

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4011 OF 2017

Bhushan Dattatrayay Kedar .. Petitioner
Versus
Dipti Bhushan Kedar .. Respondent

WITH
WRIT PETITION NO.6225 OF 2017

Dipti Bhushan Kedar .. Petitioner
Versus
Bhushan Dattatrayay Kedar .. Respondent

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Mr.S.S. Wagh i/b Mr.Vijaykumar B. Dighe for the petitioner in WP 4011/17 and for the respondent in WP 6225/17.

Ms.Dhwani Mehta for the respondent in WP 4011/17 and for the petitioner in WP 6225/17.

CORAM: SMT.BHARATI H. DANGRE, J

RESERVED ON : 28th MARCH, 2018

PRONOUNCED ON : 4th MAY 2018

JUDGMENT :-

1 Rule. Rule made returnable forthwith.

2 Both the Writ Petitions are being heard together by consent of the parties, and are being disposed of by this common judgment since the factual aspect involved in both the Writ Petitions revolve around the same set of facts.

3 Before dealing with the legal issues raised in both the petitions, it would be useful to refer to the chronology of facts and events leading to the filing of the present writ petitions, one by the husband and another by the wife.

 The marriage between petitioner husband and respondent wife is solemnized on 5th July 2006. It is not in dispute that for a very short span of time, the parties led their marital life as husband and wife, and on 25th August 2006, the wife left the matrimonial home since she was serving at Pune and she continued to stay in Pune for approximately a period of one year. It is the case of the husband that the wife was residing separately on account of she serving there, whereas it the case of the wife that because of the cruelty inflicted upon her, she had chosen to reside separately and she was rather coerced to stay away from the matrimonial house. However, it is not in dispute that on 29th August 2007, the wife came to reside in the matrimonial house, but again due to differences between the parties, the wife left the matrimonial home on 4th August 2008, and since then, there is no cohabitation between the parties. In the mean time, on 5th April 2009, a female child was born out of the wedlock.

4 As far as the proceedings instituted by the parties against each other are concerned, it is relevant to note that in 2009, the husband filed proceedings for divorce on the ground of cruelty vide HMP No.218 of 2009 in the Civil Court at Nashik. In the said petition, he sought divorce on the ground of cruelty and also on the ground of desertion. According to the husband, though desertion was mentioned as a ground for divorce, the said ground was not available since the period when the wife had left the company of the husband, was less than one year. The HMP filed by the husband came to be decided against him by judgment dated 31st August 2000 passed by the Civil Judge, Sr.Division Nashik.

Being aggrieved, the petitioner filed an appeal in the District Court which was numbered as Appeal No.243/2010. In the mean time, the wife instituted proceedings under Section 12 of the Protection of Women from Domestic Violence Act, 2005, which were rejected by the Sessions Court against which the wife has approached the High Court and the proceedings are subjudice.

5 It is pertinent to note that during the pendency of the Appeal filed by the husband, he filed a second petition, seeking divorce on the ground of cruelty and also on the ground of

desertion. The said proceedings were instituted in the Family Court as Nasik and was numbered as OA No.176/2012.

The husband moved an application Exhibit 17 on 26th November 2014 in the appeal proceedings filed by him. In the said application, he sought a relief of withdrawal of the original HMP No.218 of 2009 and the District Judge permitted withdrawal of HMP with costs of Rs.2,000/-. It is this order which forms the basis of proceedings involved in both the writ petitions and it is the specific contention of the wife that what was allowed to be withdrawn was only an appeal and not the HMP which came to be decided on merits. This controversy would be decided at a subsequent point of time. However, in order to continue with the chronology of events, it is to be noted that the amount of costs was immediately paid by the husband and accepted by the Advocate for the respondent on the same day. Subsequently, on 22nd January 2005, the wife moved an application before the Family Court in the proceedings of divorce filed by the husband vide OA No.176/12 claiming that the divorce petition is not tenable and it is barred by res-judicata. The learned Family Court passed an order on 22nd January 2015 and observed that HMP No.218/09 is withdrawn, and the subsequent Divorce Petition No.176/12 is on a

different and subsequent ground, the principle of res judicata is not applicable and the Court rejected the application.

The wife approached this Court by filing WP No.10810 of 2015 which came to be rejected on 20th January 2015 with an observation that the order dated 26th November 2014 has not been challenged by the petitioner, and in view of that order, it cannot be said that decree in HMP No.218/09 no longer subsists and in such circumstances, there is no question of applicability of doctrine of res judicata. The Court also observed that the subsequent petition was based on different cause of action, hence, question of res judicata would not arise. The order passed by this Court came to be challenged before the Supreme Court by the wife and the challenge was summarily rejected and the order passed by the High Court came to be confirmed.

6 In the mean time, the wife moved an application under Section 152 of the Code of Civil Procedure for correcting the order of District Judge passed on 26th November 2014 by filing Miscellaneous Application No.222/15 on 9th December 2005. The said application came to be opposed by the husband on the ground of its tenability and it was submitted that under Section 152, the Court is authorized to correct only arithmetical and clerical

mistakes. However, the District Judge *suo moto* treated the application under Section 152 as the application for review and reviewed the order dated 26th November 2014, by an order dated 21st January 2016, thereby rectifying its earlier order.

This order was subject matter of Writ Petition filed before this Court vide Writ Petition No.6174/16 and the High Court on the ground that the wife was not afforded an opportunity of hearing, by order dated 5th January 2017 was pleased to remand the matter back to the District Judge to be decided on its own merits and in accordance with law.

7 The Hon'ble District Judge heard the said Miscellaneous Application No.222/15 and allowed the same on 6th February 2017 by an observation that there was no order permitting the appellant to withdraw HMP No.218/09. The Court noted that what was sought to be withdrawn was only the Appeal and for that limited purpose, the other side had consented, and in any contingency, the HMP could not have been permitted to have been withdrawn since it was already decided on merits, and therefore, an error had occurred which was apparent on the face of record. In this background, the learned Principal District Judge, Nashik allowed the application filed by wife and set aside

the impugned order passed below Exhibit-17 in Civil Appeal No.243/10. The Court directed the parties to advance their submissions below Exhibit-17 and directed the matter to proceed from that stage onwards. The order of withdrawal of Civil Appeal was also set aside and appeal stood restored and the respondent wife was directed to refund the amount of Rs.2,000/- to the husband/appellant.

8 Writ Petition No.4011 of 2017 is filed by the petitioner husband who assails the said order dated 6th February 2017 passed by the Principal District Judge at Nashik. He prays for quashing and setting aside of the said impugned order and has also prayed for stay to the effect and operation of the said order. In the backdrop of the same facts, WP no.6225/17 is filed by the wife challenging the order dated 7th March 2017 passed by the Family Court, Nashik on an application filed by the wife to dismiss the petition on the ground that the petition is hit by principles of res judicata and also on the ground of abuse of the process of law. On such an application, the Family Court has observed that the HMP No.218/09 was filed by the husband on the ground of cruelty and desertion and the said petition was dismissed, against which the appeal is preferred in the District Court at Nashik. The Family

Court relying on the judgment of the Rajasthan High Court has held that desertion and cruelty are continuous grounds and has recorded a finding that on subsequent ground, the husband moved the petition, and therefore, without affording an opportunity to the husband to deal with the contention raised by the wife, the Court observed that it would not be desirable to straight away dismiss the petition on the ground of res judicata or on the ground of abuse of process of law.

9 In support of the petition, I have heard Advocate Shri S.S. Wagh appearing for the petitioner in WP 4011/17 and Ms.Dhwani Mehta appearing for the petitioner in WP 6225/17. Both the respective counsel appeared for the respective respondents in the writ petitions.

Shri Wagh, learned counsel would invite the attention of this Court to the chronology of events and would submit that the order passed by the Principal District Judge is erroneous as the Court has invoked the jurisdiction under Section 151 of the Code of Civil Procedure *suo moto* since the application that was preferred was under Section 152 of CPC and the Court had no jurisdiction to invoke its inherent powers. Further, he would submit that in effect, the Principal District Judge had exercised the

power of review by reviewing its own earlier order, which was impermissible in law. He would place reliance on the judgment of the Hon'ble Apex Court in the case of ***Nain Singh Vs. Koonwarjee and ors.***¹, wherein the Hon'ble Apex Court has found fault with the order of the High Court and has held that the Hon'ble High Court has misconceived notions about its inherent powers, and further held that under the inherent powers of the Court, as recognized under Section 151 of CPC, Court has no power to do that which is prescribed by the Court, and the Court cannot make use of the special provision where a party has its remedy provided elsewhere in the Code, and has failed to avail such a remedy. He would also submit that the power under Section 151 of the CPC cannot be exercised as an appellate power. He would also place reliance on the judgment of the Apex Court in case of ***State of U.P Vs. Roshan Singh & Anr.***² laying down the scope of Section 151 of CPC, and he would invite the attention of this Court to paragraph no.7 of the said judgment, wherein their Lordships in unequivocal terms, have held that object of Section 151 of the Code of Civil Procedure is to supplement and not to replace the remedies provided for in the Code.

1 1970(1) SCC 732

2 Appeal (civil) 453-455/08 dt.16/1/2008

As against this, Ms.Dhwani Mehta would submit that the husband had instituted proceedings for divorce on the ground of cruelty and desertion. The Court did not find substance in the contention of the husband and was pleased to reject the claim seeking divorce. She would specifically submit that the cause of action for instituting the proceedings for divorce was cohabitation between the parties for a limited period from 5th July 2006, and as according to her, it is the case of the petitioner that the wife resided away from the husband from 25th August 2006 till 29th August 2007. She would submit that it is even the case of the husband that when the wife came to reside at the matrimonial house from 29th August 2007, she behaved in a cruel manner, and she ultimately left the house on 4th August 2008 and this act of hers amounted to cruelty and he invoked the jurisdiction of the Court to seek decree of divorce on the said ground. She would submit that the husband instituted proceedings in 2009 based on the acts of cruelty which he alleged for the period of cohabitation between the parties. She would submit that thereafter, there was no cohabitation between the parties, and in fact, the wife had filed the suit for restitution of conjugal rights on 8th February 2010 at Family Court, Nashik. She would submit that the second petition

seeking divorce on the ground of cruelty and desertion filed before the Family Court, is based on the same cause of action.

She would invite the attention of this Hon'ble Court to the petition instituted by the husband vide Petition No.A-176-12 in the Family Court at Nashik, and to the specific pleadings in paragraph nos.5, 6, 7 and 10 and she submits that the entire petition is based on narration of facts from 5th July 2006 to 5th August 2008 where the husband has alleged her misbehaviour with him as well as family members and the quarrels that occurred between the parties. She would submit that the same cause of action was invoked to file the initial HMP 218/09. She would further submit that the husband had moved an application seeking amendment of the petition inserting certain other grounds of invocation of provisions of section 498A against the husband and the family members and making of wild and defamatory allegations against him and his family, and according to him, this amounted to cruelty. This application for amendment, however, came to be rejected. Thus, according to her, the second petition seeking Divorce revolves around the same cause of action which is sought to be invoked in the HMP-1 i.e. 218/09 filed by the husband which came to be rejected. Learned counsel would place reliance on the judgment of *Syed Mohd.Salie Labbai Vs. Mohd*

Hanifa¹, to emphasize the principles of res judicata, and she submitted that the best method of deciding the question of res judicata is to determine the case of the parties as put forward in the respective pleadings of their previous suits and then to find out as to what had been decided by the judgments which operate as res judicata. On the basis of her pleadings and submissions, she would submit that the order passed by the Principal District Judge, restoring the appeal and the HMP 218/09 is perfectly justified since what could not have been withdrawn is only the Appeal and not the HMP which was finally decided on merits.

10 On a deep consideration of the chronology of events placed before this Court and the submissions made by the learned counsel, two issues emerge, (1) whether the impugned order passed by the District Judge, Nashik on 6th February 2017 which rectifies its earlier order is sustainable, and (2) whether subsequent substantial proceedings in form of HMP 218/09 filed by the husband before the Family Court is hit by principles of Res judicata.

11 It is not in dispute that the husband filed an HMP-1 i.e. 218/09 in the Civil Court at Nashik, seeking dissolution of

1 AIR 1976 SC 1569

marriage on the ground of cruelty and desertion. The said petition filed by the husband came to be dismissed on 30th August 2010 with costs, and the decree was accordingly drawn. It is pertinent to note that the said judgment came to be delivered after a full-fledged conduct of the proceedings by the 2nd Joint Civil Judge, Sr.Division, Nashik. After framing of the issues, the parties filed their affidavits of evidence and were subjected to cross-examination. In spite of dismissal of the said proceeding, the petitioner instituted HMP No.176/12 before the Family Court at Nashik under Section 13(1)(ia) and 13(i)(b) on 5th May 2012. Perusal of the HMP (hereinafter referred to as "HMP-1") would reflect the incidents of the marital life of the husband and wife from 5th July 2006 to 4th August 2008 and the respondent sought to invoke the ground of cruelty and desertion in the HMP-1 and sought a declaration that the marriage be dissolved. Perusal of the second HMP (hereinafter referred to as "HMP-2") filed before the Family Court, Nashik which was numbered as 176/12, would reveal that the husband had sought dissolution of marriage on the ground of misbehaviour of the wife in the marital life and her quarrelsome nature. It refers to certain incidents between the parties from the date of marriage till 5th August 2008, and it is alleged in the petition that the wife had inflicted unbearable and

unparallel cruelty on the petitioner and his family members. In HMP-2, a statement is made that an earlier HMP was filed which came to be dismissed on 30th August 2010. The caption 'cause of action' in the HMP-2 reads thus :

Cause of action : The cause of action to this petition arose because of consistent and continued cruelty to which petitioner is subjected by respondent and also because the respondent has deserted the petitioner since 5/8/2008 without any reasonable excuse for a period of more than two years since before the date of this petition. And also because the marital tie has broken irretrievably.

Perusal of both the HMPs filed by the petitioner would reveal that the cause of action in both the cases is the marital relationship between the parties from the date of marriage till 5th August 2008, when the wife left the company of the husband. In HMP-1, the husband has narrated certain incidents in this span of marital life, whereas in the HMP-2, certain other instances have been cited, which the petitioner had not mentioned in HMP-1 though they were within his knowledge. In any contingency, the said grounds were available to him, but he had not referred to the said instances as acts constituting cruelty on the basis of which he sought a decree for dissolution of marriage. The husband had chosen to relinquish or omit the instances, which he had

specifically mentioned in HMP-2. However, what is to be looked into is the cause of action in both these petitions to find out whether HMP-2 is hit by the principle of res judicata, since for attracting the principle of res judicata, the ingredients to be proved are that the litigation is between the same parties and that the subject matter of the petition is also identical, and the matter is finally decided between the parties by a Court of competent jurisdiction.

12 What is cause of action has been laid down by the Privy Council in *Moh. Khalil Khan Vs. Mahbub Ali Mian*¹ where it is held that the correct test in cases falling under Order II Rule 2 of CPC is whether the claim in the new suit is in fact founded upon a cause of action distinct from that, which was the foundation for the former suit. The cause of action was held to be every fact which will be necessary for the plaintiff to prove a traverse in order to support his right to the judgment. If the evidence to support the two claims is different than the cause of action, are also different. For this purpose, it would be necessary to examine the proceedings to find out the cause of action involved.

Therefore, the cause of action which is a bundle of facts necessary to be alleged in order to seek the relief, will have

¹1AIR (36) 1949 P.C. 78.

to be carefully seen and in the present case, it is necessary to find out as to what is the cause of action in both the HMPs. The Hon'ble Apex Court in the case of *Syed Mohd Salie vs. Mohd Hanifa* (supra) has categorically held that the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits and then to find out as to what has been decided by the judgments which operate as res judicata. Perusal of the pleadings which have been placed on record in WP No. 6225/17 by the respondent wife would reveal that the pleadings in HMP-1 and 2 are based on the same cause of action, and though the subsequent event of filing proceedings under Section 498A by the wife as an additional ground for cruelty had been attempted to be raised by the husband by way of an amendment, the same came to be rejected. In such circumstances, this Court is of the clear opinion that HMP-1 and HMP-2 are based on identical cause of action and specifically when both the parties agree that they stayed together only from 5th July 2006 till 27th August 2006, and thereafter, for a period of one year from 29th August 2007 to 4th August 2008 when the wife parted the company of the husband. HMP-1 is based on the acts of cruelty alleged by the husband to have been inflicted by the wife during the said period of

cohabitation and the HMP-2 is also based on the pleadings of cruelty based on the same period of cohabitation, though with a slight variation in the acts alleged to be constituting cruelty. In any contingency, if the husband had omitted to mention some of the acts in the HMP-1 which were available to him, but if he chooses to intentionally not rely upon those instances which he has referred to and mentioned in HMP-2, that do not give him a distinct cause of action.

13 In order to avoid the attack on the HMP-2 on the ground of *res judicata*, the husband adopted a novel way. The husband had filed an appeal against the judgment of the Civil Judge, Sr. Division, Nashik in HMP No.218/09 which had culminated into a decree refusing him the declaration under Section 13 of the Hindu Marriage Act. The husband preferred an Appeal vide Appeal No.243/10 against the said judgment. He moved an application vide Exhibit-17 before the Principal District Judge, Nashik in Appeal No.243/10 under the caption 'withdrawal of HMP'. The application is reproduced below :

“Before the Honourable District Judge Nasik

Civil Appeal No.243 of 2010

Appellant - Bhushan D. Kedar
Respondent – Dipti B. Kedar

Withdrawal of HMP

The appellant most humbly submits that this appeal is filed against dismissal of HMP No.218/09 which was for divorce.

After filing of the original HMP 218/09, there was further cruelty to husband so also a new ground of desertion. Therefore, appellant has filed another HMP before Family Court Nashik for seeking divorce on the grounds of cruelty, desertion and false and malicious prosecution and arrest of husband in that prosecution.

Considering all these circumstances, and as rightly pointed out by this Hon'ble Court, the appellant is praying for withdrawal of HMP 218/09.

It is therefore humbly prayed that

- (1) The appellant may kindly be permitted to withdraw HMP No.218/09 and appeal no.243/10.*
- (2) Any other just and proper order as may be deemed fit.*

*(S.S.Wagh)
Advocate for appellant"*

On the said application, the say of the other side was called and the respondent wife submitted her say as follows :

SAY

May it please your Honour.

Respondent submits that the appellant already have filed Divorce Petition before the Hon'ble Family Court & it is pending.

However, they have filed this Civil Appeal. So, it was not proper & legal.

Hence, so, no objection for withdraw this Appeal but subject to 10,000/- Rs. (ten thousand) costs.

Dt. 26/11/14.

On the said application, the Principal District Judge, Nashik passed an order on 26th November 2014. The Court specifically recorded the objection of the wife for withdrawing the HMP. The Court observed thus :

“The application is opposed by the respondent on the ground that subject to awarding costs Rs.10,000/- appellant be permitted to withdraw the Hindu Marriage Petition. No person can be compelled to prosecute any appeal against his will, he has every right to withdraw the appeal. But while granting permission to withdraw the appeal, the prejudice cause to the other side the amount spend for defending shall be taken into account. As another Hindu Marriage Petition for divorce is filed by the appellant and it is pending before the Family Court, Nashik, therefore, it is necessary to permit the appellant to withdraw the Hindu Marriage Petition No.218/2009. The appellant to pay costs Rs.2,000/- (Rs.Two thousand only) to the respondent. The certified copy of the judgment and decree be handed over to the appellant so also the original documents filed by the appellant, on furnishing copies.

14 The wife moved an application in the proceedings before the Family Court seeking to invoke the bar of *res judicata* in filing the HMP-2 which came to be rejected by an order dated 24th November 2015 passed by the Judge, Family Court, Nashik. This order came to be challenged before the Hon'ble High Court in WP No.10810 of 2015. This Court did not go into the issue about the principle of *res judicata*, however, was pleased to observe that the decree earlier made in HMP-1 no longer survives and there is no question of applicability of doctrine of *res judicata*. It is pertinent to note that the High Court was only dealing with the order passed by the Judge, Family Court as regards the principles of *res judicata*

being made available to HMP-2 and had no occasion to deal with the order passed on 26th November 2014.

15 The wife, however, realizing the mistake committed while passing an order below Exhibit-17 on 26th November 2014 moved an application for modification of the order by preferring Miscellaneous Application No.222/15.

 In the said application, she invited the attention of the Court to the fact that on passing of the order dated 26th November 2014, and it being uploaded, it was noted by her that in the open court, the learned Judge has informed orally that only the appeal was permitted to be withdrawn and not the HMP. In such circumstances, she sought clarification of the order dated 26th November 2014 which permitted to withdraw the HMP along with the appeal. She stated that she had moved an application on 18th December 2014, but it was not decided. Resultantly, she moved the present Miscellaneous Application on 4th December 2015 for recalling/modifying the order dated 26th November 2014. The said application is decided by order dated 21st January 2016 by which the Principal District Judge set aside the order dated 26th November 2014, and restored the Regular Civil Appeal as well as HMP-1 to the file.

16 The issue came to be again remanded to the District Judge at Nashik in pursuance of the directions issued by this Court on 8th January 2007 in WP No.6174/16 and the Principal District Judge, on 6th February 2007, allowed the said application filed by the wife and held that the impugned order passed below Exhibit-17 is set aside and parties were directed to proceed as from that stage onwards.

17 A perusal of Exhibit-17 moved by the husband reveals that the application stated that the husband had filed HMP No.218/09 for divorce. However, on filing of the said HMP, a new ground of desertion became available, and therefore, he filed another HMP seeking divorce on the ground of cruelty and arrest of the husband in that proceedings under Section 498A. He had sought withdrawal of HMP 218/09 and also withdrawal of Appeal 243/10 by the said application. The wife had submitted her say by stating that the husband has already filed another divorce petition before the Family Court. She granted no objection for withdrawal of the Appeal, but subject to costs of Rs.10,000/-. The order dated 26th November 2014 passed by the Principal District Judge, Nashik, however reveals that the permission is granted to

withdraw the HMP 218/09. The Court wrongly observed that the application is opposed by the wife on the ground that subject to awarding costs of Rs.10,000/-, the HMP may be permitted to be withdrawn. However, the Principal District Judge has completely fell into error in making such observations. The respondent wife did not grant her objection for withdrawal of HMP, and in any contingency, she could not have, since the HMP-1 was decided by the Court on merits and dismissed against the husband after leading of evidence by the parties and a decree was drawn accordingly. The proceedings which were sought to be withdrawn and could have been permitted to withdraw was only the appeal and the Principal District Judge, Nashik has rightly observed that no person can be compelled to prosecute any Appeal against his will and he has right to withdraw the appeal and also directed payment of costs of Rs.2,000/- to the wife. However, there was no question of withdrawal of HMP since for that, the wife had not granted any no objection.

18 By the impugned order, the Principal District Judge, Nashik, considered the application filed under Section 152 and held that the error needs to be rectified. Though the specific objection of the counsel for the husband was that it was not an

arithmetical or clerical mistake which could be corrected under section 152 of CPC, the Court assumed jurisdiction under Section 151 of CPC and in any contingency, when it had arrived at a clear opinion that a gross error had occurred in permitting to allow the HMP, it sought to rectify the error by invoking the powers under Section 151 of the CPC. The Hon'ble Judge also noted that Section 151 was recorded in the title of the application, and in any contingency, the Court was of the opinion that the caption under which the jurisdiction is invoked is not relevant to do substantial justice. The impugned order clearly records that the purport of section 151 being the inherent powers of the Court is not effected or limited by any provisions in the Code and the Court in exercise of the inherent powers may pass such order as it may deem necessary to meet the ends of justice, or to prevent the abuse of process of the Court.

It is true that Section 151 of CPC which is the inherent power of the Court is intended to secure the ends of justice and the ends of justice would extend to the litigating parties before the Court and should not go to the benefit of only one of the party. However, when the Court notices that it has committed a gross error and the said error was brought to the notice of the Court, the Court thought it fit to invoke its inherent

jurisdiction. The contention of the learned counsel for the husband that it amounted to reviewing its own order, and therefore, the remedy of appeal could have been invoked which is permissible under the statute, is not a justiceable argument since Section 151 itself begins with the words “Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders, as may be necessary for the ends of justice or to prevent abuse of the process of the Court”. No fault can be found with the impugned order passed by the Principal District Judge, Nashik who has noted that the order which was passed below Exhibit 17 was not sustainable, and the Court was of the opinion that though the order could not have been corrected under Section 152, the Court has assumed its inherent jurisdiction and exercised the same by correcting the order passed by it on 26th November 2014. In any contingency, it is a settled proposition of law that the proceedings which could had been put to rest and in the present case, the HMP-1 on the basis of which a decree was drawn could not be permitted to be withdrawn. It can be rectified/corrected in an appeal and that appeal can be withdrawn. However, withdrawal of the said Appeal would not nullify the effect of a decree pronounced by a Court of competent jurisdiction and this is the error which was committed by order

dated 26th November 2014 which is rectified on an application preferred for review, by passing the impugned order on 6th February 2017. In such circumstances, the order impugned in WP 4011 of 2017 dated 6th February 2017 do not suffer from any illegal infirmity and needs to be upheld.

19 Further, in WP No.6225/2017, the wife has assailed the impugned order dated 7th March 2017 and raised an issue of *res judicata*. As noted in the para above, the ground of cruelty which has been raised in the HMP-1 is identical to the one which has been raised in the HMP-2, and since this Court has arrived at a conclusion that the cause of action on the basis of which HMP-1 is filed, is similar to the cause of action on the basis of HMP-2 is filed. In this backdrop, this Court is of the clear opinion that it will attract the principles of *res judicata* since the essential characteristics of principles of *res judicata* have been recognized as (i) the litigation between the parties must be same (ii) the subject matter of the suit must be identical (iii) that the matter must be finally decided between the parties (iv) that the suit must be decided by the Court of competent jurisdiction.

20 On perusal of the pleadings in HMP-1 and HMP-2, it is clear that all the ingredients of the principles of *res judicata* satisfied and in such circumstances, the observation made by the Judge, Family Court in the impugned order that the desertion and cruelty are continuous grounds giving fresh cause of action for the spouse to institute fresh proceedings is not applicable in the present case. The cruelty alleged in the HMP-1 is based on the same set of facts which are found in the pleadings canvassed in HMP-2. The Court of competent jurisdiction has, after due consideration of the material placed before it, rejected the ground of cruelty and did not find favour with the said ground and also did not find favour on the ground of desertion.

 In any contingency, when by the impugned order passed by the Principal District Judge, Nashik on 21st June 2016, the HMP-218-09 as well as the Appeal filed in the District Court vide Appeal No.243/10 have been restored and directed to be proceeded on its own merits, the said proceedings being made alive, the HMP-2 filed before the Family Court, is not maintainable. The HMP-2 which is filed on the basis of same cause of action seeking a decree for divorce cannot be sustained since the decree passed in HMP-1 is revived and continues its existence, along with

the proceedings in Appeal. The impugned order passed by the Judge, Family Court on 7th March 2017 which is assailed in WP 6225/17 rejecting the application filed by the wife by invoking principle of res judicata cannot be sustained. The said order passed on 7th March 2017 do not take into consideration the order passed by the Principal District Judge, Nashik who has rectified his earlier order and restored the HMP-1 as well as the Appeal. In the present scenario, the rejection of the application is, therefore, without consideration of the aforesaid facts and therefore, the order dated 7th March 2017 is liable to be set aside.

In any contingency, since the HMP-218/09 being decreed against the husband, and since there is no stay granted to such a decree, the Family Court could not have rejected the application filed by the wife claiming res judicata. The decree passed in HMP 218-09 refuses to grant divorce to the husband on the ground of cruelty and desertion. As long as the said decree is not set aside, there is no question of the second HMP being dealt with by the Family Court at Nashik in form of second HMP. In such circumstances, the impugned order passed by the Family Court on 7th March 2017 rejecting the application of the petitioner is quashed and set aside, being unsustainable in the peculiar facts of the case.

21 In light of the aforesaid discussion, Writ Petition No.4011/17 assailing the order dated 21st January 2016 passed by the District Court Nashik is dismissed. Writ Petition No.6225/17 challenging the order dated 7th March 2017 passed by the Judge, Family Court is allowed.

In any contingency, since the HMP-1 and the Appeal filed against the said judgment are now restored, and are directed to proceed by the impugned order passed by the Principal District Judge, the Family Court would deal with the second HMP in the backdrop of the existing decree in HMP-1 declining Divorce Decree on ground of cruelty and desertion. As far as ground of desertion is concerned, the Court is at liberty to consider whether a fresh cause of action would survive in HMP-1, since the parties are residing separately since more than one year.

Writ Petitions are allowed in the aforesaid terms.

Rule is made absolute accordingly.

No order as to costs.

(BHARATI H. DANGRE, J)