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

**WRIT PETITION NO.6318 OF 2023**

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... Petitioner

**V/s.**

Y

... Respondents

Ms. Sharon Patole for the petitioner.

Mr. Abhijit Sarwate with Ms. Hardev K. Aidhen and Mr.  
Ajinkya Udane for the respondents.

**CORAM : AMIT BORKAR, J.**

**DATED : SEPTEMBER 8, 2023**

**P.C.:**

- 1.** Considering the controversy involved, names of the parties should be masked while uploading the order.
- 2.** This writ petition under Article 227 of the Constitution of India takes exception to the order dated 1 August 2022 passed by Family Court No.3, Pune rejecting application filed below Exhibit 127.
- 3.** The petitioner/original respondent No.2 filed application below Exhibit 127 seeking deletion of her name from the divorce petition filed by the original petitioner (wife). According to the petitioner, she being a lady does not fall within the definition of “adultery”. There is no material on record to show that she had ever committed adultery. Moreover, from the material on record it

appears that there are other persons against whom adultery is alleged but they are not made parties. During the course of submissions, it is submitted that prayer for payment of compensation in the divorce petition, i.e. prayer 111(o) is not maintainable against the petitioner. In support of her submission, she placed reliance upon the judgment of the Apex Court in the case of **Joseph Shine v. Union of India** reported in (2019) 3 SCC 39.

4. On perusal of the impugned order, it appears that the Trial Court rejected the request of the petitioner relying on Rule 5 of the Hindu Marriage and Divorce Rules, 1955, which reads thus:

**“5. *Necessary Parties.*—** (a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds:

- (i) that the name of such person is known to the petitioner although he has made due efforts for discovery;
- (ii) that such person is dead;
- (iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed;
- (iv) for any other sufficient reason the Court may deem fit to consider.

(b) In every partition under section 13(2)(4) of the Act the petitioner shall make “the other wife” mentioned in that section a co-respondent.

(c) In every petition under section 11 of the Act on the ground that condition in section 5(1) is contravened, the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.”

**5.** On perusal of the divorce petition, it appears that the petitioner has made allegations that respondent No.1 is living with adultery. In the divorce petition, allegations are made against the petitioner that she indulged in the acts of adultery. The allegations to that effect are made in paragraphs 43 to 49.

**6.** Therefore, rejection of an application to delete respondent No.2 based on Rule 5 cannot be termed as perverse order.

**7.** In so far as prayer for deletion of prayer clause 111(o) is concerned, it appears that such prayer was not made before the Family Court. This Court exercised power under Article 227 of the Constitution of India which is essentially a supervisory power to ensure that subordinate Courts act within their jurisdiction. In the absence of adjudication by the subordinate Court, the Court under Article 227 of the Constitution of India for the first time cannot exercise power of judicial review. Such power can be exercised under the last clause of Article 227 of the Constitution of India where the Constitution empowers High Court to issue writ for “any other purpose” but such power can be exercised only as a consequence of judicial review of exercise of discretion by the subordinate Court. Without such power of judicial review, power

for “any other purpose” cannot be exercised.

**8.** Even considering the relief sought by the petitioner on merits, reliance is placed on Rule 16 of the said Rules by the petitioner. On perusal of Rule 16, it appears that the said Rule governs payment of costs. Such power needs to be exercised by the Court at the time of final hearing of the proceedings. The power conferred on the Court under Rule 16 is in a petition presented by the husband.

**9.** In the facts of the case, the relief claimed is relief of compensation and not costs. Moreover, for deletion of prayer in the petition, powers analogous to Order 6 Rule 16 needs to be exercised. It is well settled that unless pleadings are scandalous, vexatious or is made with an intention to embarrass the trial, such trial need not be exercised by the Court. It is well settled that such power need to be exercised in exceptional circumstances as the Court cannot regulate right of a party to make pleadings. Therefore, in my opinion, the prayer made by the petitioner for deletion of prayer clause 111(o) of the divorce petition need not be accepted.

**10.** Reliance placed on the judgment in the case of **Joseph Shine** (supra) is wholly inapplicable in the facts of the present case as the pleading is regulated by Rule 5 of the said Rules. Once rights of the parties are governed by the provisions of Constitution or law within the meaning of Article 13, it carves out exception to Article 21 of the Constitution of India unless such law is declared as unconstitutional by the competent Court. In the absence of

challenge to Rule 5 making necessary averments in the petition, judgment in the case of **Joseph Shine** (supra) is inapplicable in the fact situation of the present writ petition.

**11.** On overall consideration of the matter, no interference under Article 227 of the Constitution of India is called for.

**12.** The writ petition, therefore, stands dismissed. No costs.

**(AMIT BORKAR, J.)**