

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12311 OF 2015

Ramesh Gajanan Rege	..	Petitioner
vs.		
Anjali Ramesh Rege	..	Respondent

Mr. B. M. Patwardhan for Petitioner.
Mr. A. D. Sarwate for Respondent.

CORAM : M. S. SONAK, J.
DATE: 27 JANUARY 2016

P.C :

1] This petition challenges the order dated 21 January 2013 below Exhibit '67' in petition PA No. 850 of 2005 by the Family Court at Pune.

2] In fact, petition PA No. 850 of 2005 has already been dismissed by the Family Court at Pune and the petitioner has instituted a substantive appeal being Family Court Appeal (Stamp) No. 35219 of 2015 before the Division Bench in that regard. In view of the dismissal of petition PA No. 850 of 2005, it is doubtful whether the present petition survives.

3] However, the learned counsel for the petitioner points out that there is observation made by the Family Court that the order of maintenance made in petition PA No. 850 of 2005, consequent upon

the dismissal of the said PA No. 850 of 2005, is to be regarded as an order in the counter claim instituted by the respondent. In view of the same, the learned counsel for the petitioner submits that though according to him this direction is illegal, the petition survives and is required to be entertained.

4] As against the impugned order dated 21 January 2013, the petitioner has in fact instituted a writ petition no. 7952 of 2013. On 20 September 2013 however, the petitioner withdrew the said petition unconditionally i.e. without seeking any leave to institute a fresh petition. The order dated 20 September 2013, reads thus :

“P.C. :

Learned counsel for the Petitioner submits that in view of the fact that the prayer and the Writ Petition No. 7950 of 2013 seeking expeditious trial is granted, he seeks to withdraw the above Petitions.

2. Prayer as prayed for is granted in the interest of justice.

3. It is made clear that the said Writ Petitions have not been decided on merits.”

5] Thereafter, the petitioner, no doubt, for reasons set out in the civil application (Stamp) No. 15679 of 2014 or CAW No. 1526 of 2014 has applied for recall of order dated 20 September 2013 made in writ petition no. 7952 of 2013 and to restore the said petition to file and to hear the same on merits. The said civil application, even

according to the learned counsel for the petitioner is pending. The date upon which the said civil application was made is possibly 13 June 2014.

6] Notwithstanding the pendency of the aforesaid civil application, the petitioner has instituted the present petition to once again challenge the order dated 21 January 2013. In paragraph 5 of the petition, the petitioner has made the following averment.

*“5. The Petitioner wanted to restore WP no. 7952/2013, for which he has filed a civil application no. CAW/1526/2014 on 12th June 2014 (**ANNX 8**) for restoration of the WP 7952/2013. In spite of several efforts by the Petitioner, it never came up for final hearing and not yet finally decided. Even otherwise, the Petitioner has a right to file this Writ Petition as explained above. It is not necessary to get the said civil application decided in view of this Writ Petition. Once this Writ Petition is admitted, the Petitioner would withdraw the said civil application. With this background, the withdrawal of earlier WP no. 7952/2013, which was not decided on merits, is not a bar in filing this Writ Petition.”*

7] In my judgment, the institution of the present petition, is an abuse of the process of the Court. This is not a case of applicability of the doctrine of *res judicata*. However, if the petitioner chooses to withdraw a petition without seeking leave to file a fresh petition, then, such a petitioner cannot, normally, institute a fresh petition and insist that the same be heard on merits, notwithstanding the

circumstance that an application seeking recall of the earlier order is still pending. If this is permitted, the same will perhaps encourage the vice of forum shopping. A principles analogous to those contained in Order XXIII Rule 1 of the CPC will apply to a situation of this nature.

8] The Hon'ble Apex Court in the case of *Sarguja Transport Service vs. State Transport Appellate Tribunal, Gwalior & Ors.*¹ has made the following observations in paragraph 9 :
paragraph 9 from judgment

“9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying R. 1 of O. XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extra ordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other

1 AIR 1987 SC 88(1)

remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Art. 21 of the Constitution since such a case stands on a different footing altogether. We, however, leave this question open."

[Emphasis supplied]

9] For the aforesaid reasons, this petition is dismissed with costs of Rs.10,000/- (Rupees Ten Thousand) to the respondent. The costs to be paid within two weeks from today.

10] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)