



Meena

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 223 OF 2022

Ms. Melinda Fantin Botelho,
D/o Mr. Santana Botelho,
Aged 33 years,
Residing at H. No. 332,
Vhodlem Bhat
Taleigao, Tiswadi, Ilhas, Goa.Petitioner

Versus

1. The State of Goa
Through the Chief Secretary,
Secretariat Building
Porvorim, Bardez, Goa.
(Official Address)Respondent No.1.
2. The Civil Registrar-Cum-Sub-
Registrar of Tiswadi
Having it's office at :
02nd Floor, Spaces Building,
Patto Plaza, Panaji- Goa.Respondent No.2
3. Mr. Ralston M. Botelho
S/o. Mr. Rosario Botelho,
Residing at H.No.500A,
Alto- Cabesa, Near GMC
Hospital, Santa Cruz, Tiswadi, Respondent No.3.
Goa- 403 202

Mr. Aurobindo Gomes Pereira, Advocate for the Petitioner.

***Ms. Maria Simone Judith Correia, Additional Government Advocate
for the Respondent Nos.1 and 2.***

***Mr. J.E. Coelho Pereira, Senior Advocate, Amicus Curiae with Mr.
Vilas Pavithran an Mr. Pancham Phadte.***

Mr. M. B. D'Costa, Senior Advocate, Amicus Curiae with Ms. Isabel

D'Costa and Mr. Nash Monteiro.

**CORAM : VALMIKI MENEZES AND
NIVEDITA MEHTA, JJ.**

RESERVED ON : 21st NOVEMBER, 2024.

PRONOUNCED ON : 9th MAY, 2025

JUDGMENT: (Per Valmiki Menezes, J.)

1. Heard learned Counsel for the parties.
2. Rule. Rule is made returnable forthwith. With the consent of the parties petition is disposed of finally.
3. This petition, invoking our powers under Article 226 of the Constitution of India, seeks issuance of a writ of mandamus to direct the Respondent No.2 (The Civil Registrar of Tiswadi) to strike off and cancel entry No.88/2017 and make necessary endorsement against the entry of marriage between the Petitioner and the Respondent No.3, that their Canonical Marriage was declared to be null and void. Further, this Petitioner seeks an order to quash and set aside communication dated 10th/11th March 2022 issued by the Respondent No.2.
4. It is the Petitioner's case that a Canonical Marriage was celebrated on 27th April, 2017 between the Petitioner and the Respondent No.3 at the church of Santa Cruz, and based on the

Marriage Certificate issued by the Archdiocese of Goa, the Respondent No.1, Civil Registrar, transcribed the Canonical Marriage into the Register of Marriage under entry No.88 in the Marriage Register of the Year 2017. The Petitioner claims that her Canonical Marriage was in accordance with Decree Law No.35461 of the Law of Marriage (Decree Law) applicable to the State of Goa. On 5th February 2019 the Petitioner initiated a process of Annulment of her marriage in terms of the Canonical Law, before the Patriarchal Tribunal of the Archdiocese of Goa which was granted on 26th November, 2020 by a “Definitive Sentence” declaring the Canonical Marriage between the Petitioner and Respondent No.3 to be null and void. It is the Petitioner’s case that ultimately this “Definitive Sentence” came to be ratified by a Decree of Ratification dated 15th September 2024, by the “Metropolitan Tribunal” of the Archdiocese of Bombay at Mumbai, which according to the Petitioner conclusively declares the marriage to be null and void, entitling her to have the entry in the book of Civil Registration of Marriages, before the Sub-Registrar of Tiswadi, to be cancelled.

5. It is the Petitioner’s case that this Court, in the case of *Elmas Fernandes v. State of Goa & Ors.*, (in Writ Petition No. 351 of 2017) declared Article 19 of the Decree Law No.35461 as unconstitutional and struck down only Article 19 of the Law on grounds that it excluded judicial review by this Court under Articles 226 and 227 of the Constitution of India. It was also averred in the petition that Article 4 of the same Decree Law was earlier struck down by the Court of the Judicial Commissioner of Goa in the case of *Espiciosa Nunes v. Francisco Nicolau Fernandes*(AIR 1974 GDD 46).

6. It is the Petitioner's case that when she approached the Civil Registrar at Panaji on 16th December 2021 for cancellation of the entry of Registration of her marriage in the Marriage Register, the Registrar i.e. Respondent No.2 referred to the judgment of this Court in *Elmas Fernandes*(supra), contending that since the decision of this Court was under challenge before the Supreme Court under Civil Appeal No.446-447 of 2020, the Petitioner's application would be processed after decision in that matter and after the order of the Ecclesiastical Tribunal had been ratified by the High Court. It is this communication that is sought to be quashed, direction is given to the Registrar to give effect to the order of the Ecclesiastical Court and endorse cancellation of the marriage based upon that order.

7. The following submissions were advanced by learned Advocate Shri Aurobindo Gomes Pereira for the Petitioner:

- (a) It was submitted that the effect of striking down Article 4 and Article 19 of the Decree Law by judgment of this Court would at most render the Decree Law to be without laying down a procedure for having the order of the Ecclesiastical Court to be ratified by the High Court; according to the learned Counsel, merely because the striking off of Article 19 would also strike off the procedure laid down to have such order ratified by the High Court, would by itself not rendered a Decree of such Court invalid. The learned Counsel took us through the decision of this Court of *Elmas Fernandes*(supra) to contend that the Judgment has, in fact, upheld that the Decree Law, even without Article 4

and Article 19 thereof (which have now been struck down), would still bring about civil consequences. The Counsel therefore contends that the Decree Law, without Article 4 and 19 thereof would continue to operate as valid law, within the State of Goa and consequently, any order of annulment of marriage under Canonical Law, passed by the Ecclesiastical Court would have to be given effect to by the Registrar, by cancelling the marriage in the Register.

In other words, it is contended that in the absence of Article 19, the procedure of having such orders ratified by the High Court is no longer required to be followed, and such orders can now be directly given effect to by the Registrar for cancelling the entry of marriage.

- (b) The learned Counsel appearing for the Petitioner contends that the Decree of the Ecclesiastical Court is valid and therefore must be given effect to, even in the absence of Article 19, which has been struck off. He submits that as a consequence of striking off Article 19 of the Decree Law by this Court in *Elmas Fernandes* (supra), this Court has no power to ratify the order of the Ecclesiastical Court granted to the Petitioner, nor does any other authority have the power to endorse this decision. He therefore contends that the decision does not require any endorsement or ratification, and being valid, as accepted by this Court in its observations made in *Elmas Fernandes* (supra), would have to be given effect to by the Sub-Registrar.

(c) The learned Advocate for the Petitioner then contends that by not giving effect to the order of the Ecclesiastical Court, the effect of the inaction of the Registrar is that the Petitioner is unable to remarry and have a family. The Petitioner is a lady who is 35 years of age, whose biological clock is ticking by. The learned Counsel therefore contends that the refusal to delete the entry of marriage is an arbitrary act, comes in the way of the Petitioner seeking remarriage and therefore amounts to infringement of Human Rights and is violative of Article 14 and Article 21 of the Constitution of India. The learned Advocate relies upon the following case law in support of his submission:

- i. ***Elmas Fernandes v. State of Goa & Ors.***, Writ Petition No. 351 of 2017
- ii. ***Espiciosa Nunes v. Francisco Nicolau Fernandes***, AIR 1974 GDD 46
- iii. ***Rajendra Prasad Gupta v. Prakash Chandra Mishra & Ors.***, (2011) 2 SCC 705

8. *Per contra*, Senior Advocate Mr. J. E. Coelho Pereira, appointed as Amicus curiae in the matter, has advanced the following submissions:

- (a) The learned Senior Advocate submits that the effect of striking down the provisions of Article 19 of the Decree Law would render a decree or order passed by the Ecclesiastical Court under Canon Law to be without civil consequences. He has taken us through the provisions of Article 2 of the Decree Law

which provides for solemnization of marriages in the presence of the Civil Registrar, as per Civil Laws, or their solemnization before the Catholic Church, as per Canonical Law, with the conditions to impose in the Civil Law for that purpose. He then took us through the provisions of Article 4 of the Decree Law, which bars the Civil Courts from passing any decrees in relation to a Canonical Marriage contracted under the Decree Law, under which the spouses are deemed to have renounced their civil rights of seeking divorce. He then took us through the judgment in *Espiciosa Nunes* (supra) by which Article 4 of the Decree Law was struck down as unconstitutional.

(b) The learned Senior Advocate has taken us through the scheme of Article 19 of the Decree Law, which has been struck down by this Court in *Elmas Fernandes* (supra), holding the same to be unconstitutional. It is his contention that Article 19 had provided for the enforcement of such orders only if they had been endorsed by the High Court; he submits that under Article 19, it was the High Court which was competent to enforce such an order and direct the Civil Registrar to make an endorsement in the Marriage Register. He therefore contends that the effect of the absence of Article 19 of the Decree Law renders orders passed by the Ecclesiastical Court with no civil effects; therefore, the entries in the Marriage Register, now, cannot be cancelled to give such civil effect. The learned Senior Advocate has taken us through the judgment of this Court in *Elmas Fernandes*(supra) and *The Archbishop Patriarch of Goa, Daman & Diu, Most Rev.*

Fr. Filipe Neri Ferrao v. State Information Commission & Ors., reported in 2023 SCC OnLine Bom 1694.

9. Mr. M.B. Costa, Senior Advocate appointed as Amicus Curiae in the matter, has made the following submissions:

- (a) He submits that under Article 2 of the Decree Law, parties have an option to opt for registering their marriage under Civil Law or under Canonical Form of marriage by subjecting themselves to the jurisdiction of the church under Canonical Law. He submits that if parties choose the latter form, the provisions of Article 2 takes away jurisdiction of the Civil Court to decide the annulment or divorce of that marriage, and in such event, it is only the Ecclesiastical Court that would have jurisdiction. He submits that, notwithstanding the striking down of Article 19 or Article 4 of the Decree Law, the orders of the Ecclesiastical Court would have to be given civil effect by endorsing an entry of the annulment in the Marriage Register.

10. Ms. Maria Simone Judith Correia, learned Additional Government Advocate, appearing for Respondent No.2/ Civil Registrar, whilst adopting the arguments advanced by Senior Advocate J. E. Coelho Pereira, has, in addition, made the following submissions:

- (a) Article 19 of the Decree Law was the provision that gave civil effect to orders of the Ecclesiastical Court, and on it being struck down, effectively now, such orders would have no civil effects.

She further submits that the scheme of Article 19 required the consent and concurrence of the High Court to give such order the force of a Civil Decree and it was only the High Court that could direct the Civil Registrar, after having concurred with the decision, to make an endorsement in the Marriage Register, cancelling the effects of the marriage. The learned Advocate contends that the entire Article 19 having been struck down, the order of the Ecclesiastical Court will have no civil effect.

11. The point that falls for our determination is whether the orders of the Ecclesiastical Court declaring annulment of a marriage under Canonical Law have civil effects after the provisions of Article 19 of the Decree Law No.35461 were struck down by this Court in *Elmas Fernandes* (supra).

12. For ready reference, we have quoted the relevant provisions of Decree Law No. 35461:

“Art 2. The marriage may be solemnized in the presence of the Government employees responsible for the work of civil registration as per the civil laws, or before the ministers of the Catholic Church, as per the canonical laws and under the conditions imposed by the civil law for such cases.

§1: This system is applicable to the natives and non-natives. For the effect of this present decree, natives means the persons of the Colonies of Africa and Timor who are included in the definition of article 2 of decree n.º 15:473 dated 6 February, 1929 (Civil and Criminal Political Statute of the Natives), and of the Decrees which regulate it in each Colony.

§2 The provisions of this Decree are without prejudice to

the provisions of the laws regarding the observance of the usages and customs in relation to the non-catholic natives, however repealing polygamy and other usages inconsistent with the Portuguese public law.

§3 In this Decree the term «missionary» includes all the priests of the Catholic Church duly authorized to administer the sacraments in the Portuguese Colonies.

Art. 4. *In harmony with the essential characteristics of the Catholic marriage which is deemed, after bringing this decree into force, by the very fact of solemnization of the canonical marriage, the spouses shall renounce the civil right of seeking divorce, for which reason the Civil Courts shall not have the power to decree the same in relation to such a marriage.*

Art. 19. *The cognizance of the causes regarding the nullity of canonical marriage and regarding the exemption of non-consummated religious marriage is reserved by the competent Ecclesiastical Courts and Offices.*

§1: The decisions and judgements of the said Offices and Courts, when final, shall be forwarded to the highest Ecclesiastical Court, for the purpose of verification and shall be thereafter with respective judgements of that highest Ecclesiastical Court, transmitted through the diplomatic channel to the competent High Court, which will enforce them without revision and confirmation, and order that they be endorsed in the books of Civil Registration on the margin of the certificate of the marriage.

§2: The Ecclesiastical Tribunal may request the Civil Court for service of summons or notice to the parties, expert witnesses, as well as doing of any acts of enquiry which they deem convenient.

13. The primary submission of the Petitioner is that striking down of the entire body of Article 19 of the Decree Law, by this Court in *Elmas Fernandes* (supra) would still leave the order/decreed passed by the

Ecclesiastical Court intact and executable, since it has been held in the same judgment that the Decree Law, is part of the body of law applicable to the State of Goa and is enforceable. The submission is further elaborated to contend that notwithstanding the procedure and requirements of Article 19 of the Decree Law to be followed i.e. ratification of the order of the Ecclesiastical Court by the High Court, the order would now have to be directly given effect to by the Civil Registrar, bypassing the High Court.

14. The provisions of Article 4 were struck down way back in 1973 in *Espiciosa Nunes*(supra), holding the same to be *ultra vires* to the constitution. It was held in that judgment that parties to a marriage, celebrating the marriage according to canonical rights, could not be presumed to know that, by Canonical Law, they had renounced their civil rights to get a divorce. The effect of striking off Article 4 was that every Christian who was married under the Canonical Law and according to the canonical rights, notwithstanding the bar created under Article 4, could always seek a divorce/ dissolution of the marriage contracted under Canonical Law before a Civil Court.

15. Under the scheme of Article 19, the Ecclesiastical Courts could take cognizance of Calls for declaring a canonical marriage to be a nullity. Decisions of Ecclesiastical Courts, under the first proviso to Article 19, are required to be verified by the highest Ecclesiastical Court and **Shall** be transmitted to the High Court for enforcement. In our opinion, what this means is that the High Court would not act as a

postman to forward such orders for enforcement, that these orders would be subject to the supervisory and Review jurisdiction of the High Court, as held in *Elmas Fernandes*(supra).

16. In *Elmas Fernandes*(supra), the challenge in the petition was to the constitutional validity of Article 19 of the Decree Law. The further relief sought was for a declaration that the endorsement made by the Civil Registrar pursuant to the order passed under the Article 19 of the Decree Law, cancelling the entry of the registration of the marriage was illegal and nullity. The submission of the Respondent in that matter was that the High Court, under Article 19 only acts as an Administrative Authority and does not act as a Judicial Authority. Paragraph 116 of the judgment has formulated the question that arose for consideration in that judgment, being whether the orders passed by the Administrative Judge of the High Court directing the Registrar of Marriages to make an entry in the Register is an administrative order simplicitor, without power of review or whether the High Court can set aside a decree passed by the two Courts below on merits by exercising judicial powers or powers of superintendence or review under Articles 226 and 227 of the Constitution of India.

17. Whilst answering this question, this Court, in *Elmas Fernandes* (supra) held as under:

118. We will consider the issue on the basis of the submission advanced by the learned counsel for the parties at great length and decide whether such decrees passed by the Ecclesiastic Tribunals declaring the marriage nullity would be the Tribunals within the

supervisory jurisdiction of this High Court or not. We shall also decide the issue simultaneously whether the principles of natural justice were required to be followed by such Tribunal while declaring a marriage nullity, whether an opportunity to cross examine the opposite party or to engage an advocate before such Tribunal, right to engage an advocate before such Tribunal, examination of the witness by the other side in presence of other side, whether High Court can simplicitor transmit the decrees of these Tribunals to the Registration of the Marriage without hearing any of the parties and more particularly the party who had lost before such Tribunal or not.

119. This Court shall now decide whether Article 19 of the Decree No. 35461 deserves to be declared as unconstitutional on the ground that the power of review of High Court under Articles 226 and 227 of the Constitution of India whether are taken away and if taken away, such provision is ultra vires Articles 14 and 21 of the Constitution of India and thus should be declared as unconstitutional or on such ground the said Article 19 of Decree No. 35461 shall be read down and various principles of natural justice shall be read in the said Article or not.

....

126. In our view, Article 19 of Decree No. 35461 thus could not impose a bar against the High Court from exercising a power of review. Such powers enshrined under Articles 226 and 227 of the Constitution of India in the High Court can be whittled down only by a provision in the Constitution of India and not in such Article 19 of the Decree No. 35461. The said Article 19

of the Decree No. 35461, thus deserves to be declared as unconstitutional and ultra-vires Article 14 and 21 of the Constitution of India. The principles of law laid down by the Supreme Court in the case of The State of Haryana vs. The Haryana Cooperative Transport Ltd. & Ors. (supra) squarely applies to the facts of this case. We are respectfully bound by the said judgment.

128. In so far as the submission of Mr.Coelho Pereira, learned Senior Counsel for the respondent no.2 that by the very act of celebration of the canonical marriage, the spouses renounce the civil right of applying for divorce and for that reason the divorce could not be granted by civil courts as far as the catholic marriages are concerned, there is substance in this submission made by the learned Senior Counsel. The question still arises as to whether the orders passed by such Tribunals constituted under the provisions of the said Decree No. 35461 and could be challenged before the High Court by exercising writ jurisdiction under Articles 226 or 227 of the Constitution of India or not. Mr. Coelho Pereira, learned Senior Counsel could not dispute that though the said Article 19 of the Decree No. 35461 provides that the orders passed by the two Tribunals below have to be transmitted to the Registrar of Marriage without power of review, powers of High Court under Articles 226 and 227 of the Constitution of India cannot be taken away.

129. Though, Article 19 of the Decree No. 35461 was enacted to give recognition of judgments and annulments of marriage with respect to Catholics by Patriarchal Tribunal and Metropolitan Tribunal and to give civil effect to have such decision being transmitted by the High Court to the concerned Registrar of Marriages for cancellation, the said

power restricting the power of review by the High Court under Articles 226 and 227 of the Constitution of India is ex-facie unconstitutional and ultra-vires provisions of the Articles 14 and 21 of the Constitution of India.

130. In so far as the reliance placed by the learned Senior Counsel for the respondent no.2 on the judgment of this Court in Joao Azavedo Vincent Paul Fernandes (supra) is concerned, in the said proceedings, no constitutional validity of Article 19 of the Decree No. 35461 was challenged in that matter. The said judgment thus would not assist the case of the respondent no.2.

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*134. It is not in dispute that the Patriarchal Tribunal and Metropolitan Tribunal have passed the orders under Decree No.35461 thereby annulling the marriage between the petitioner and the respondent no.4. The said Portuguese Decree has not been amended by any civil law prevailing in the State of Goa and more... particularly in respect of the Chapter relating to marriage and divorce. performed under the Canon Law. It is not the case of the respondents that the said two Tribunals are private forum and not exercising statutory function. This Court in case of *Especiosa Nunes of Bicholim & Anr. vs. Francisco Nicolau Fernandes of Mercês & Anr.*, AIR 1974 Goa, Daman & Diu 46 has held that Article 4 of the Decree has taken away the right of getting divorce under civil law only from those Catholics who had married canonically under Catholic rites and not from the Catholics who had married under common civil law. In the said judgment, Article 4 of the Decree is declared*

as ultra-vires and unconstitutional and has been struck-down on the ground that the said Decree has taken away the right of getting divorce under the civil law only from those Catholics who had married canonically under Catholic rites and not from the Catholics who had married under common civil law and the same was violative of Article 14 of the Constitution of India.

....

162. In our view, by virtue of Goa, Daman and Diu (Administration) Act, 1962 all laws which were in force prior to the appointed date in terms of section 5(1) of the said Act are stated to continue to be in force until amended or repealed by competent legislature or a competent authority in the State of Goa. The provisions thus constituted under the said Decree No. 35461 have statutory power to annul a marriage performed by the parties covered by the said Portuguese Civil Code, in view of the provision of Goa, Daman and Diu (Administration) Act, 1962. The judgment of the Supreme Court in case of Molly Joseph and Ors. (supra) thus would not apply to the facts of this case and is clearly distinguishable.”

18. Thus, referring to the afore quoted paragraphs of *Elmas Fernandes* (supra), there is a specific consideration of the question in paragraph 119 thereof, whether the entire provision of Article 19 is ultra vires Articles 14 and 21 of the Constitution of India and thus should be declared as unconstitutional or on such ground, the said Article 19 of Decree No. 35461 shall be read down and various principles of natural justice shall be read into the said Article. In answer to this question it

has been held in paragraphs 126 and 129 of the judgment that the entire Article 19 of the Decree Law was struck down as being violative of Articles 14 and 21 of the Constitution of India.

19. In this context, reference has been made to the judgment of a Single Judge of this Court in *The Archbishop Patriarch of Goa, Daman & Diu, Most Rev. Fr. Filipe Neri Ferrao* (supra), which was deciding a challenge to the order of the Goa State Information Commissioner holding The Archbishop Patriarch of Goa, Daman & Diu acting as the Patriarchal Tribunal to be a “Public Authority” within the meaning of Section 2(h) of the Right to Information Act, 2005 (RTI Act). From the submissions recorded in paragraph 12 of the judgment, reliance was placed, by the Ecclesiastical/Patriarchal Tribunal on the judgment of *Elmas Fernandes*(supra) to contend that under Article 19, recognition was granted to canonical marriages and annulment order of the Ecclesiastical Tribunal, like the Patriarchal Tribunal, however, since this Article 19 was struck down in *Elmas Fernandes* (supra), even the limited recognition granted to the annulment orders, no longer applies. This submission was further recorded, that after the striking down of Article 19, these Tribunals could not be termed as a “Public Authority” under the RTI Act.

20. No doubt, in answer to the above submission a Single Judge of this Court, considering what was held in *Elmas Fernandes* (supra) has opined that though the Division Bench, in the operative portion of the judgment declared Article 19 of the Decree Law as unconstitutional and struck it down, it had restored the annulment petition before the

Patriarchal Tribunal for fresh decision and therefore it appears that the Division Bench really struck down the portion of Article 19 that barred judicial review. Be that as it may, as things stand today, Article 19 of the Decree Law stands struck down and an appeal against the judgment has been admitted by the Hon'ble Supreme Court; the matter is pending decision before the Apex Court, but till then, the decision in *Elmas Fernandes* (supra), which strikes down the entire Article 19 of the Decree Law continues to hold good.

21. What stems from the above discussion is that, if the orders of the Ecclesiastical Tribunal could be given effect to, only subject to the High Court considering their content and then passing an order, if the same were accepted, directing the Civil Registrar to give effect to the order by deleting/endorsing the entry of marriage, in the absence of the provisions of Article 19 which are now struck down, the orders of the Ecclesiastical Tribunal could not be given effect to by the Civil Registrar. It appears to us, that the scheme of Chapter II of which Article 19 forms part was to give civil effect to orders of the Canonical Court/Ecclesiastical Courts through the provisions of Article 19, by appointing the High Court as the authority to enforce such orders by examining them and ordering that they be endorsed by the Civil Registrar in the Marriage Registers. Once Article 19 has been entirely struck down, the orders of such Tribunals now do not receive the imprimatur of the High Court and therefore would not have civil consequences.

22. For the reasons discussed above, we are of the opinion that in view of the position that Article 19 has now been struck down in its entirety, the Order/Affirmative sentence of the Ecclesiastical Tribunal dated 26th November, 2020 confirmed by the Decree of Ratification dated 5th September, 2021 would have no civil effects. Consequently, the Civil Registrar of Tiswadi, by communication dated 10th March, 2022 has rightly refused to endorse the entry in the Register of Marriages of the marriage of the Petitioner with Respondent No.3. Consequently, we dismiss this petition. Rule stands discharged. No Costs.

NIVEDITA MEHTA,J.

VALMIKI MENEZES,J.