

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

WRIT PETITION NO. 4833 OF 2017

Mrs.Shikha Amit Didwania	...	Petitioner
V/s.		
Amit Shyamsunder Didwania	...	Respondent

- Mr.S.R. Murarka i/b. Law Chamber of Siddharth Murarka for the Petitioner.
- Mr. S.D. Patil i/b. Mr.Yogesh C. Shah for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 21st FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the Petitioner and the Respondent.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 15th July, 2016, passed by 9th Joint Civil Judge Senior Division, Thane, below Exhibit-21 in Marriage Petition No.34 of 2015.

3] The application at Exhibit-21 has filed by the Respondent-husband, who has filed the Marriage Petition No.34 of 2015 before the trial Court for a decree of divorce on the ground of cruelty. In that

case, the Petitioner-wife has filed the written statement. Thereafter, the matter was kept for recording evidence of the Respondent-husband. At that stage, on 8th July, 2016, Respondent has filed the application at Exhibit-21 contending *inter-alia* that the case was adjourned for chief and cross-examination on 2nd July, 2016. However, as he was not keeping well, adjournment application was moved and the matter was taken up on 10th July, 2016. However, on that day, as the Court was preoccupied, it was adjourned to 15th July, 2016. It was submitted that as he was going out of India on 10th of the said month, he was not in a position to attend the Court and to pursue with the matter. In that situation, if any order is passed against him, in his absence, great prejudice will be caused to him. Therefore, he wants to withdraw the said petition with liberty to file a fresh petition.

4] This application was resisted by the present Petitioner-wife contending that heavy costs be imposed for wasting the valuable time of the Court and liberty should not be granted to file a fresh petition.

5] The trial Court, however, vide its impugned order has held that, as the Respondent-husband was not willing to proceed at present in the matter and no substantial reason was advanced by the present Petitioner-wife to keep the matter on record, the application for withdrawal of the Petition was allowed with permission to file a fresh

petition and as the valuable time of the Court was wasted, the costs of Rs.2,000/- was imposed to be deposited with the District Legal Aid Authority, Thane.

6] This order of the trial Court is challenged in this Writ Petition by learned counsel for the Petitioner-wife by submitting that after taking frequent adjournments and the dates convenient to him, the Respondent-husband has remained absent and thereafter filed this application for withdrawal of the petition. Within one month thereafter he has filed another fresh petition for divorce on the same ground, which clearly goes to show that the Respondent-husband has abused the process of law and therefore, the impugned order passed by the trial Court of allowing the withdrawal of the petition with liberty to file a fresh petition being not legal and correct; needs to be quashed and set-aside.

7] Per contra, learned counsel for the Respondent-husband has submitted that the trial Court was vested with the discretion as to whether to grant such permission for withdrawal or not with liberty to file a fresh petition. The trial Court has after considering the entire material on record has granted such permission and it was subject to the costs of Rs.2,000/-. Therefore, it cannot be said that the discretion exercised by the trial Court was not legal, correct or proper and in

such situation, this Court should be slow in interfering with the said discretion.

8] It is true that under Order-23 Rule-(1)(3) of C.P.C., the trial Court is having a discretion to decide whether the permission to withdraw the Petition with liberty to file a fresh petition is to be granted or not. However, such discretion is expected to be exercised with proper care and caution. Wider the discretion, wider the responsibility on the Court to exercise such discretion properly, reasonably and not arbitrarily. It may be true that the Respondent could have simpliciter withdrawn the said Petition. However, the reason given by him for withdrawal of the said Petition and too seeking liberty to file a fresh petition on the same cause of action and thereafter within one month Respondent filing another fresh Petition, requires some consideration. As per Rule (1)(3) of Order-23 of C.P.C., the Court has to record its satisfaction that, (a) a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the Plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Then only on "such terms as it thinks fit", the Court can grant the Plaintiff permission to withdraw from such suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter of the suit or such part of a claim. The impugned

order passed by the trial Court does not reflect this satisfaction on the part of the trial Court.

9] As observed by the trial Court itself in its order, the record shows that inspite of giving convenient dates and after seeking frequent adjournments, the Respondent remained absent and when the trial Court showed its reluctance to adjourn the matter, he has moved the application for withdrawal of the Petition. It was only on the ground that he was going out of India on 10th of the said month. However, he has not specified when he will be returning back and whether the matter can be adjourned till then. If within one month from the withdrawal of the proceeding before the trial Court, he has returned from the abroad and filed another fresh Petition, it clearly indicates that the intention of the Respondent was not at all bonafide and as submitted by learned counsel for the Petitioner, his entire intention was just to harass the Petitioner-wife.

10] In such situation, even if, he could not have been compelled to continue with the Petition, at-least while granting the liberty, the trial Court should have exercised its discretion in a proper manner. Allowing such permission subject to costs of Rs.2,000/-, that too payable or deposited towards District Legal Aid Authority, Thane, cannot be called as proper exercise of discretion. It was the Petitioner-

wife, who has suffered on the count of filing of such Petition and thereafter, its withdrawal and again filing of another Petition. Therefore, Petitioner-wife should have been compensated properly. To that extent, the trial Court should have imposed heavy costs, while granting such permission to the Respondent-husband of withdrawing the Petition, with liberty to file a fresh Petition.

11] Therefore, to that limited extent the interference is definitely warranted in the impugned order of the trial Court and hence, in addition to the costs imposed by the trial Court of Rs.2,000/- to be deposited towards the District Legal Aid Authority, Thane, the Respondent-husband is directed to pay the costs of Rs.40,000/- to the Petitioner-wife, within one month from the date of this order. This order will be a condition precedent for maintainability of second Petition. Only on fulfillment of this condition, Respondent-husband's second Petition will be taken up before the trial Court. In case of failure on the part of the Respondent-husband to fulfill this condition, his second Petition will stand automatically dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]