

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7430 OF 2024

Shraddha Hitesh Raikar

Aged about 43 years,

Adult, Hindu, Indian inhabitant,

At present residing at Flat No.202

Om Shree Ji Apartments,

Borivali (East),

Mumbai 400 066

Occupation : Housewife

...Petitioner

Versus

Hitesh Dattaram Raikar

Aged about 45 years,

Also adult of Mumbai, Hindu,

Indian Inhabitant,

Residing at Flat No.802,

'A' Wing, Rajsundar CHS Ltd.

Dahisar(E), Mumbai:- 400 068

Occupation : Service

...Respondent

-
- Ms. Saroj Nitin Jadhav, for the Petitioner.
 - Ms. Purva Naik a/w Ms. Pranita Desai i/b. Purva Naik, for the Respondent.
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CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 12th DECEMBER 2025

PRONOUNCED ON : 18th DECEMBER 2025

JUDGMENT :

1. The Petitioner is taking exception to the order dated 06.11.2023, passed below Exhibit 10, in Petition No. A-2646 of 2019, passed by the Family Court No.3 at Bandra Mumbai, thereby rejecting the Application filed by the Petitioner taking objection to the maintainability of the second Petition for Divorce filed by the Respondent-Husband.

2. The brief facts of the case are that, the Petitioner and the Respondent got married on 16.12.2011. The Respondent-Husband filed Divorce Petition No. A-842 of 2014. The Petitioner-Wife also filed Petition for restitution of conjugal right, viz., Petition No A-1018 of 2014. A common judgment and decree came to be passed in both the Petitions on 28.07.2017, dismissing the Petition for Divorce filed by the husband and allowing the Petition for restitution of conjugal rights filed by the wife, directing the husband to resume cohabitation within a period of two months.

3. The Respondent-Husband did not challenge the dismissal of his Petition for Divorce or even the order granting restitution of

conjugal rights. On the other hand, the Petitioner has filed execution proceedings on 09.03.2018, seeking compliance of the order dated 28.07.2017, along with maintenance Petition No. C-58 of 2018, for maintenance under Hindu Adoption and Maintenance Act, 1956. The Family Court has allowed her Application for execution, attaching the 1/3 salary of the Respondent till further orders for non-compliance of decree of restitution of conjugal rights. The Employer of the Respondent was directed to deduct 1/3 salary from his account and remit it to the Court by way of Demand Draft and warrant of attachment was accordingly issued vide order dated 05.01.2019.

4. Pursuant to the warrant of attachment, the Consent Terms were entered between the parties on 02.04.2019. In the Consent Terms, the Respondent has voluntarily agreed to pay sum of Rs.20,000/- p.m. to the Petitioner on or before 10th day of every month in view of the Settlement Terms. The Petitioner agreed not to press the interim maintenance in her Petition, i.e., Petition No. C-58 of 2018.

5. After the execution of Consent Terms, the Respondent has

once again filed Divorce Petition No A-2646 of 2019, before the Family Court at Bandra, Mumbai. The Petitioner has filed an Application raising objection to the maintainability of the Petition for Divorce under Section 11 of the Code of Civil Procedure, 1908, (CPC) on the ground that, the subsequent Petition for Divorce was not maintainable since the earlier Petition for Divorce was filed on the same ground, therefore, it was hit by principle of *res judicata*. The objection of the Petitioner was decided by the Family Court on 16.10.2021 by passing an order to frame separate issue and the Application was disposed of. The order passed on 16.10.2021 was challenged in Writ Petition No. 2700 of 2022. This Court has set aside the order dated 16.10.2021, by remanding the matter back to the Family Court, by directing to decide the Application at Exhibit 10 afresh, vide order dated 08.12.2022. After remand, the Judge, Family Court, has decided the Application, vide order dated 06.11.2023, which is impugned in the present Writ Petition.

6. The learned Advocate Ms. Saroj Jadhav for the Petitioner has strongly taken objection to the impugned order by contending that, the Petition for Divorce filed by the husband under Section 13(1)

(ia) of the Hindu Marriage Act, 1955 (**HMA**), has already been dismissed, and the Petition for restitution of conjugal rights has been allowed. The Respondent, without raising any challenge to both the orders, has again filed a Petition for Divorce on the same grounds, which is not at all permissible. The order granting Divorce has been passed by the Family Court on 28.07.2017 and the second consecutive Petition has been filed in 2019 on the same ground, i.e., ground of cruelty under Section 13(1)(ia) of the HMA.

It is her contention that, although she brought to the notice of the Family Court that, all the grounds and averments in the memo of both Petitions are verbatim same, the Family Court failed to consider it. In order to demonstrate cruelty on the part of the Petitioner, her alleged statements have been reproduced in the vernacular language, in both the Petitions, which do not differ in substance. It is, therefore, contended that, the second Petition, having been filed on identical grounds, is not maintainable. Without considering the objection raised by the Petitioner in its proper perspective, the objection of the Petitioner has been rejected by the Family Court. It should have been appreciated by the Family

Court that, the Respondent has neither challenged the Decree of restitution of conjugal rights nor the rejection of his Petition for Divorce. Hence, the Judge, Family Court, has committed an error in entertaining the second Petition for Divorce on the same ground.

7. It is submitted that, the Respondent is agitating the same issue, which have been already decided in the earlier round of litigation. It is, thus, clearly barred by the principle of *res judicata* and hit by Section 11 of CPC read with Order 7 Rule 11(a) and (d) of the CPC. Thus, according to the Petitioner, the impugned order is required to be quashed and set aside.

8. In support of her contention, the Petitioner is relying on the judgment in the case of ***Sanjeev Vyankatesh Ranade V/s. Meghna Sanjeev Ranade***, decided by this Court in Family Court Appeal No.16 of 2023 decided on 21.07.2011. More particularly, on Para No.36 of the judgment, which reads thus :

“36. The Family Court, on analysing the pleadings and evidence, while dealing with Point No. 1, adverted to the outcome in the previous proceedings between the parties in Application No. PA. 813 of 1998, which was filed by the wife for restitution of conjugal rights. It noted that, even in the said proceedings, the question whether the husband deserted the wife was specifically addressed and was answered in favour of the wife. In addition, the Family Court considered the oral evidence given by the wife and her

1. 2011 SCC OnLine Bom 937

father as well as the husband, and eventually concluded that it was clear that the husband was guilty of desertion, that is to say, of abandoning the wife without reasonable cause and without her consent or against her wish or of wilfully neglecting her. The conclusion so reached by the Family Court, in our opinion, is unexceptionable. The fact whether the husband had deserted the wife was specifically put in issue in the proceedings before the Family Court for restitution of conjugal rights filed by the wife. That issue was answered in favour of the wife. That finding has been allowed to attain finality by the husband. For, no appeal against the decision of the Family Court granting decree for restitution of conjugal rights has been filed by him. In that sense, the circumstances which obtained prior to granting of decree for restitution of conjugal rights on 26th November, 2000 need not be reconsidered in the present proceedings. The finding recorded by the Family Court in that regard will bind the parties.”

9. The challenge raised to the impugned order has been opposed by the Respondent, by filing reply affidavit. The learned Advocate Ms. Purva Naik for the Respondent submits that, the principle of *res judicata* cannot be made applicable to the facts of the present case. According to her, the Petitioner has not come before this Court with clean hands. She has misled this Court and suppressed the Consent Terms dated 02.04.2019, entered between the parties in the execution Petition filed by the Petitioner, wherein the Respondent has agreed to pay sum of Rs. 20,000/- p.m. by way of a maintenance. Accordingly, the Respondent has been regularly paying the maintenance as per the Consent terms dated 02.04.2019. In view of the satisfaction of the execution Decree, the Execution Petition itself has been disposed of. In support of her

submission, she relies on the case status of the Execution Petition, which is annexed to the reply affidavit, which shows that the Regular Darkhast filed on 22.03.2018, is uncontested and fully satisfied and has been disposed of on 22.08.2023. The other important aspect according to her is that, the second Petition for Divorce has been filed by the Respondent invoking two provisions of the HMA, 1955, one under Section 13(1A)(ii) and second under Section 13(1)(ia) and (ib). Assuming without admitting that some instances to demonstrate cruelty by the Petitioner has been repeated in the Petition, however, the other ground, i.e. Section 13(1A)(ii) invoked by the Respondent, does not bar filing of the second Petition. Since the second ground was not raised in the first Petition for Divorce, that ground is very much available to the Respondent, for grant of prayer for Divorce.

10. Section 13(1A)(ii) of the HMA provides that, if there is no resumption of cohabitation between the parties to the marriage for a period of one year or more after passing of Decree for restitution of conjugal rights, either of the parties can present Petition for dissolution of marriage. According to the Respondent, he had

already agreed to pay maintenance of Rs. 20,000/- p.m., pursuant to which the Execution Petition filed by the Petitioner has been disposed of. As a result, the proceedings for restitution of conjugal rights have attained finality, and cannot be agitated again.

11. Failure of resumption of cohabitation between the Petitioner and the Respondent has created a right in his favour to invoke Section 13(1A)(ii) of the HMA, 1955, to file proceedings for Divorce. As such, the Judge, Family, Court, has appreciated this fact and has passed an order perfectly in consonance with the legal position. Therefore, the order under challenge does not deserve any interference. In support of her contention, she relies on the decision of the Hon'ble Calcutta High Court in the case of ***Prahbat Kumar Chakraborty V/s. Papiya Chakraborty***². More particularly, on Para No.25, which reads thus :

*“25. As regards the application of the rule of res judicata in the present case it is submitted by Mr. Banerjee that the rule of res judicata does not have any manner of application in the present case as the rule of procedure cannot supersede the law of the land. ***** provision laid down in section 13(1A)(ii) of the Act gives a right to the wife respondent to make a prayer for dissolution of marriage when there is no restitution of conjugal rights between the parties to the marriage for a period of one year or upwards after the passing of the decree. Apart from this, the subsequent conduct of the husband/appellant was sufficient to indicate that the husband had no honest intention to take back his wife. On the contrary he initiated different proceedings, both*

² 2003 SCC OnLine Cal 48

civil and criminal, against his wife and other in-laws. Such subsequent conduct should also be regarded as new cause of action to file a suit for divorce under section 13(1A)(ii) of the Hindu Marriage Act. These, according to Mr. Banerjee, amount to fresh positive acts of cruelty.”

12. I have heard the respective parties. A very narrow issue is involved in the present Writ Petition. Admittedly, the Petition for Divorce filed by the husband on the ground of cruelty, invoking Section 13(1)(ia) of the HMA, has been dismissed by the Family Court, vide common judgment and order dated 28.07.2017, allowing the Application for restitution of conjugal rights filed by the wife. It is also not disputed that, both the orders passed vide common judgment has not been challenged by the Respondent. In fact, in the Execution Petition, the Respondent has agreed by way of Consent Terms to pay an amount of Rs. 20,000/- p.m. to the Petitioner towards the interim maintenance. These Consent Terms have been filed in RD No. 118 of 2018. The Consent Terms also contains a stipulation that, in view of the settlement, the Petitioner has agreed not to claim interim maintenance in her Petition C-58 of 2018. When a query was made to the learned Advocate for the Petitioner about the status of her Execution Petition, she has submitted that, she has withdrawn the Execution Petition No. 118

of 2018. Therefore, as on today, even the Execution Petition filed by the Petitioner does not survive.

13. Upon perusal of both the memo's of the Petitions, for Divorce filed by the Respondent, tendered by the learned Advocate for the Petitioner, i.e., Petition No. A-842 of 2014 and A-2646 of 2019, all the grounds as far as 'cruelty' is concerned, are common in both the Petitions, except one incident dated 05.10.2017. The alleged incident had taken place after passing of Decree in the HMA on 28.07.2017, alleging that, the Petitioner has forcibly tried to enter the parental house of the Respondent in his absence and abused his old parents with filthy and objectionable language, and also threatened to throw them out of the house. It is the only additional incident in the alleged ground of cruelty taken by the Respondent.

14. I have perused both the memos of Petition for Divorce, placed on record by the Petitioner. Upon perusal of the subsequent Petition No. A-2646 of 2019 filed by the Respondent, it is evident that, it has been filed with an additional ground, i.e., failure of resumption of cohabitation between the parties. This ground, admittedly, was not raised in the earlier Petition for Divorce since that ground was

not available to the Respondent while filing the earlier Petition. In the earlier Petition, the only ground invoked was ground of cruelty under Section 13(1) and (ia) of the HMA, 1955. Therefore, there is no substance in the submission of the Petitioner that, the consecutive Petition for Divorce is not maintainable, as it would be hit by the principle of *res judicata*. Section 11 of the CPC reads thus:

“Section 11 Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

15. In short, if the subject matter between the same parties has been decided by a Competent Court, the same subject matter cannot be agitated again for the same relief. Order 7 Rule 11 provides for rejection of claim. The Petitioner is claiming that, the case of the Petitioner would also be covered by Clauses (a) and (d) of Rule 11 of Order 7, i.e, where there is no disclosure of cause of action and the plaint is barred by any law.

16. As stated herein above, though the relief claimed in the

previous as well as the subsequent Petition for Divorce is same, however, it needs to be appreciated that, the subsequent Petition for Divorce has been filed raising ground, which is available to the Respondent by operation of law, it is the statutory remedy available to the Respondent, which cannot operate as *res judicata*. The second ground in the Petition has become available to the Respondent due to non-resumption of cohabitation after passing of Decree of restitution of conjugal rights. In fact, Section 13(1A)(ii) provides for a cooling period of one year in case there is no resumption of cohabitation, this right under Section 13(1A)(ii) becomes available to the either of the parties. In the present case, the second Petition for Divorce is presented after a period of 2 years from the first order dated 28.07.2017. Since the Statute itself provides for a remedy due to failure of resumption of cohabitation, the second Petition cannot be dismissed on the ground of *res judicata* or for that matter, the plaint cannot be returned under Order 7 Rule 11 Clause (a and d) of the CPC as prayed by the Petitioner.

17. I do not find any error committed by the Judge, Family Court,

while passing the order below Exhibit 10 dated 06.11.2023, hence, no interference is warranted. As such, the Writ Petition is dismissed. No order as to cost.

(MANJUSHA DESHPANDE, J.)