

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.1073 OF 2019**

Ms. Rosita Antoneita Regina Fernandes,
Major in age, Indian National,
Resient of H.No.297, near Palolem Beach,
Arch Chapel Side, Cancona Goa.

..... Petitioner

V E R S U S

1. Mr. Jose Fernandes,
Major in age, Indian National,
Resident of H.No.297,
near Palolem Beach,
Arch Chapel Side, Cancona Goa.

2. The Civil Registrar,
Civil Registrar, Salcete-Goa.

..... Respondents

Shri Vivek Rodrigues, Advocate for the Petitioner.

Shri John A. Lobo, Advocate for the Respondent No.1.

Coram:- DAMA SESHADRI NAIDU, J.

Reserved on :- 3 February 2021

Pronounced on :- 23 March 2021

JUDGMENT:

Heard the learned counsel for the parties. Rule. Rule made returnable forthwith. The learned counsel appearing for the respondent no.1 waives service.

Introduction:

2. Two divorcees, in their mid-40s, marry each other. They live happily or normally for a few years. Then, the husband realises that the wife is not interested in him; she is interested in his property. The wife is past her prime to beget children, too. They frequently fight. So he thinks back and realises that when he 'consented' to marry, he suffered from a "grave lack of discretion of judgment". And that grave lack of discretion of judgment is about the "essential matrimonial rights and duties" the wife and husband are expected to give and accept mutually. Given the

personal laws that bind them, the husband takes recourse to Canon Law and gets the marriage annulled.

3. So, the questions are these: (a) What is a grave lack of discretion of judgment? (b) What are the essential matrimonial rights and duties between the two spouses?

Facts:

4. The petitioner is the wife; the respondent is the husband. Their marriage was solemnised and registered on 27.07.2012. By then, they each had a failed marriage. When they entered this matrimonial bond, they were in their mid-forties.

5. For about a year, the couple had been happy. Later, there arose certain differences, which, according to the respondent, are irreconcilable. So he complained to the Parish Priest, who tried to counsel both the wife and husband; he failed to bring about any reconciliation or rapprochement between them.

6. Under these circumstances, the husband applied to Ecclesiastical Tribunal for the annulment of the marriage. Then, the Tribunal called for the report from the Parish Priest, who reported to it about his failed efforts. Eventually, on the merits, the Tribunal annulled the marriage. It was on 14.10.2017.

7. Aggrieved, the wife approached the Metropolitan Tribunal of the Archdiocese of Bombay. Again, through an order dated 26.05.2018, the appellate Tribunal too confirmed the annulment. Later, with a delay of over one year, the petitioner has filed this Writ Petition. Meanwhile, this Court, on its administrative side, confirmed the decree of annulment through its proceedings, dated 14.06.2018.

8. In the above factual background, I have heard Shri Vivek Rodrigues, the learned counsel for the petitioner; and Shri John A. Lobo, the learned counsel for the respondent.

A Word of Appreciation:

9. Before I extract the respective counsel's submissions ever so briefly, I may place on record a word of appreciation for both the learned counsel. They have produced both parties before me in the chamber and tried to persuade their respective clients to have an amicable settlement and to end their marital discord. Despite their best efforts, the counsel could not achieve their ends. So, they wanted the Court to rule on the merits.

Submissions:

Petitioner:

10. Shri Rodrigues, to begin with, has submitted that the primary Tribunal has grossly violated the principles of natural justice. The petitioner—a destitute, deserted woman—has had no means of defending herself effectively, given her lack of legal knowledge and paucity of funds. He reminds me that the appeal was in Mumbai. At any rate, Shri Rodrigues has contended that unless there is an opportunity of cross-examination to the wife to expose her husband's false claims, the Tribunal ought not to have annulled the marriage. About the inviolability of natural justice principles, he has drawn my attention to a judgment rendered by a Division Bench of this Court in *Mrs. Elmas Fernandes v. State of Goa & Ors.*¹, dated 15.10.2019.

11. On the merits, Shri Rodrigues has submitted that it is the wife that has been the victim of the matrimonial dispute. But she alone was made to pay the price for the husband's actions, in the end. As to the marital obligations (for example, begetting children) the wife has allegedly failed to discharge, Shri Rodriguez points out that the husband has known all along that not only himself but also his wife was in her mid-forties when they married. Then, biologically, he could have realised the difficulties in their having children.

12. As to the other allegations the husband made, Shri Rodrigues points out that they are the daily grind between any married couple. Even

¹ WP No.351 of 2017

those trial allegations have no evidential support. That apart, he has also contended that the Tribunal has disregarded the wife's counter-allegations and has believed the husband's *ipsi dixit*.

13. To sum up, Shri Rodrigues has submitted that the petitioner, now in her mid-fifties, is a destitute woman with no one else to look to and nowhere else to go to. With the annulment of the marriage, the wife has been condemned to live as if she had never been married. That is, she could not even claim any maintenance from her husband, who goes scot-free. So, Shri Rodrigues urges this Court to reverse the concurrent findings of the Tribunals below.

The First Respondent:

14. On the other hand, Shri John Lobo, the learned counsel for the husband, has elaborated on the significance of the Canon Law and the practices adopted under that law. First, he tried to repel the petitioner's contentions on the question of natural justice violation. He has submitted that nowhere—that is, either before the primary Tribunal or before the appellate Tribunal—has the wife pointed out any procedural lapses. Nor has she asked for any opportunity to examine any person.

15. According to Shri Lobo, the Tribunals below have even considered the views of the “Defender of the Bond”, who, according to Shri Lobo, is a disinterested, neutral person. So, the wife's plea about natural justice violation is only an afterthought. To elaborate, Shri Lobo reminds me that pending the writ petition, this Court's Division Bench ruled on the violation of natural justice in matrimonial proceedings under the Canon Law. He further points out that the wife brought in the plea of natural justice through an amendment in 2021, though the writ petition has been pending for many years. It is only to see that the pleadings are attuned precedentially.

16. On the merits, Shri Lobo has drawn my attention to Canon 1095 of the Code of Canon Law 1983 and submitted that Clause (2) squarely applies to the case on hand. So the Tribunals below have applied that

provision and concluded that the husband's consent to the marriage had been vitiated. According to Shri Lobo, the Tribunals have found that the lack of understanding has been evident on the part of both spouses, and that has made matrimonial life impossible. Thus, he has urged this Court not to upset the Tribunals' findings for they are, he stresses, well-considered concurrent findings. Shri Lobo has also contended that the Writ Petition suffers from laches because it was filed one year, four months after this Court's confirming the annulment, on its administrative side.

Reply:

17. In reply, Shri Rodrigues has submitted that even in her pleadings before the appellate Tribunal, the wife impliedly pleaded the violation of natural justice. That is, in the writ petition, through an amendment, she has only elaborated and elucidated what had been latent before the Tribunal. As to the alleged laches, Shri Rodrigues points out that the wife has no means, now or then, to approach the Court. Nor has she possessed the legal knowledge to prosecute her case diligently. In fact, a few months after she suffered the order from the appellate Tribunal, she approached this Court for legal aid. And this Court has assigned the file to him. Then, he asked the wife to submit all the relevant documents for him to read and to prepare the case. Thus, the writ petition has been delayed. Shri Rodrigues also insists that the wife's want and misery must not defeat her legal rights.

Rebuttal:

18. To rebut the wife's plea of poverty, Shri Lobo, the husband's counsel, points out that it is her own assertion that she was going to various authorities, including the Courts complaining about her husband. So nothing prevented her from filing this Writ Petition.

19. Heard Shri Vivek Rodrigues, the learned counsel for the petitioner; and Shri John A. Lobo, the learned counsel for the Respondent No.1.

Discussion:

What is a grave lack of discretion of judgment?

20. To appreciate the controversy, let us examine the facts as the husband pleaded before the Tribunal.

21. The respondent-husband married the petitioner-wife in September 2012. The marriage was solemnised in a Church. The husband has one failed marriage; he got it annulled, as he has done now. As he was “looking for a good woman to marry”, a lay woman-preacher at a retreat centre introduced him to the respondent. The respondent, too, has a failed marriage. Her earlier marriage had been annulled—evidently, by her first husband, of course. Once the petitioner and the respondent had been introduced to each other, the respondent—within a month of their acquaintance—insisted on their getting married.

22. This hurried approach on the petitioner's part did not provide "sufficient courtship" for the respondent. So they did not come to know each other well. Given the respondent's “undue haste”, the petitioner “was in a confused state of mind”. At one stage, the respondent “felt he should not go ahead with the marriage”. But his position compelled. He “had to manage the business at Canacona and return home at Paroda, a distance of about 30 kilometres”. That made him “re-think about cancelling the marriage”. And, the petitioner, too, “cajoled him with her sweet talk”.

23. After the marriage, initially they lived normally. But tensions between them grew gradually on property matters. The wife focused more on the property and less on her husband. Besides, “he felt cheated by the respondent, who did not tell him that she already had a menopause prior to marriage”. After the marriage, the husband wanted to have children, and he even took her to the doctor. Then he has learnt that his wife underwent “menopause prior to the marriage”. Thus, the husband and the wife “started arguing and fighting with each other. They both accused each other of exerting violence on him/her. Their interpersonal as well as conjugal relationship suffered gravely”.

24. The wife faces another allegation, too: she has “dragged the petitioner [to] the Police Station and civil court”. So, they reached “a point of differences and lack of trust, where [the husband] felt it was all over”.

25. With no hope of reconciliation, in October 2016, the husband presented a petition before the Patriarchal Tribunal for a declaration of nullity of his marriage with the petitioner. Under “can. 1673, 1^o”, the Tribunal accepted the petition and formulated “the doubt”: “Is this marriage null and void on the ground of Grave Lack of Discretion of Judgment, in terms of can. 1095, 2^o” on the husband’s part or on the couple’s part.

Patriarchal Tribunal’s Verdict:

26. Patriarchal Tribunal has held that (1) the marriage was celebrated without sufficient courtship; (2) the husband was in a confused state of mind when he consented to the marriage; (3) the wife hurried the marriage; (4) the couple contracted the marriage without due preparation as required by the Church Law; (5) the wife prevented the husband from making satisfactory inquiries about her; (6) the wife did not disclose her age to the husband; (7) the wife was secretive about her menopause; (8) the wife was not candid, and that affected “their interpersonal as well as conjugal life”; (9) there were constant fights between them, and they even turned violent; (10) the husband has spoken the truth “, but the same cannot be said of” the wife. In short, the husband and wife “did not make a mature, evaluative, and discreet judgment about self, about the person of the spouse, and about the marriage with the person.”

27. In the end, the Patriarchal Tribunal has noted that the “Defender of the Bond has raised no objection to the declaration of nullity of this marriage on the stated ground”. The Tribunal, indeed, is Patriarchal.

The Appellate Forum:

28. The Appellate Forum confirms the Patriarchal Tribunal's findings. Though the principle of merger applies, I have only referred to the Patriarchal Tribunal's verdict, for the Appellate Tribunal's verdict echoes and endorses the Patriarchal Tribunal's findings.

The Law:

29. As we have seen above, according to the Patriarchal Tribunal, as affirmed by the Appellate Tribunal, the matrimonial consent has been "vitiated by a failure of judgment concerning the rights and obligations essential to marriage as per can. 1095, 2^o". In this context, the Patriarchal Tribunal extracts Canon 1095, 2^o, which according to it, states:

The following are incapable of contracting marriage [...] those who suffer from *a grave lack of discretion of judgment concerning the essential matrimonial rights and obligations* to be mutually given and accepted.

30. To appreciate this canonical compulsion, we must first understand what are "a grave lack of discretion of judgment" and "the essential matrimonial rights and obligations". First, it is a "grave" lack of discretion. In contrast, it must not be light, trivial, frivolous, inconsequential, petty, or silly. Second, that grave lack of discretion of judgment must concern the "essential" matrimonial rights and obligations. That is, not all matrimonial rights and obligations but only the essential ones matter.

31. Chapter IV of the Canon Law deals with "Matrimonial Consent". Canon 1195, in its entirety, reads:

Can. 1095 — They are incapable of contracting marriage:

1^o who lack the sufficient use of reason;

2^o *who suffer from grave lack of discretion of judgment concerning essential matrimonial rights and duties which are to be mutually given and accepted;*

3^o who are not capable of assuming the essential obligations of matrimony due to causes of a psychic nature².

(italics supplied)

²Code of Canon Law, Latin-English Edition, Canon Law Society of America (1983), as translated from CODEX IURIS CANONICI, Libreria Editrice Vaticana, Vatican City.

32. The Patriarchal Tribunal has rightly disregarded Clause (1), which deals with “sufficient use of reason”, and Clause (3), which deals with the “causes of a psychic nature”. So we will confine to Clause (2): lack of discretion of judgment about the essential matrimonial rights and duties.

33. In *Marriage in Canon Law, Texts and Comments, Reflections and Questions*³, Ladislav Orsy S. J., considers that “in canon 1095 the meaning of “lack of sufficient use of reason,” “lack of discretion of judgment” and “incapacity to assume marital obligations” certainly cannot be determined by law alone; the interpretation of that canon must include the very best and most recent findings of the science of psychology and psychiatry”. (Page 40, Principles of Interpretation.) According to Ladislav Orsy, Canon Law has been moving from “conceptual rigidity toward pragmatic justice and equity”.

34. Ladislav Orsy goes on to observe that the norms of the old Code were conceived based on a few philosophical assumptions, not explicitly stated in the law—for example, even if a person was ignorant or in error about “the properties of marriage, if he desired to marry he was bound by the eternal laws flowing from its nature”. The laws born from these assumptions displayed the characteristics of an ideology: logically, they were clear and consistent but often in conflict with the concrete demands of justice and equity. The new Code, notes Ladislav Orsy, retained some of the philosophical assumptions but introduced a few pragmatic rules to mitigate their harshest consequences; by doing that, it opened the door to the world of empirical psychology. The result is a less cohesive system where the traditional abstract principles coexist uneasily with recent developments in human sciences⁴.

35. According to Ladislav Orsy, the overall meaning of Canon 1095 is that a person intending to marry must have the capacity to think

³Ed. 1988, Michael Glazier, Wilmington, Delaware, p.125

⁴Ibid, p.125

rationality, to decide responsibly, and to carry out the decision by action. This capacity must be present when the spouses exchange their promises. If the validity of the promises is ever doubted, all that has happened before and all that has followed later can serve only as signs to determine the precise state of the spirit of the person at the moment of the exchange of the promises⁵.

36. Since canon law as such has no competency in defining in what exactly the sufficient use of reason consists, “what exactly the discretion of judgment is, and how much strength is enough to assume the obligations”, this canon is an open invitation to the science of empirical psychology and medical psychiatry to fill the gap and provide the necessary information. Pertinently the learned author stresses that “the canonical comments on these norms must be restrained; the issues are not canonical”. Further, because the criteria do not come from the field of law but from the field of the perpetually developing sciences of psychology and psychiatry, “the meaning of this canon cannot be fixed; it will keep developing”⁶.

37. About Clause (2) of Canon 1095, Ladislav Orsy observes that as to the discretion of judgment about the essential rights and duties to be mutually given and accepted, the assumption of the law is that there might be persons in possession of their mental ability, but for some reason, they cannot use it properly; they cannot form a judgment either about marriage in general or about the union they intend in particular. In other words, “the defect must be grave; that is, the deviation of judgment from what is considered normal must be significant.”⁷.

Use and Abuse:

38. Cormac Burke in his *The Theology of Marriage, Personalism, Doctrine, and Canon Law*⁸ observes that among the new dispositions of

⁵Ibid, p.130

⁶Ibid

⁷Ibid, p.131

⁸The Catholic University of America Press, Washington DC, ed.2015, p.101

matrimonial law in the 1983 Code, there is no doubt that Canon 1095 “has been the most used (and to some, the most abused) in tribunal work”. The canon lays down that “those who suffer from a grave lack of discretionary judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted” and “those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage” are incapable of contracting marriage.

39. The attempt to fit a hypothetical incapacity for the *bonum coniugum* (the good of the spouses) within the terms of this canon will simply not work. An “incapacity for the end has no invalidating effect on consent. More to the point, the object of consensual incapacity under Canon 1095 are the essential rights/obligations of matrimony”. Cormac Burke stresses that

there is clearly no right to the *bonum coniugum* (just as, we repeat, there is none to the other end of procreation). While one can allow that there is a moral obligation on the each of the spouses to work towards their “good,” canon law (excepting of course the cases of deliberate deceit or positive exclusion) has refused to give juridical status to this moral obligation.

40. Most pivotal for our discussion is the learned author’s observation that “one has the right to what must be given by the other, not to what marriage itself may or may not give”. The gift of offspring, according to Cormac Burke⁹,

depends not just on the spouses but ultimately on God. And the gift of the “good” of the spouses, however one chooses to understand it, depends indeed on God (who certainly wants it), but also on the free response of the spouses to God’s grace as it comes to them through the peculiar plans of his providence. *Sometimes God’s plan for the good of the spouses involves a childless marriage*, and it not infrequently seems to involve a union *where personality differences create tensions between the spouses that can pull the marriage apart* unless they have recourse to prayer and *generous sacrifice so as to learn to get on together. Incapacity and lack of effort or of generosity are not to be confused*. What then of a

⁹Ibid, p.102

claim that one person was not consensually capable under c. 1095 *because he or she was unable to assume the obligation of making the other person happy? I doubt that it could be juridically upheld. I am sure that such a claim does not accord with any true understanding of the married commitment.*

(italics supplied)

41. How apt and to the point are the above observations! Indeed, felicitous.

42. In *The Law of the Church in the Nullity of Marriage due to Cause of Psychic Nature*¹⁰, Roberto Rosas of St. Mary's University School of Law (USA) deals with the "lack of discretion of judgment". Regarding Canon 1095, the learned author reasons that the psychic anomalies recognised by affirmative sentences as sources of the lack of discretion are, for example:

concealed depression, dependent personality disorder, psycho-affective immaturity, and immaturity associated with a narcissistic personality disorder, schizophrenia or paranoid schizophrenia, abnormalities of personality and character, with marked passivity and dependence and pathological gambling, organic personality syndrome.

43. Roberto Rosas observes tellingly that there are numerous sentences considered in terms of the lack of internal freedom; they confirm the principle that although various psycho-affective factors, arising from the peculiar psychic anomalies, can exercise a disturbing influence, not any alteration of the elective faculty causes the incapacity of free election, but only one that touches the inner freedom and forces it or severely restricts. "It is confirmed that the limitation or injury of internal freedom produces a legal effect of invalidating marriage under discretionary incapacity of Canon 1095 (2) "only if it comes from a severe or grave mental disturbance, which represses or severely limits the autonomy of the same freedom".

¹⁰⁶ Prawo i Kościół (The Law and the Church) 183 (2014), <https://commons.stmarytx.edu/facarticles/538/>

44. The reasons the Tribunals below have given for allowing the husband to have the marriage annulled simply trivialise a sacrament. Secularly speaking, the decision shocks one's sense of justice; spiritually speaking, it shocks one's canonical convictions or conventions.

45. Let us not forget, theologically the doctrine of marriage as a sacrament presupposed three other doctrines: (a) that marriage was indissoluble; (b) that the mutual consent of the spouses was by itself sufficient to establish a valid marriage; (3) that the diriment impediments of relationship extended far beyond naturally abhorrent, incestuous unions. The relationship of these doctrines to the sacramental theology of marriage is difficult to determine, but the four doctrines were inseparable aspects of a single ecclesiastical view or model of marriage. So reckons Philip L. Reynolds in his *How Marriage Became One of the Sacraments*¹¹.

46. The principle that the consent of the spouses alone (*solus consensus*) was sufficient to establish a valid and indissoluble marriage emerged with the doctrine of marriage as a sacrament. The principle that consent alone was sufficient excluded several other things that could plausibly be and sometimes had been considered necessary for a valid marriage. For convenience, one may divide these excluded items into four overlapping categories: the consent of other parties, such as parents; contractual formalities, such as betrothal gifts, dowries, and documentation; publicity, witnesses, and community involvement; and religious rites, such as the nuptial blessing and the priestly joining of right hands. Any or all of these things might be considered important, pious, fitting, or honorable, but according to the principle of *solus consensus* none was strictly necessary for a valid marriage. Nor could a marriage be annulled on the grounds that any such condition had not been satisfied.

¹¹Cambridge University Press, ed.2016, p.40

47. If we look for a judicial interpretation of Canon 1095, we may come across the decision of Tribunal of the Roman Rota¹², Birmingham, the UK, rendered on 13 June 1991. The Tribunal observes that if marriage is a basic human right, corresponding to a deeply ingrained natural inclination, then incapacity to give valid matrimonial consent, as contemplated in nos. 2 and 3 of this canon, is a grave disability that can only result from a *serious* anomaly in man's psychic faculties. According to the Birmingham Tribunal, this was the main point of the addresses of the Pope to the Rota in 1987 and 1988. "For the canonist, the principle must remain clear that *only incapacity, and not just difficulty, for giving consent, renders marriage null... An argument for real incapacity can be entertained only in the presence of a serious form of anomaly which, however one chooses to define it, must substantially undermine the capacity of understanding and/or of willing of contracting party's*" (AAS vol. 79 (1987) 1457). (italics supplied)

48. Simply stated, the expression "incapable of contracting marriage" speaks only of the incapacity of a psychic or psycho-physical nature. It required the incapacity when the matrimonial consent was 'given', but not something that has emerged after the consent has been given or exchanged.

What Follows:

49. We have seen the true import of paragraph (2) of Canon 1095. Let us see what has happened between these spouses. When the petitioner and the respondent married, they had been in their mid- or late-40s. Now, they are in their mid-50s. They both had a failed marriage, each. Once bitten, twice shy; so to say. Neither was wet behind the ears, then.

50. Let us see what the husband has stated as his justification for the annulment:

"We did not have courtship. We did not come to know each other as persons. Deep in my heart, I did not want to marry in haste without knowing the girl, but the situation forced me to consent to

¹²<http://www.cormacburke.or.ke/node/399>

the marriage. First of all, my mother had died, and I was having a tough time managing the business in Canacona and return home at Paroda. I did not want to live alone in such a big house in Paroda. Secondly, Rosita's talk was so sweet that I was taken up by her and blindly did what she told me to do" (sess. 1, q. 5).

Rosita tricked and forced me into this marriage. She *did not allow me to think or even consult anybody*, including Josephine Fernandes.

Initially, our interpersonal relationship was good. Then I realised her evil intention of grabbing my property. I trusted her, but she did not trust me". Initially, our sexual relationship was good, but when I took her to the doctor as I wanted to have children, I learned that Rosita was menopausal even prior to marriage, which she did not tell me. If I knew it before marriage that she was already in a state of menopause, I would not have got married to her. I wanted to have children."

(italics supplied)

51. From the italicized portions above, we understand all began well, but all may not have gone on well—ever after. Being happy ever after is for fairy tales, not for families. First, courtship is not *a sine qua non* for a canonical, sacramental marriage. As the respondent puts it, deep in his heart, he did not want to marry in haste. But the situation forced him: (a) his mother died; (b) he had a tough time managing his business; (c) he did not want to live alone in a big house. So, the marriage for the respondent was an acute necessity. He was desperate to have a spouse, a companion, even a domestic help. And his consent was because of his own compulsion. Then, the allegation is that the petitioner sweet-talked him into the marriage. This assertion contradicts the respondent's first statement. Even otherwise, the respondent cannot expect a bride or a bride-to-be to be harsh and unpleasing. She is expected to be sweet, and so must be her talk. The alleged trick the petitioner played was that she did not allow the respondent to think or even consult anybody else. He has already said his own family circumstances forced him to marry. Consultation may be a cautionary principle, not a condition precedent, of a marriage.

52. Then, the respondent agrees that initially, their interpersonal relationship was good. Later, he allegedly realised that the petitioner was trying to grab his property. Men may not be from Mars and women from Venus¹³. That said, they may have different priorities in life and different motivating factors for matrimony even. A man may have a myriad causes and excuses, but a woman's matrimonial quest basically begins with her yearning for safety and security—financial or otherwise. Can a man treat that as a woman's love for lucre? Caveat: This assertion, I reckon, does not mean women are weaklings or in any way inferior.

53. Then comes the final salvo. The respondent agrees that initially their sexual relationship was good. Later, he wanted to have children, When the couple contacted the doctor, the respondent came to know that the petitioner had crossed her menopause.

54. According to National Health Service, the UK¹⁴, menopause is a natural part of aging that usually occurs between 45 and 55 years of age. As a woman's oestrogen levels decline. In the UK, the average age for a woman to reach menopause is 51. But around 1 in 100 women experience menopause before 40 years of age. This is known as premature menopause or premature ovarian insufficiency.

55. The World Health Organization defines natural menopause as the permanent cessation of menstruation resulting from the loss of ovarian follicular activity without an obvious intervening cause and is confirmed only after 12 consecutive months of amenorrhoea. In general, natural menopause occurs between 45 and 55 yr of age. *In India¹⁵, the range of mean age at menopause reported in different studies appears to be rather young, between 41.9 and 49.4.* Regarding menopause, according to the

13John Gray's *Men are from Mars, Women are from Venus* has an interest take on how man and woman fundamentally differ in their mental makeup and outlook as if they were two species, rather than one.

14<https://www.nhs.uk/conditions/menopause/>

15 Natural menopause among women below 50 years in India: A population-based study, Indian Journal of Medical Research, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5320842>

Indian National Family Health Survey (NFHS-3) carried out during 2005-2006, about 18 per cent of currently married women in the age group of 30-49 yr had reached menopause; a very similar finding of 17.7 per cent was reported in an earlier survey round (NFHS-2, 1998-99).

56. We have already seen from Cormac Burke commentary, *The Theology of Marriage, Personalism, Doctrine, and Canon Law*, that procreation or woman's ability to procreate is no essential canonical condition for a marriage to be sustained. Should we allow one of the spouses that married well-past their prime to complain about his aged partner's inability to beget children? We ought not to. We cannot ask a woman to do something which is biologically impossible. The petitioner's age must have forewarned the respondent about the chances of their having a child. It is, indeed, not the respondent's case that the petitioner concealed her age. Nor is it his case that she lied to his specific question about her menstrual status. After all, modesty prevents a woman from making an issue out of menopause. She can hardly speak of it.

57. To sum up, 'consent' is a voluntary act of a person with no cognitive impairment or psychic abnormalities or shortcomings. Not thinking wisely or not thinking leisurely does not vitiate consent. "Confused statement of mind" as pleaded by the respondent will not fall under paragraph (2) of Canon 1095. We have seen from standard commentaries above what amounts to a "grave lack of discretion of judgment concerning essential matrimonial rights and duties which are to be mutually given and accepted". It must be a severe or grave mental disturbance or disorder, which represses or severely limits an individual's cognitive ability. That is, the incapacity must be of a psychic or psycho-physical nature. Mere difficulty or post-marriage discord cannot come within the purview of paragraph (2) of Canon 1095.

What are the essential matrimonial rights and duties between two spouses?

58. On this question, we need not labour much. Barring the allegation that the petitioner cannot beget children, the respondent has

not pleaded much. Nor have the Tribunals below focussed on it—rightly so because of the lack of pleadings.

59. I have already quoted Cormac Burke that there is clearly no right to the *bonum coniugum* (the good of the spouses). One may accept there is a moral obligation on each spouse to work towards the couple's common "good," but canon law—except in the cases of deliberate deceit or positive exclusion—has refused to give juridical status to this moral obligation: the good of the spouses, that is the happiness in matrimony or well-being. Let us not forget that the daily grind of life tests every relationship, and matrimony is no exception. In matrimony, happiness, quarrel-free relationship, a dream-come-true union of man and woman, a family teeming with wealth and children, too, may be desirable. But it remains a pious wish. It is not an essential matrimonial right or duty.

60. Then the "gift of offspring". Science may have its say, but we still use the idiom "blessed with a baby". According to Cormac Burke, childbirth depends not just on the spouses but ultimately on God. "Sometimes God's plan for the good of the spouses involves a childless marriage". He acknowledges that 'not infrequently' do we see a union where personality differences create tensions between the spouses that can pull the marriage apart "unless they have recourse to prayer and generous sacrifice so as to learn to get on together. Incapacity and lack of effort or of generosity are not to be confused." What then of a claim that one person is consensually incapable under c. 1095 because he or she could not assume the obligation of making the other person happy? The learned author doubts if it could be juridically upheld. And he is sure that such a claim does not accord with any true understanding of the married commitment.

61. That will suffice.

Delay and Laches:

62. It is a case marked by delays. There was a delay in the parties' getting married. There was a delay in the petitioner's pursuing her legal

remedies. Granted. But in pursuing one's remedies that define or redefine one's life, no one deliberately dithers—usually. In matrimonial cases where one tries to snap the bond and where the other tries to hang on to it, we must not merely look at the calendar to count the delay; we should rather look to all the attending circumstances. Here is a woman who has no means of living. The husband accuses her of having married him for his property. She denies that but agrees she is destitute.

63. First, she battled here in Goa before the Matriarchal Tribunal. Later, she went to the Appellate Tribunal in Mumbai. Her efforts must have taxed her financially and made her distraught at the disaster she was made to meet: the annulment. Finally, she came to this Court and told it she had no means to prosecute her case anymore. The Court provided legal assistance and gave her a counsel. And that counsel, whose efforts are appreciable, has asked her to secure all the documents. Finally, he has filed the case. In that process over a year has passed. That can hardly be fatal for a woman who could not prosecute her case because of her poverty—nothing else.

64. The constitutional conscience of this nation has avoided the temporal limits on a person's fundamental rights. The same principle applies even to constitutional rights. The doctrine of delay is almost anomalous to the Indian Constitutional scheme. But the doctrine of laches holds its place. The laches must be writ large on the person's conduct. In a case like this, it must be nothing short a virtual abandonment of one's right for an inordinate period. And in the meanwhile, an indefeasible right must have accrued to the adversary's advantage. Neither is present here.

65. For the reasons I have stated above, I have no hesitation in holding that the Tribunals below have gravely erred in annulling the marriage between the petitioner and the respondent.

Result:

66. I, therefore, allow this writ petition and, as a consequence, set aside the impugned order dated 26.05.2018, passed by the Metropolitan

Tribunal of the Archdiocese of Bombay and the endorsement in the Marriage Register.

As this judgment hopefully leads to the parties' reunion, no order on costs.

DAMA SESHADRI NAIDU, J.

NH

NITI K

HALDANKAR

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