

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10810 OF 2015

Dipti Bhushan Kedar	..	Petitioner
VS.		
Bhushan D. Kedar	..	Respondent

Mr. Samir Vaidya for Petitioner.
Mr. S. S. Wagh for Respondent.

CORAM : M. S. SONAK, J.
DATE: 20 NOVEMBER 2015

P.C. :-

1] The challenge in this petition to the order dated 24 August 2015, by which the Family Court has rejected the Petitioner's application at Exhibit '24' urging dismissal of petition no. 176 of 2012 instituted by the Respondent seeking divorce, on the ground that the same is barred by the principle of *res judicata* set out in Section 11 of the CPC.

2] The record reveals that the Respondent had instituted H. M. Petition No. 218 of 2009 seeking divorce on the ground of cruelty and desertion. The said petition was dismissed after full trial. The Respondent thereafter carried the matter in appeal before the District Court, Nashik, being Civil Appeal No. 243 of 2010. The Respondent however, by application at Exhibit '17' in the said appeal, withdrew not merely the appeal but H.M. Petition No. 218 of 2009. This is recorded in the order dated 26 November 2014 which was made after afford of opportunity of hearing to the Petitioner herein. At the stage when the order dated 26 November 2014 was made, the Petitioner had contended that subject to

awarding costs of Rs.10,000/- the Respondent be permitted to withdraw the H. M. Petition. The order dated 26 November 2014 has not been challenged by the Petitioner herein. In view of the order dated 26 November 2014, it cannot be said that the decree in H.M. Petition No. 218 of 2009, any longer subsists. There is, in such circumstances, no question of applicability of the doctrine of *res judicata*.

3] That apart, in the impugned order, it has been observed that petition No. 176 of 2012 is based upon a different cause of action as well as on additional grounds. The Family Court has placed reliance upon the decision of Rajasthan High Court, in which it is laid down that desertion and cruelty are continuing wrongs and therefore, the doctrine of *res judicata* will not apply, where, a fresh petition is filed on basis of continued cause of action. At this stage, it is not necessary to comment upon the principle. However, in the facts of this case, it is clear that the decree earlier made in H. M. Petition No. 218 of 2009 no longer survives and therefore, there is no question of applicability of doctrine of *res judicata*. There is accordingly, no jurisdictional error in the making of the impugned order. This petition is therefore dismissed.

Chandka

(M. S. SONAK, J.)