* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 08.09.2026
Pronounced on: 20.11 .2026

\# **CNR No. DLHC010225682026**

\+ MAT.APP.(F.C.) 179/2026, CM APPL. 34051/2026

[redacted] .....Appellant

Through: Mr. Sarojanad Jha, Mr. Suraj Malik, Ms. Rajreeta Ghosh, Mr. Rahul Kumar and Ms. Muskan Saxena, Advocates.

versus

[redacted] .....Respondent

Through: Mr. Ajay Sharma and Mr. Mukul Vats, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIVEK CHAUDHARY
HON'BLE MS. JUSTICE RENU BHATNAGAR

J U D G M E N T

1. The present appeal under Section 19 of the Family Courts Act, 1984 has been preferred by the appellant-wife against the order dated 13.04.2026 passed by the learned Principal Judge, Family Court, South-West District, Dwarka, Delhi in HMA No. 23/2022 titled [redacted], whereby the learned Family Court dismissed the appellant's application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (CPC). By the said application, the appellant had sought rejection of the divorce petition instituted by the respondent-husband under Section 13(1)(ia)

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and (ib) of the Hindu Marriage Act, 1955 (HMA), on the ground that the same was barred under Order XXIII Rule 1(4) of the CPC.

2. The principal grievance of the appellant is that, while the application was founded solely on the bar contained in Order XXIII Rule 1(4) of the CPC, the learned Family Court proceeded to adjudicate the application on the principle of *res judicata* under Section 11 of the CPC, without considering the applicability of Order XXIII Rule 1(4), which was the specific ground urged by the appellant.

3. Brief facts necessary for the adjudication of the present appeal are that the marriage between the parties was solemnized on 04.12.2014 at Village Dadri Toe, Tehsil Badli, District Jhajjar, Haryana, according to Hindu rites and ceremonies.

4. After approximately seven years of marriage, the respondent instituted a petition under Section 13 of the HMA, being HMA No. 16/2021 before the Principal District Judge, Family Courts, Gurugram, seeking dissolution of marriage on the ground of cruelty. The appellant entered appearance in the said proceedings through counsel.

5. On 21.10.2021, the respondent made a statement before the learned Principal District Judge, Family Courts, Gurugram, stating that he did not wish to proceed with the petition and that the same may be dismissed as withdrawn. The petition was accordingly dismissed as withdrawn. No liberty was sought by the respondent, nor was any liberty granted by the Court to institute a fresh petition in terms of Order XXIII Rule 1(3) of the CPC.

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6. Thereafter, the respondent instituted the second divorce petition, being HMA No. 23/2022 before the Principal Judge, Family Court, South-West District, Dwarka, Delhi, under Sections 13(1)(ia) and 13(1)(ib) of the HMA. According to the appellant, the second petition was founded on the same set of facts and cause of action as the earlier petition which had been withdrawn without liberty.

7. The respondent, along with the second petition, also placed on record the pleadings and documents pertaining to the earlier proceedings, including the first petition, orders dated 29.09.2021 and 21.10.2021, the application for withdrawal and his statement recorded on 21.10.2021.

8. Upon service of the second petition, the appellant filed an application under Order VII Rule 11 read with Section 151 of the CPC seeking rejection of the second petition on the ground that, in view of the withdrawal of the first petition without permission to institute a fresh petition, the second petition was barred under Order XXIII Rule 1(4) of the CPC. The respondent filed replies to the said application.

9. After conclusion of arguments, the appellant filed written submissions dated 27.02.2026. It is the appellant's case that neither in the application nor in the written submissions was any plea of *res judicata* under Section 11 of the CPC raised. Nevertheless, vide the impugned order dated 13.04.2026, the learned Family Court considered the matter on the touchstone of *res judicata* and dismissed the appellant's application without examining the bar under Order XXIII Rule 1(4) of the CPC.

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10. Aggrieved by the aforesaid order, the appellant-wife has preferred the present appeal.

11. Learned counsel for the appellant submits that the principal grievance of the appellant is that the learned Family Court failed to adjudicate the application filed under Order VII Rule 11 read with Section 151 of the CPC on the specific ground on which the same was preferred, namely, the bar contained in Order XXIII Rule 1(4) of the CPC. It is submitted that, instead, the learned Family Court proceeded to examine the matter on the touchstone of *res judicata* under Section 11 of the CPC, although no such plea had been raised by the appellant either in the application or in the written submissions filed before the learned Family Court. It is, therefore, contended that the impugned order proceeds on a ground which was not the subject matter of the application and fails to consider the actual issue arising for determination.

12. Learned counsel for the appellant further submits that, since the bar under Order XXIII Rule 1(4) of the CPC was apparent from the respondent's own pleadings and the documents filed along with the subsequent petition, the second petition was liable to be rejected under Order VII Rule 11 of the CPC. It is submitted that the learned Family Court, instead of examining whether the subsequent petition was maintainable in view of the statutory bar, proceeded to consider an altogether different principle and consequently failed to adjudicate the application on the ground on which it had been filed.

13. In support of his submissions, learned counsel for the appellant relies upon the judgment of this Court in ***Nidhi Jain v. Ankit Jain***,

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2023 SCC OnLine Del 4369. In the said case also, the respondent-husband had earlier instituted proceedings seeking dissolution of marriage and subsequently withdrew the same unconditionally, whereafter a fresh petition was instituted on substantially the same cause of action. This Court held that, where the earlier petition had been voluntarily abandoned without permission to institute a fresh petition, the subsequent petition was barred under Order XXIII Rule 1(4) of the CPC.

14. Learned counsel for the respondent, on the other hand, submits that the earlier petition was not withdrawn on merits or with an intention to abandon the respondent's claim for dissolution of marriage. It is submitted that, during the course of the proceedings, the respondent was advised by his counsel that the said petition had been instituted before a Court which did not have the appropriate territorial jurisdiction to entertain the proceedings, as the parties had never resided within the said jurisdiction. It is contended that the withdrawal of the earlier petition was, therefore, necessitated solely on account of the defect relating to territorial jurisdiction and was not an abandonment of the respondent's substantive claim.

15. Learned counsel further submits that the fact that the earlier petition was withdrawn without seeking formal liberty cannot, in the circumstances of the present case, be construed so as to permanently deprive the respondent of his right to seek dissolution of marriage before the Court having jurisdiction to entertain the proceedings.

16. We have considered the submissions advanced by learned counsel for the parties and perused the material placed on record.

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17. Before deciding the points of objection raised by the appellant in the present appeal, it is necessary to refer to the provision of Order XXIII Rule 1 CPC which reads as under-

"*ORDER XXIII*

Withdrawal and Adjustment of Suits

[1. ***Withdrawal of suit or abandonment of part of claim****.—(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,—

(a) that 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 suit or part of a claim,

it may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

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> *(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*
>
> *(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff.]"*

18. Further, it is necessary to bear in mind the special nature of proceedings before the Family Court. The Family Courts Act, 1984 contemplates a less formal and more conciliatory approach in matrimonial disputes. Section 10(3) of the Family Courts Act empowers the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings, or at the truth of the facts alleged by the one party and denied by the other, while Section 20 of the Family Courts Act provides an overriding effect to the provision of the Act.

19. In the present case, there is no dispute that the respondent had earlier instituted HMA No. 16/2021 and that the said petition was subsequently withdrawn without obtaining liberty to institute a fresh petition. However, the mere fact of withdrawal, in the circumstances of the present case, cannot be viewed in isolation. The application seeking withdrawal of the earlier petition, forming part of the record, indicates that the respondent did not intend to abandon his claim for dissolution of marriage on merits. The earlier petition was sought to be withdrawn on account of an objection relating to territorial jurisdiction, the respondent having been advised that the petition had

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been instituted before a Court within whose territorial jurisdiction the parties had not resided. At this stage, it is relevant to refer to the relevant portion of the respondent's application seeking withdrawal of the earlier petition filed before the Family courts, Gurugram. The relevant portion of the said application is reproduced as under-

> *"2. That it comes to the notice of the counsel that the party to the pe tition never reside together at Gurugram, so for the petition is not possible to be decree on the legal grounds as per section 19 of HMA.*
>
> *3. That the petitioner lastly reside together with the respondent at Najafgarh, Delhi and it is require to file the petition under the same court of jurisdiction.*
>
> *4. That the petitioner is not interested to proceed in the above petition and like to withdraw the same for the purpose as detailed."*

20. Pursuant to the said filing of the abovementioned application, the statement *simplicitor* of the respondent herein was recorded on 21.10.2021 by the Principal Judge, Family Court, Gurugram, resulting in passing of withdrawal order.

21. Thus, the circumstances in which the earlier petition came to be withdrawn assume considerable significance. The withdrawal was not occasioned by a decision of the respondent to give up his matrimonial claim or by adjudication on the merits of the allegations forming the basis of the divorce petition. The respondent sought to withdraw the proceedings so as to pursue his claim before the Court having the appropriate territorial jurisdiction.

22. In these circumstances, applying the provisions of Order XXIII Rule 1(4) of the CPC in a manner which would completely foreclose

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the respondent from pursuing his matrimonial claim before the Court having territorial jurisdiction would, in our view, result in the substantive matrimonial dispute being left undecided. The consequence would be particularly harsh where the earlier proceedings had not progressed to any meaningful stage and there had been no adjudication on the merits.

23. The Family Court is required to bear in mind the nature of the proceedings before it and the legislative intent underlying the Family Courts Act. The provisions of the CPC, where applicable, are not intended to become an instrument for defeating substantive matrimonial rights on technical grounds, particularly where the circumstances demonstrate that the earlier proceeding was withdrawn for bona fide reasons and not with an intention to abandon the underlying claim.

24. The Supreme Court in ***Jet Ply Wood (P) Ltd. v. Madhukar Nowlakha & Ors.***, (2006) 3 SCC 699, although, was dealing with the specific question of the Court's inherent power to recall an order permitting withdrawal of a suit, in circumstances where such withdrawal, having been occasioned by a mistaken understanding, was resulting in grave prejudice and injustice to the plaintiff, the underlying principle enunciated therein is of wider application. The Supreme Court recognized that where the procedural law is silent on a particular aspect, the inherent powers of the Court may be invoked *ex debito justitiae* to secure real and substantial justice between the parties. The decision thus underscores the settled principle that procedural law is a handmaid of justice and is intended to advance the

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cause of justice rather than thwart it. Therefore, while the factual and statutory context of ***Jet Ply Wood*** (supra) may be distinct from the present case, the underlying reasoning that a procedural requirement ought not to be permitted to defeat substantive justice or result in manifest injustice remains equally applicable to the present circumstances.

25. In the case of ***Jet Ply Wood*** (supra), the Apex Court has observed as under-

> *"23. As indicated hereinbefore, the only point which falls for our consideration in these appeals is whether the Trial Court was entitled in law to recall the order by which it had allowed the plaintiff to withdraw his suit.*
>
> *24.From the order of the Learned Civil Judge (Senior Division) 9th Court at Alipore, it is clear that he had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that by passing such an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the Court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order passed by it earlier. In the circumstances set out in the order of 24th September, 2004, the learned trial court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the conscious decision of the Court not to exercise such jurisdiction in favour of the plaintiff.*

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25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005, though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005, in which reference has been made to a bench decision of the Calcutta High Court in the case of Rameswar Sarkar (supra) which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code Of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code Of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. This Court had occasion to observe in the case of Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527, as follows:

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar's case, allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when through

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> *mistake the plaintiff had withdrawn the suit, the Court would not be powerless to set aside the order permitting withdrawal of the suit.*
>
> *27. We are of the view that the law having been correctly stated in the aforesaid case, the learned Single Judge of the Calcutta High Court in making an order on the same lines did not commit any error of jurisdiction which calls for any interference in these appeals.*
>
> *28. The appeals are, therefore, dismissed, but without any order as to costs."*

26. The object of proceedings relating to matrimonial disputes is to ensure that the substantive rights and disputes between the parties are adjudicated on merits and are not defeated merely on account of procedural or technical considerations, unless the statute expressly mandates such consequence in the facts of the case.

27. In the present case, the record indicates that, when the earlier petition was withdrawn, notice had been issued and the appellant/defendant had entered appearance by filing a memorandum of appearance. The matter had not proceeded to the stage of evidence and there had been no adjudication upon the allegations of cruelty or desertion forming the basis of the respondent's claim. The subsequent petition was thereafter instituted before the Court which, according to the respondent, had the appropriate territorial jurisdiction.

28. The reliance placed by learned counsel for the appellant on the judgment of the Coordinate Bench of this Court in ***Nidhi Jain*** *(supra)*, is, in our view, misplaced in the facts of the present case. In ***Nidhi Jain*** *(supra)*, the earlier matrimonial proceedings for divorce on the

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ground of cruelty had progressed substantially and had reached the stage of the petitioner's evidence when the earlier petition was withdrawn by the petitioner alleging being fed up on account of legal battles. The factual matrix in the present case is materially different because in the present case, the petition was withdrawn at the threshold on account of lack of territorial jurisdiction. No petition can progress further in a court having no jurisdiction to try the same. Its withdrawal cannot have the effect to non-suit a petitioner whose case is not decided on merits.

29. The ultimate object of the proceedings before the Family Court is to adjudicate the matrimonial dispute between the parties in accordance with law and, wherever possible, on its merits. In the peculiar facts of the present case, we are of the view that the ends of justice would be better served by permitting the respondent to pursue the subsequent divorce petition before the Court having the appropriate territorial jurisdiction, rather than terminating the respondent's substantive claim at the threshold on account of the manner in which the earlier petition came to be withdrawn.

30. Consequently, although the earlier petition was withdrawn without a formal order granting liberty to institute a fresh petition, the surrounding circumstances in which such withdrawal took place, the stage of the proceedings at that time, and the absence of any adjudication on merits are relevant considerations. The subsequent petition, therefore, ought not to be rejected at the threshold in the peculiar facts of the present case.

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31. In view of the discussion hereinabove, and having regard to the peculiar facts and circumstances of the present case, we do not find any infirmity in the impugned order dated 13.04.2026 passed by the learned Family Court warranting interference by this Court in exercise of its appellate jurisdiction.

32. The appeal, along with all pending applications, if any, is accordingly dismissed.

VIVEK CHAUDHARY, J.

RENU BHATNAGAR, J.

NOVEMBER 20, 2026*/KZ*

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