Atre who was a stamp vendor and was examined by the plaintiffs is concerned, in his examination-in-chief, he deposed that on 12th June, 1963 Waman Chavan and the plaintiff no.1 had purchased two stamps each of Rs.1.50 denomination. He had sold two stamps each of Rs.1.50 to Waman Chavan. The said Waman Chavan had put his signature in the register as a purchaser of stamp. He deposed that the entry was in his handwriting. The plaintiff no.1 had purchased two stamps each of Rs.1.50 at serial no.725 and had put her thumb mark in the register as a purchaser of the stamps. He also deposed that on 7th September, 1963, Namdeo Jadhav had purchased stamp of Rs.1.50 from him at serial no.1163 and he had obtained his thumb mark in the register of purchaser of stamp. The entry in the register was in his handwriting. He deposed that on 7th September,

1963, defendant no.1, wife of Namdeo Jadhav had purchased stamp of Rs.1.50 from him at serial no.1164 and had put her thumb mark in the register as purchaser of stamp. The witness had alleged to have obtained the thumb mark of the defendant no.1. The witness produced two extracts about the entries in the register marked as Exs.76 and 77.

45. The said witness however in his cross examination admitted that he did not personally know the purchasers of the stamp and he did not attest the thumb mark of the purchasers in the register. The witness deposed that he had mentioned the names of the purchasers in the register and on the stamps as stated by them.

46. The plaintiffs had examined one Mr.Ambadas Jagdale as witness no.3. In his examination in chief, he deposed that he was working as a clerk to the advocate since 50 years at Madha and he scribed documents like application etc. as directed by advocate or on the request of the parties who come to him. He deposed that the documents dated 7th September, 1963 shown to him was in his handwriting. He deposed that defendant no.1 had obtained divorce deed from Namdeo Jadhav. He had scribed the documents on the say of both the parties. He scribed one more divorce deed which was obtained by Namdeo Jadhav from defendant no.1. Namdeo Jadhav had put his thumb mark on the document. The witness has alleged to have attested the thumb mark. He deposed that he had attested the thumb marks of the attesting witnesses on the documents.

47. The said witness however in his cross examination admitted that he did not possess licence to work as a bond-writer. He possess

licence as clerk of an advocate. He admitted that without perusing document, he could not tell whether he scribed any document. He admitted that he was not in a position to say whether signature or initial of executant was to be obtained at the place of corrections or alterations in document.

48. The fourth witness examined by the plaintiffs i.e. Namdeo Chavan in his examination in chief deposed that he knew Namdeo Jadhav, the plaintiffs and also the defendants. He deposed that he knew the relationship between the defendant no.1 and Namdeo because he resided in the same village. Plaintiff no.1 was residing in the house of the Namdeo Jadhav since her marriage with Namdeo before 25 years. The witness deposed that he was a witness to the marriage. In the marriage ceremony, 5 steps were performed. He also deposed that there was a divorce between Namdeo Jadhav and the defendant no.1. The divorce deed was executed by the said Namdeo and defendant no.1 in presence of two panchas by them. He deposed that there is custom of taking divorce by documents in presence of two panchas. All the parties belonged to Maratha community. At the time of the death of Namdeo Jadhav, the plaintiff no.1 was living in his house whereas the defendant no.1 was living at Angar, plaintiff nos. 2 to 4 were living in the house of Namdeo.

49. The said witness in his cross examination admitted that Sakharbai who was sister of the plaintiff no.1 was the wife of the cousin of the said witness. He deposed that he did not remember the date, season or year of the marriage of plaintiff no.1 with Namdeo. About 30 persons were present at the time of marriage but he did not remember the time of

the marriage. He also did not know whether wedding invitation cards were given to the concerned persons. He could not describe what was homa and the ceremony of taking five steps by the couple. Insofar as divorce between the defendant no.1 and Namdeo Jadhav is concerned, it was deposed that he did not witness any other divorce in the Maratha community.

50. The fifth witness examined by the plaintiffs was Mr. Babu Sambhu Parve. In his examination in chief, he deposed that he knew all the plaintiffs and the defendants and also knew Waman Chavan. He deposed that the plaintiff no.1 was the wife of Waman Chavan who had married with Namdeo Jadhav in the month of Kartik before 25 years. He was the witness to that marriage. Homa was performed. He deposed that defendant no.1 was staying at Angar when the plaintiff no.1 had married to Namdeo. He deposed that defendant no.1 was suffering from a disease and thus the said Namdeo had divorced her. Plaintiff no.1 and Waman Chavan also divorced each other. He deposed that he was the witness to the divorce deed between plaintiff no.1 and Waman Chavan when Gafoorsaheb had scribed the divorce deed. Waman Chavan put his signature on the divorce deed and the plaintiff no.1 put her thumb impression. He deposed that in Maratha community there was a custom in which a divorce could be effected with mutual consent in presence of four panchas.

51. The said witness in his cross examination deposed that he had not received any marriage invitation card of the plaintiff no.1 with Namdeo Jadhav. He could not tell the day or date of the marriage. His house was not in the same locality where the house of Namdeo Jadhav

was situated. He deposed that he had learnt that defendant no.1 had a disease and was thus divorced by Namdeo Jadhav. He attested his thumb mark on the divorce deed which was between plaintiff no.1 and Waman Chavan. He deposed that he could not tell any other instance of a woman of his community remarrying after divorcing her first husband.

52. The defendant no.1 examined himself as a witness. In her examination in chief she deposed that she married with Namdeo Jadhav when she was minor and had never suffered from black leprosy. She also deposed that in her community there was no custom of obtaining divorce by consent before panchas. She denied that the said Namdeo Jadhav had married with plaintiff no.1 or that the said Namdeo Jadhav was father of plaintiff nos. 2 to 4. She deposed that the plaintiff no.1 was the wife of Waman Chavan and was living with Waman Chavan in his house till his death. She deposed that the plaintiffs had no interest in the suit property and had never cultivated any part of the suit land.

53. In her cross examination, she deposed that the suit land was an ancestral property of Namdeo Jadhav. She belonged to Maratha community. Waman Chavan as well as plaintiff no.1 also belonged to Maratha community. She did not know what was the procedure if husband or wife in their community wanted divorce and separation. She deposed that the plaintiff nos. 2 to 4 were living with plaintiff no.1 since their birth. In her cross examination she denied that she was suffering from black leprosy. She deposed that the relations between the plaintiff no.1 and Waman Chavan were not cordial. She did not know whether the plaintiff no.1 and Waman Chavan divorced each other on 12th July, 1963.

54. A perusal of the plaint filed by the original plaintiffs clearly indicates that it was not pleaded that there was a divorce between the plaintiff no.1 and her first husband Waman Chavan before she allegedly contracted marriage with Namdeo Jadhav.

55. The question that arose before the learned trial judge was that if there was no pleading in the plaint by the plaintiffs that there was a divorce between the plaintiff no.1 and her first husband Waman Chavan, whether evidence led if any on such alleged divorce could be relied upon by the plaintiffs. The learned trial judge held that the plaintiffs had tried to suppress the material fact in their plaint about status of the plaintiff no.1 on the date of her alleged marriage with Namdeo Jadhav. A perusal of the oral evidence led by the plaintiff no.1 clearly indicates that the plaintiff no.1 could not produce the alleged divorce deed between the plaintiff no.1 with Waman Chavan which was alleged to have been lost before 10-20 years. The learned trial judge also considered the deposition of the plaintiff no.1 in R.C.S.No. 121 of 1966 at Ex.69. In the said deposition, the plaintiff no.1 had deposed that the divorce deed was in her possession. The said deposition was recorded on 20th January, 1975. The learned trial judge rightly held that the plaintiff no.1 had contradicted herself on the point of loss of divorce deed and was not stating the truth about her alleged divorce with the said Namdeo Chavan. The plaintiff no.1 also did not seek any permission to adduce secondary evidence about the execution and contents of the divorce deed.

56. In my view the learned trial judge has rightly held that the evidence of the plaintiff no.1 about the alleged divorce between her and Waman Chavan did not appear natural and reliable.

57. Insofar as evidence of PW-2 Dattatraya Atre who had alleged that he had sold two stamp papers to the plaintiff no.1 and Waman Chavan on 12th June, 1963 is concerned, in my view even if it was proved that the said witness had sold any stamp paper to the plaintiff no.1 and Waman Chavan, that would not prove that any divorce had actually taken place between the plaintiff no.1 and the said Waman Chavan. The said witness admitted in his cross examination that he did not know the purchaser of the stamp personally. He was not witness to the execution of the alleged divorce deed between plaintiff no.1 and the said Waman Chavan. The identity of the purchaser of the stamp was also not established in the evidence of the said Dattatraya Atre. The said witness thus neither could prove the case of the plaintiffs on the issue of the alleged divorce between plaintiff no.1 and the said Waman Chavan nor about the alleged prevailing customary divorce.

58. Insofar as evidence of Mr.Ambadas Jagdale (PW-3) is concerned, he was alleged to be working as a clerk in the office of an advocate and had alleged to have scribed the documents on the say of defendant no.1 and the said Namdeo Jadhav i.e. the alleged deed of divorce. He had not perused the document before deposing that he had scribed the said document. The said witness even could not say whether the signature or initial of the executor was to be obtained at the place of correction or alteration of the documents. In my view the said witness did not prove the alleged divorce between Namdeo Jadhav with the defendant no.1 herein. The said clerk did not possess licence to work as a bond writer and had not personally seen the documents.

59. The evidence of Namdeo Chavan (PW-4) who was examined by the plaintiffs on the issue of customary divorce in the community though had deposed in his examination in chief that the divorce was executed in presence of two panchas and there was a custom of executing the divorce documents in presence of two panchas, he admitted that he was not a witness to any other divorce in the Maratha community. The said witness was admittedly a close relative of the plaintiff no.1. He also could not remember the date, season or year of the marriage of plaintiff no.1 with Namdeo. His evidence was inconsistent with the evidence of plaintiff no.1.

60. Insofar as evidence of PW-5 Mr.Babu Sambhu Parve is concerned, he deposed that one Mr. Gafoorsaheb had scribed the divorce deed between the plaintiff no.1 and Waman Chavan. The learned trial judge has rightly held that if the scribe of the alleged divorce deed was alive, the plaintiffs ought to have examined the said scribe. A perusal of the record indicates that the plaintiffs did not seek permission to lead secondary evidence about the execution and contents of the alleged divorce deed between the plaintiff no.1 and Waman Chavan. The plaintiffs in my view ought to have examined Mrs.Girijabai who was the first wife of Waman Chavan and admittedly was alive on the date of recording the evidence who could have been a reliable witness to prove the alleged divorce between the plaintiff no.1 with Waman Chavan and her evidence could have been the best possible evidence to prove the case of the plaintiffs.

61. A perusal of the record clearly indicates that it was not the case of the plaintiff no.1 that she was a witness to the divorce between the

defendant no.1 and Namdeo Jadhav. In the written statement, the defendants had specifically denied that the defendant no.1 had divorced her husband late Namdeo Jadhav at any point of time. The defendant no.1 also had specifically denied that she was suffering from any black leprosy. The allegation of the plaintiffs that the defendant no.1 was suffering from black leprosy and on that ground there was a divorce between Namdeo Jadhav with the defendant no.1 on that ground or otherwise was not proved by the plaintiffs. The evidence of the plaintiff no.1 on this issue was hear say evidence and she had no personal knowledge about the alleged divorce between the defendant no.1 with Namdeo Jadhav.

62. A perusal of the evidence of all the witnesses examined by the plaintiffs clearly indicates that none of the witness examined by the plaintiffs could prove that in the Maratha community, divorce was permissible and could be obtained by execution of deed of divorce in presence of panchas or other witnesses. The witnesses admitted in the cross examination that they had not attended any other alleged customary divorce in the Maratha community. Except bare words in the plaint that such divorce was permissible by executing a deed of divorce before panchas in the plaint, the plaint was totally vague. There was no specific evidence led by the witnesses examined by the plaintiffs on the issue of alleged customary divorce in the Maratha community by executing deed of divorce before panchas and such alleged customary divorce was not proved at all.

63. The learned trial judge in my view has rightly rendered a finding that the alleged customary divorce by execution of deed of

divorce in the presence of panchas was not proved by the plaintiffs. A perusal of the order passed by the lower appellate court however indicates that the lower appellate court has totally overlooked the fact that the pleadings as well as the oral evidence led by the plaintiffs on the issue of alleged customary divorce was totally vague and without particulars. In my view the lower appellate court has passed the impugned order allowing the appeal by overlooking the evidence on record mechanically and has reversed the findings rendered by the learned trial judge. In my view the lower appellate court could not have interfered with the findings rendered by the learned trial judge on the issue that the alleged customary divorce by execution of deed of divorce in presence of panchas was not proved by the plaintiffs.

64. A perusal of the order passed by the Lower Appellate Court clearly indicates that the Lower Appellate Court failed to appreciate the inconsistency in the oral evidence led by the witnesses examined by the plaintiffs on the issue of the steps taken in the marriage of the plaintiff no.1 with Namdeo Jadhav. The Lower Appellate Court failed to appreciate that even if the presumption in law could be drawn of a marriage in view of the plaintiff no.1 allegedly stayed with Namdeo Jadhav for long time and plaintiff nos.2 to 4 having begotten out of the said relationship, that itself would not prove that the plaintiff no.1 was divorced by her husband Waman Chavan prior to her alleged marriage with Namdeo Jadhav. It is erroneously held by the Lower Appellate Court that there was no necessity to point out any other instance referred to by PW-5 Mr.Babu Parve examined by the plaintiffs.

65. It is well settled principles of law laid down by the Supreme Court that prevalence of customary divorce in the community to which the parties belong, contrary to general law of divorce must be specifically pleaded and established by person propounding such custom. In my view, in absence of any proper pleadings on behalf of the plaintiffs in the plaint about the then alleged existing custom and customary divorce in the Maratha Community, the plaintiffs could not have led any oral evidence on the said issue. Be that as it may, though the oral evidence was led by the plaintiffs by examining five witnesses, the plaintiffs, in my view, have miserably failed to prove the prevalence of customary divorce in the Maratha Community to obtain divorce by execution of the document in presence of panchas when such customary divorce was contrary to general law of divorce prescribed under the provisions of the Hindu Marriage Act, 1955.

66. Section 13 of the Hindu Marriage Act, 1955 provides for dissolution of marriage by a decree of divorce on various grounds set out therein. Section 4 of the Hindu Marriage Act, 1955 provides that save as otherwise expressly provided in the Hindu Marriage Act, 1955, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage Act, 1955 shall cease to have effect with respect to any matter for which provision is made in the said Act. Section 29 (2) of the Hindu Marriage Act, 1955 provides that nothing contained in the said Hindu Marriage Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement

of the said Act. Section 3(a) of the Hindu Marriage Act, 1955 defines the expressions 'custom' and 'usage.' It is provided that unless the context otherwise requires, the custom and usage signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family. It is provided that the rule is certain and not unreasonable or opposed to public policy and further provided that in the case of a rule applicable only to a family, it has not been discontinued by the family.

67. The conjoint reading of Section 3(a), 4(a) and 29 (2) of the Hindu Marriage Act, 1955 indicates that though Section 29(2) of the said Act saves customary rights, a person who relies upon such custom has to prove that such custom and usage had been continuously and uniformly observed for a long time and had obtained the force of law amongst Hindus in their local area, tribe, community, group or family and such custom was not unreasonable or opposed to public policy. In my view, the plaintiffs have miserably failed to prove at the first instance that there was any such custom prevailing in the Maratha Community to obtain divorce by execution of a document in presence of Panchas and secondly, whether such alleged customary divorce was continuously and uniformly observed for a long time in the Maratha Community and was not opposed to public policy. None of the witnesses examined by the plaintiffs could prove such alleged customary divorce having been followed continuously and uniformly in their community before the learned trial Judge.

68. A perusal of Section 4 of the Hindu Marriage Act, 1955 clearly indicates that any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage Act, 1955 shall cease to have effect after the Hindu Marriage Act, 1955 came into force.

69. In so far as submission of Mr.Mandlik, learned counsel for the respondents that since there was a presumption of law of a valid marriage between the plaintiff no.1 and the said Namdeo Jadhav in view of the plaintiff no.1 having stayed with Namdeo Jadhav for a long period and three children having begotten out of such relationship and thus there was a presumption of a valid divorce between the plaintiff no.1 and the said Waman Chavan prior to contracting her marriage with Namdeo Jadhav is concerned, I am afraid this submission cannot be accepted. In my view, no presumption of law can be drawn in respect of a valid divorce between the parties. The divorce can be granted only under the provisions of Section 13 of the Hindu Marriage Act, 1955 amongst Hindus on the grounds set out therein unless such divorce is recognized by custom. In my view, even if the plaintiff no.1 was staying with the said Namdeo Jadhav for some time and if any issues were begotten out of such relationship between the plaintiff no.1 and the said Namdeo Jadhav, even if legal presumption of marriage of the plaintiff no.1 and the said Namdeo Jadhav is drawn in accordance with law, presumption of divorce of the plaintiff no.1 with her husband Waman Chavan cannot be drawn by any Court of law.

70. In my view, divorce can be granted either by a decree of Court or by custom prevailing in the community continuously and

uniformly observed and had obtained the force of law amongst such community which was not unreasonable or opposed to public policy. The plea of divorce has to be raised very specifically and has to be proved strictly. Section 5 of the Hindu Marriage Act, 1955 provides that a marriage may be solemnized between any two Hindus if neither party has a spouse living at the time of the marriage. It is thus clear beyond reasonable doubt that unless the plaintiff no.1 had specifically pleaded and proved that she was divorced by Waman Chavan before she had alleged to have married with the said Namdeo Jadhav, she could not have contracted any marriage with the said Namdeo Jadhav. In my view, the plaintiff no.1 was not eligible to get married to the said Namdeo Jadhav in view of the plaintiff no.1 not having proved her divorce with Waman Chavan before allegedly contracting the marriage with Namdeo Jadhav.

71. A person must be eligible to get married before contracting the marriage and not otherwise. Section 11 of the Hindu Marriage Act provides that any marriage solemnized after the commencement of the said Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5. It is thus clear that if the husband of the plaintiff no.1, i.e. Waman Chavan was alive and their marriage was subsisting at the time of alleged marriage between the plaintiff no.1 and Namdeo Jadhav and there being no divorce between them, the defendant no.1 and Namdeo Jadhav, neither the plaintiff no.1 nor the said Namdeo Jadhav could have contracted marriage with each other and such marriage would be a void marriage

being in contravention of the conditions set out of Section 5 (i) of the Hindu Marriage Act.

72. In my view, even if presumption of law could be drawn of a valid marriage between the plaintiff no.1 and Namdeo Jadhav, there cannot be a presumption in law that the said marriage was preceded by a valid divorce between the plaintiff no.1 and Waman Chavan and also between the defendant no.1 and Namdeo Jadhav unless the same was strictly proved. Admittedly, the defendant no.1 in her written statement had pleaded that she was never divorced with the said Waman Chavan. The plaintiffs have failed to prove the divorce of the plaintiff no.1 with Waman Chavan and also the divorce between the defendant no.1 and Namdeo Jadhav before allegedly contracting the marriage with Namdeo Jadhav. I am thus not inclined to accept the submission of Mr.Mandlik, learned counsel for the respondents that the Court has to draw a presumption of a valid divorce having obtained by the plaintiff no.1 with Waman Chavan and the defendant no.1 with Namdeo Jadhav before the plaintiff no.1 allegedly having contracted the marriage with Namdeo Jadhav.

73. In so far as the judgment of the Supreme Court in the case of *Badri Prasad vs. Dy. Director of Consolidation and Ors. (supra)* relied by the learned counsel for the respondents (original plaintiffs) is concerned, it is held by the Supreme Court that a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife and although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. It is held that law leans in favour of

legitimacy and frowns upon bastardy. There is no dispute about the proposition of law laid down by the Supreme Court in the said judgment. The said judgment, however in my view, does not lay down a law that similar presumption shall also be drawn in respect of the customary divorce deemed to have been existed before a party to such alleged customary divorce having started living together with another party for a long spell as husband and wife. The said judgment of the Supreme Court in the case of *Badri Prasad vs. Dy. Director of Consolidation and Ors. (supra)*, in my view, thus does not assist the case of the original plaintiffs.

74. In so far as the judgment of the this Court in the case of *Ningu Vithu Bamane & Ors. Vs. Sadashiv Ningu Bamane & Ors. (supra)* relied by the learned counsel for the respondents (original plaintiffs) is concerned, this Court in the said judgment has taken a view that there is a legal presumption in favour of marriage and legitimacy and the burden of proving a fact existing otherwise is on the party who challenges the marriage between two persons and the legitimacy of the children born of such marriage. There is no dispute about the propositions laid down by this Court in the said judgment. In my view, even the said judgment would not assist the case of the original plaintiffs in support of the submission that the Court shall draw a legal presumption in favour of a valid customary divorce alleged to have been obtained before the plaintiff no.1 alleged to have contracted the marriage with Namdeo Jadhav and the said Namdeo Jadhav also had alleged to have given a customary divorce to the defendant no.1. It is thus clear that the alleged marriage between the plaintiff no.1 and Namdeo Jadhav is void.

75. In so far as the submission of Mr.Mandlik, learned counsel for the original plaintiffs that in one of the proceedings, the defendant nos.2 & 3 who are sons of the defendant no.1 admitted that the plaintiff nos.2 to 4 were step brothers and sisters of the defendant nos.2 & 3 and thus the plaintiffs were not required to prove the admitted fact is concerned, learned counsel placed reliance on the judgment of the Supreme Court in the case of *Union of India (UOI) vs. Moksh Builders and Financiers Ltd. and Ors. (supra)*. In my view, even if there was any such admission on the part of defendant nos.2 & 3 that would not be a ground for drawing a legal presumption that there was any valid customary divorce between the plaintiff no.1 with Waman Chavan and the defendant no.1 with Namdeo Jadhav. The said judgment, in my view, thus would not assist the case of the original plaintiffs.

76. In so far as the alleged divorce deed being Exhibit 79 produced by the plaintiffs is concerned, since the plaintiffs failed to prove the prevailing custom of obtaining a customary divorce in the Maratha Community by executing a document in presence of Panchas, even if the said divorce deed was alleged to have been proved, in my view, the said document would not be sufficient to prove the dissolution of marriage of the plaintiff no.1 and Waman Chavan by alleged customary divorce prevailing in the Maratha Community.

77. A perusal of the plaint filed by the plaintiffs and the evidence led clearly indicated that the suit property was not a self-acquired property of Namdeo Jadhav, but was an ancestral property. The plaintiffs failed to prove any partition of the property at any point of time. In my

view, since the plaintiff no.1 was not a legally wedded wife of Namdeo Jadhav, she could not claim right in the ancestral properties. Since the plaintiff nos.2 to 4 were not the children out of the lawful marriage between the plaintiff no.1 and the said Namdeo Jadhav, the plaintiff nos.2 to 4 also cannot claim any right in the suit properties which were admittedly the ancestral properties.

78. In so far as the question of law formulated by this Court i.e. 'whether under Section 65 of the Indian Evidence Act, 1872, secondary evidence in the form of oral evidence can be led or considered to prove the contents of the document allegedly lost' is concerned, in my view, before allowing production of secondary evidence, it must be established that the original document is lost or destroyed or is being deliberately withheld by the party. Supreme Court in the case of **Rakesh Mohindra Vs. Anita Beri and Ors.**, reported in **2016 ALL SCR 1** has held that the party who seeks to lead secondary evidence has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is held that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispenses with its proof, which is otherwise required to be done in accordance with law.

79. It is held by the Supreme Court that the pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party who seeks to produce secondary evidence must establish for

the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. In the facts of this case, the plaintiffs could not prove before the learned trial Judge that any of the alleged divorce deed was executed and lost and could not have produced and thus they were entitled to lead secondary evidence under Section 65 of the Indian Evidence Act, 1872. In my view, the party who seeks to lead secondary evidence has to establish that such party is not able to produce the primary document which beyond his control or that the same is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used. Unless these mandatory conditions of Section 65 of the Indian Evidence Act, 1872 are complied with, such party cannot be allowed to lead secondary evidence. The substantial question of law no.(i) is accordingly answered in negative in the facts of this case.

80. In so far as the substantial question of law no.(ii) is concerned, the plaintiffs had failed to prove the divorce of the plaintiff no.1 with Waman Chavan before allegedly contracting the second marriage with Namdeo Jadhav and thus there could not be any presumption under Sections 50 and 114 of the Indian Evidence Act, 1872 as to the legality as well as factum of the second marriage of the plaintiff no.1 with the deceased Namdeo Jadhav in view of the existing first marriage of the plaintiff no.1 with Waman Chavan. The said question of law no.(ii) is answered accordingly.

81. In so far as the substantial question of law no.(iii) is concerned, the plaintiffs have failed to prove any recognized custom in Maratha community to dissolve a marriage by giving divorce to each other privately before the panchas. The said question of law no.(iii) is accordingly answered in negative.

82. In so far as the substantial question of law no.(iv) is concerned, in my view, since there was no averment in the plaint about first marriage of the plaintiff no.1 with Waman Chavan, the Lower Appellate Court could not have considered the oral evidence led by the plaintiff no.1 in respect of the said alleged dissolution of first marriage with Waman Chavan. The said question of law no.(iv) is accordingly answered in negative.

83. In so far as the substantial question of law no.(v) is concerned, In my view, since the plaintiffs have failed to prove actual and legal dissolution of the marriage of the plaintiff no.1 and her first husband Waman Chavan, the said question of law no.(v) is answered in negative.

84. In so far as the substantial question of law no.(vi) is concerned, the plaintiffs have failed to prove that there was actual and legal dissolution of the marriage of the defendant no.1 and deceased Namdeo Jadhav and thus the said question of law no.(vi) is answered in negative.

85. In so far as the substantial question of law no.(vii) is concerned, in my view, the plaintiffs have failed to prove the customary

divorce. The alleged divorce deed Exhibit 79 was not sufficient to prove the dissolution of marriage of plaintiff no.1 and Waman Chavan in absence of proof of any custom or customary divorce in the Maratha Community by execution of the document in presence of Panchas. The said question of law no.(vii) is accordingly answered in negative.

86. In so far as the substantial question of law no.(viii) is concerned, in my view, since the plaintiff no.1 was not a legally wedded wife of Namdeo Jadhav, she has no right, title or interest of any nature whatsoever in the suit property which is ancestral property. The said question of law no.(viii) is accordingly answered in negative.

87. In my view, the impugned judgment delivered by the Lower Appellate Court is totally contrary to the law and in ignorance of and overlooking the documentary and oral evidence led by the parties. Various findings recorded by the Lower Appellate Court are totally perverse and thus are required to be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

88. I therefore pass the following order :-

- (i) The impugned judgment dated 3rd September 1992 passed by the Lower Appellate Court in Civil Appeal No.246 of 1989 is set aside. Civil Appeal No.246 of 1989 is dismissed;
- (ii) The judgment and decree dated 31st March 1989 passed by the learned trial Judge in Regular Civil Suit No.27 of 1990 is upheld;
- (iii) Second Appeal No.108 of 1993 is allowed in aforesaid terms;

- (iv) In view of disposal of the appeal, civil application does not survive and is accordingly disposed of;
- (v) There shall be no order as to costs.

R.D. DHANUKA, J.