Bombay High Court
Manekbai Nadirshaw Vachha vs Nadirshaw Jamshedji Vachha on 20 February, 1936
Equivalent citations: AIR 1936 Bom 442
Author: Broomfield
JUDGMENT Broomfield, J.

1. This is an appeal under Section 42, Parsi Marriage and Divorce Act 15 of 1865, from an order of B.J. Wadia, J. sitting in chambers as Judge of the Parsi Chief Matrimonial Court, Bombay, reducing the amount of permanent alimony awarded to appellant from Rs. 85 to Rs. 50 per mensem. The parties were married in 1915. In November 1927, the appellant brought a suit under the Act for dissolution of her marriage with the respondent on the ground of adultery. The case was tried by Davar, J. and 11 delegates, and a decree for dissolution of the marriage was made on 31st January 1928. On 6th July 1928, Davar, J. sitting in chambers made an order that the respondent should pay the appellant Rs. 85 per mensem as permanent alimony from 1st February 1928. Subsequently both parties re-married and on 6th March 1935, the respondent took out a chamber summons before B.J. Wadia, J., upon which the amount of monthly payment was reduced as stated above. The main question in this appeal is whether the learned Judge had any authority to vary the order of his predecessor. This by itself is a fairly simple question, but the appeal raises incidentally a question of considerrable difficulty in connection with the practice of the Parsi Chief Matrimonial Court, Bombay. The difficulty arises from the form of the original order. The only sections in the Act dealing with alimony are Sections 33, 34 and 35. Section 33 deals with alimony pendente lite and we are not concerned with that. But it may be noted that it empowers the Court to order the husband to make a monthly or weekly payment to the wife during the suit. Section 34 is in these terms:

The Court may, if it shall think fit, on any decree for divorce or judicial separation, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum, or such monthly or periodical payments of money for a term not exceeding her life, as, having regard to her own property (if any), her husband's ability, and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties, and suspend the pronouncing of its decree until such instrument shall have been duly executed.

In case any such order shall not be obeyed by the husband, he shall be liable to damages at her suit, and further to be sued by any person supplying her with necessaries during the time of suoh disobedience, for the price or value of such necessaries.

2. Section 35 provides that in all cases in which the Courts shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to a trustee, and may impose terms and restrictions. This last section, which corresponds to Section 24, English Matrimonial Causes Act, 1857 does not appear to confer any independent power but only means that any decree or order made under Section 33 or Section 34 may provide for payment direct to the wife or to a trustee on her behalf, and may be made subject to conditions. So far as the express provisions of the Act go at any rate, there is no power to make an order for permanent alimony except under Section 34, and the power there given is to order the husband to secure to the wife a gross sum or monthly or periodical payments. The language is different and, no doubt, intentionally different from that of

Section 33 under which a husband may be ordered to pay a monthly or weekly sum.

3. Now Act 15 of 1865 is largely based on the English Act to which I have just referred, and Section 34 is praotioally the same as Section 32 of that Act. There are slight differences of wording, but they do not appear to affect the sense materially. The construction which the English Courts have placed on this section is that it conferred no other power except to secure a gross sum or annual sums to the wife by charging the property of the husband; if he had no property, no order could be made; he could not be ordered to make periodical payments out of wages or salary. It was also held that an order of the kind contemplated by the section, viz., an order securing the payment or payments to the wife, could not be afterwards varied, as the intention of the legislature was that it should be permanent: Rawlins v. Rawlins (1865) 4 Sw and Tr 168, Hyde v. Hyde (1865) 12 L T 235 and Medley v. Medley (1882) 7 P.D 122; see also Iswarayya v. Iswarayya 1931 P.C 234.

4. Section 32 of the English Act of 1857 applied only to decrees for dissolution of marriage and to the award of permanent alimony, or as the English lawyers call it maintenance, in such cases. Alimony in the case of decrees for judicial separation was dealt with separately in Sections 17 and 22. The Court was empowered to make such provision for alimony as should be deemed just, and the principles and practice of the. Ecclesiastical Courts were to be followed in that connexion. It had been the practice of those Courts in dealing with cases of divorce a mensa et toro they did not pronounce decrees of divorce a vinculoto order payments to be made by the husband to the wife and to vary such orders when necessary. There are no similar provisions in the Parsi Marriage and Divorce Act. Sections 33, 34 and 35 of the Act apply both to decrees for dissolution and to decrees for judicial separation.

5. As it was considered to be a defect in the English Act that a husband who had the means to pay maintenance, though not possessing any property on which the payment could be secured, could not be ordered to pay, the Matrimonial Causes Act of 1866 gave the Court power to order weekly or monthly payments and to disoharge, modify or suspend the order should the husband become unable to pay. It is to be noted that the power to vary the order was not given in respect of what I may call the securing order under Section 32 of the Act of 1857 but only in respect of the personal order for monthly or weekly payments, power to make which, in the case of decrees for dissolution of marriage, was conferred for the first time by the Act of 1866. These new provisions were incorporated in the Divorce Act of 1869, but there has been no corresponding amendment of the Parsi Act.

6. Thus we have this curious position that the only provision in the Parsi Act empowering the Court to grant permanent alimony, in the case of dissolution of marriage and judicial separation alike, is one which has been construed by the English Courts as conferring no power to order the husband to make periodical payments to his wife, unless at any rate tbe payment is secured by the execution of a deed or otherwise. In the present case however the payment was not secured in any way. Davar, J. made a simple order on the husband to pay Rs. 85 per mensem. We understand that this has been the practice in the Parsi Chief Matrimonial Court for a long time.

7. In this appeal we are not directly concerned with the question whether the original order of Davar, J. was valid. It was not appealed against and in this appeal there are no cross-objections. Counsel for the respondent has contended indeed that the order was not one which the Court had any power to make under Section 34. But he does so, not with the view of attacking the order itself, but in order to show that the considerations on which it has been held that an order made under the corresponding section of the English Act is permanent and cannot be varied, have no application in the present case. Those considerations apply to orders securing certain payments by a deed or otherwise. The order we are concerned with is a mere personal order to pay. This is undoubtedly a good argument so far as it goes. Whatever view may be taken off the validity of Davar, J.'s order, it is obvious in view of what I have said that the question whether the order oan be varied or not cannot depend merely on the construction of Section 34 or the corresponding English section. For instance, a case like Motibai v. Motibai (1900) 24 Bom 465, which was referred to in the course of the argument is of no assistance to us. There a husband had been ordered to pay to his wife a certain sum by way of permanent alimony and the payment was secured on his property. Russell, J. expressed the opinion that the order could not be varied. B. J. Wadia, J. in his order in this case says that this was an obiter dictum, and I gather that he dissents from it. But, in view of the authorities to which I have referred, it would seem that Russell, J. was" perfectly right. His opinion, however, has no bearing on the present case for he was dealing with a different bind of order altogether.

8. B.J. Wadia, J. naturally has not considered the question of the validity of Davar J.'s order. No such question was argued before him; and we understand there was little or no argument even on the question whether the Court has power to vary the order. For the reasons which I have indicated I must confess that I feel grave doubts as to whether the power to order a husband to make payments to his wife by way of permanent alimony without the payment being secured on the husband's property is conferred on the Court by Act 15 of 1865 or can be deduced from its provisions. I feel graye doubts also as to whether there is any inherent jurisdiction under which such a power may be exercised. In a previous order, which was cited in the course of the argument (Suit No. 2 of 1929), B.J. Wadia, J. referred to a passage in Halsbury apparently as authority for the proposition that the practice of the English Courts may be applied to Parsis. The cases cited in Halsbury are all decisions of the Ecclesiastical Courts or of the Divorce Courts following the practice of the Ecclesiastical Courts, and they were cases of judicial separation and not dissolution of marriage. But, as counsel for the appellant has shown in his learned and interesting argument, since the decision of the Privy Council in Ardaseer Cursetjee v. Perozeboye (1856) 6 M.I.A 348 neither the old Supreme Court nor the High Court nor any other Court apart from statute has had any jurisdiction to apply the English Ecclesiastical' law or practice to matrimonial disputes between Parsis. If, as we are given to understand, an amendment of Act 15 of 1865 is tinder contemplation, this is obviously a matter which deserves consideration.

9. Assuming, however, as I think we must for the purposes of this appeal, that the original order of Davar, J. is a valid order, I have no hesitation in holding that the Court has an inherent power to vary it on general principles. As I have mentioned already, Section 35 of the Act governs all orders for alimony. The Court, therefore, may impose any terms or restrictions which it considers expedient. If alimony is not secured as provided in Section 34, and there is merely a personal order to the husband to pay so much a week or month, it would obviously be proper to provide that the

amount might be reduced or increased on good cause shown, and to reserve liberty to apply for a variation of the order. Striotly speaking, perhaps, this should be done in the original order, and we understand that is now the usual practice. But in the case of an order which from its very nature cannot be intended to be immutable, it is not unreasonable to hold that liberty to apply may be implied.

10. This view, in my opinion, derives substantial support from the decision of the Privy Council in Iswarayya's case (4). That was a case under Section 37, Divorce Act 4 of 1869, which contains not only a provision for securing permanent alimony on the property of the husband, but also a provision for a personal order on the husband to pay a monthly or weekly sum, and a proviso under which the order for such payments may be discharged, modified or suspended if the husband should become unable to pay. The question before the Court was whether such an order could be varied in the interest of the wife, i. e., whether the Court could order payment of a larger sum. It was held that the Court had power to vary the order in this way, although the power is not expressly given in the section or elsewhere in the Act, and the principal reason for the decision is given at p. 356 of the report in Iswarayya's case (4):

A power of this nature is, prima facie, not one which ought to be exercisable once and once only; and, unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

11. I am of opinion therefore that the order made by B.J. Wadia, J. was within his powers and that there is no substance in the appeal on that ground. Nor, in my opinion, is there any ground for interference on the merits. It is usual and not unreasonable to provide that payments by way of permanent alimony should cease in the event of re-marriage of the wife. That was not done in the present case, but it is a good ground, in my opinion, for reducing the amount of alimony, and I see no reason to differ from B. J. Wadia, J's. view of what is a fair and proper order in the circumstances of the case. In my view, therefore, the appeal should be dismissed with costs.

Tyabji, J.

12.The parties were married on 15th September 1915, according to the law relating to Parsi marriages. On 21st November 1927, a suit was brought by the wife (the appellant) in the Parsi Chief Matrimonial Court in which the prayers were for divorce or in the alternative for judicial separation, and for alimony. On 31st January 1928, J.D. Davar, J. passed a decree for dissolution of the marriage. J.D. Davar, J. on 6th July 1928, fixed in chambers Rs. 55 per month for alimony pendente lite and Rs. 85 as permanent alimony from 1st February 1928. On 26th December 1934, the plaintiff remarried. The defendant-respondent has also re-married. On 6th March 1935, the defendant took out a chamber summons before B.J. Wadia, J. for reduction of the alimony, and it was reduced to Rs. 50. Two main questions were argued before us, (l) that B.J. Wadia, J. had no power to vary Davar, J.'s order for maintenance, and (2) that assuming he had the power, he exercised his jurisdiction wrongly and the amount of maintenance should not have been reduced.

13. It is desirable at the start to advert to the distinction observed in England between permanent alimony after judicial separation, and maintenance after dissolution of marriage and divorce. The distinction is one not only of terminology. It is important for reasons affecting the substantive rights of the parties. Historically speaking, the Ecclesiastical Courts in England exercised their Ecclesiastical jurisdiction to separate a husband and wife a mensa et toro without divorcing them. After such a judicial separation the parties could lawfully live apart though the marriage tie was not absolutely severed. In such oases the jurisdiction to grant alimony was possessed and exercised by the Ecclesiastical Courts. Since the parties remained husband and wife, the grant of alimony by the Ecclesiastical Courts was merely the enforcement of: the right, which the wife had, to be supported by her husband. When in 1859 a new jurisdiction, altogether to dissolve the marriage, was conferred on the Courts in England, the situation was entirely altered. The right that the wife has to be supported by her husband may continue while she continues to be his wife, though they live separate. But rights and liabilities of a new species are involved in an order that the former husband shall continue to maintain and support the former wife after the marriage which made them husband and wife has been dissolved. The question of making provision for the maintenance of the wife after dissolution of the marriage had not arisen before the Ecclesiastical Courts, since the jurisdiction to dissolve the marriage was itself new. The Ecclesiastical Courts had not been concerned with making provision for a woman who had ceased to be a wife: Iswarayya v. Iswarayya 1931 P.C 234. The Parsi Marriage and Divorce Act mentions only alimony there is nothing to indicate whether maintenance is or is not intended to be included in alimony. The Parsi Chief Matrimonial Court, whose decree and order are in question, is specially constituted with defined powers under Act 15 of 1865. The preamble of the Act recites the necessity for defining and amending the law relating to marriage and divorce among Parsis, and the expediency of making such law conformable to the customs of the said community. The Act is subdivided under seven heads, which include the following:

Of Marriages between Parsis, (Ss. 3-14), Of Parsi Matrimonial Courts, (Ss. 15-26) and Of Matrimonial Suits, (Ss. 27-43).

14. The first of these three heads contains substantive law relating to requisites to the validity of Parsi marriages and penalties for disregarding them. As regards the constitution and jurisdiction of the Parsi Matrimonial Courts, it is provided that for the purpose of hearing suits under the Act, special Courts shall be constituted: Section 15. The local limits of the jurisdiction of the Courts are defined and ancillary matters are provided for. So that the jurisdiction of each such Court is expressly limited (1) in respect of its local limits, and (2) in that its jurisdiction is stated to be for the purpose of hearing suits under the Act. Then follows the part headed "Of Matrimonial Suits," which is thus subdivided: (a) For a deoree of nullity (Ss. 27, 28); (b) for a decree of dissolution in case of absence (S. 29); (c) for divorce or judicial separation (Ss. 30-35); (d) for restitution of conjugal rights (Ss. 36-43). The suit before Davar, J., evidently came under sub-division (c) which covers Sections 30-35. For the present purposes the jurisdiction of the Court therefore to hear suits under the Act (S. 15) has to be considered with reference only to Sections 30-35. In other words, it may be taken that the Court is specifically constituted for the purpose of hearing suits under Sections 30-35 and it would seem to follow that the Parsi Chief Matrimonial Court of Bombay has no jurisdiction material to the present case, unless it can be brought under Sections 30-35. These sections contain

provisions relating to suits for having the marriage dissolved and grant of decrees for divorce and for demanding judicial separation. The last three sections under this head (Ss. 33-35) deal with questions relating to alimony.

15. Of the three sections that I have mentioned, Section 33 refers only to alimony pendente lite. It only authorises the Court to order the husband to pay reasonable sums monthly or weekly during the suit. Section 33 is clearly not relevant. So that only Sections 34 and 35 are left for consideration. Section 34 empowers the Court on any decree for (a) divorce (after which the parties no more remain husband and wife) or (b) judicial separation: (1) to order that the husband shall secure by a deed to the wife such gross sum or monthly or periodical payments of money as shall be deemed just, and (2) for that purpose to require a proper instrument to be executed, and (3) to suspend the pronouncing of its decree until such an instrument is executed. In case any such order shall not be obeyed, the section provides two remedies: viz. (1) liability to damages at the wife's suit, and (2) liability to a suit by a person supplying her with necessaries. The other section Section 35, authorizes the Court to give directions subserving any decree or order for alimony; it may (1) direct that the alimony shall be paid either to the wife herself or to any trustee on her behalf (2) impose terms or restrictions, and (3) appoint a new trustee. The result material for the present purposes seems to be that the Court constituted for hearing suits under the Act is specifically authorized to make an order, (1) requiring a proper instrument to be executed to secure the sum or payments deemed to be just in accordance with Section 34; (2) in cases in which any decree or order for alimony has been made, to direct that the alimony be paid to the wife herself or a trustee and to impose terms and restrictions: Section 35.

16. The orders that may be made under these sections may be appreciated from the effect given to similar provisions in England and in particular by the form of instrument adopted for securing the sum or payment. The Matrimonial Causes Act 1857 (20 & 21 Vic. c. 85), Sections 32 and 24, now the Judicature (Consolidation) Act (15 & 16 Ceo V. c. 49), Section 190, sub-ss. (1) and (5) correspond with Sections 34 and 35 of the Parsi Marriage and Divorce Act. But the background of substantive law in England may be different from that applicable to Parsis; and with regard to Parsis, questions relating to their customs (to which the preamble refers) may have to be determined by evidence as between the parties. Lord Russell in Iswarayya v. Iswarayya 1931 P.C 234 desired it to be fully realized that as a general rule an Indian Act does not fall to be construed in the light of statutes. enacted by another Legislature; but that the position might be different in the case of an Act like the Divorce Act which makes an express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts has been transferred, and to the principles and rules on which that Court acts and gives relief. There is no such reference in the Parsi Marriage and Divorce Act. Moreover, unless the substantive law applicable to the Parsis by reason of their customs or otherwise, is exactly in accord with the English law inherited by the Courts in England from the Ecclesiastical Courts, and altered from time to time by statutes in England, the effect of the section would be different in the two cases. The Matrimonial Causes Act, 1857, (20 and 21 Vic, c 85), established in England a new Court of Record and the jurisdiction in matters matrimonial then vested in Ecclesiastical Courts in England was transferred to it. The order of Davar, J. dated 6th July 1928, was that the respondent should pay to the appellant Rs. 85 per month as an allowance after their marriage was dissolved. The allowance is called permanent alimony by Davar, J. It is clear that

it was not such an order as is authorized by Section 34. It was not an order that an instrument be executed to secure any sum or payment. Lord Russell in Iswarayya v. Iswarayya 1931 P.C 234, speaking with reference to a section of which para. 1 is, with slight verbal changes, reproduced in Section 34, Parsi Marriage and Divorce Act, said (p. 357):

.... the Court was given power on a decree for dissolution to order the husband to secure by deed to the wife a gross sum or an annual sum, and to suspend the pronouncing of its decree until the deed had been executed. This provision (which it will be observed took the form of a secured sum) is strictly not alimony, though inaccurately so called in the marginal note to the section, but permanent maintenance. Under that section, there was no power to make any subsequent order. The section, by its terms, pointed to one order in relation to one deed, pending the execution of which the dissolution decree could be suspended.

17. Lord Russell proceeds to observe that the section was intended to be brought into operation against a husband who had property on which the payment of a gross or annual sum could be secured, and that it could have no effective operation against a husband who had no such property. The husband without having any such property may be in a position to make a monthly or weekly payment to the wife during their joint lives. But such ability on the part of a husband, who has no such property, would not enable the Court to exercise the power under Section 34; the Court could not effectively order him to execute such an instrument as Section 34 contemplates, since the instrument requires the existence of property on which the payment may be secured. In my opinion, Davar J.'s order clearly cannot be brought under Section 34. Nor does Section 35 authorize thecnaking of a decree or order for alimony. It only authorizes directions of the nature I have indicated being given in oases where a decree or order for alimony has been made. No doubt, it is assumed that a decree or order for alimony may be made. But the only decrees or orders having reference to alimony or maintenance that the Act specifically authorizes are: (1) orders for payment during suit, and (2) orders to execute an instrument for securing payments. So that if the authority of the Court to make decrees or orders for alimony is to be confined within the four corners of the Act, then such directions as Section 35 contemplates can be given only where alimony is ordered pendente lite, or the directions may take the form of appropriate provisions in the instrument under Section 34.

18. I am, in any case, unable to find any express provisions in the Act authorizing such an order as was made by Davar, J. an order that periodical payments should be made by the husband to the wife after dissolution of marriage. I have already stated that in the examination of the Parsi Marriage and Divorce Aot, if any light is to be sought from English decisions, there is necessity for caution, because of the difference in the substantive provisions of the English law and the law applicable to the Parsis. The English law is to be found, I presume, in the precedents and statutes, whereas the Parsi law may have to be derived from the evidence of their customs. But subject to this it is useful to turn to concrete examples of how Section 34 operates in practice. Thus in Burroughes v. Abbott (1922) 1 Ch 86 the Divorce Court on making a decree absolute for dissolution of marriage, had on 25 th November 1907, ordered the husband to secure to the wife annual payments for life. The deed was executed on or about 20th July 1909. 12 years lateron 17th November 1921 a part of the deed was held to be void in view of the prohibitions of the Income-tax Acts, notwithstanding that the deed

was executed in supposed obedience to an order of the Court. It was also found that the deed did not in fact conform to the Court's order and did not carry out the clear intention of the Court though the counsel who settled it believed that he had settled it in strict compliance with the order.

19. In a considered judgment P.O. Lawrence, J. held that the plaintiff could enforce his right to have the deed put into proper formby rectificationso as to make it conform to the order and to effectuate the intention of the Court. With reference to making an order for rectification (which thus became necessary) it was admitted without serious contest that Lawrence, J. sitting in the chancery division had jurisdiction. Yet Lawrence, J. doubted the propriety of his exercising that jurisdiction. As however all the parties were desirous of avoiding expense and delay, Lawrence, J. consulted the President of the Probate, Divorce and Admiralty Division and exercised the jurisdiction, the President having intimated his agreement with that course and his consent, so far as his consent would be useful. Prom the dates I have mentioned it appears that the deed was dated 20th July 1909, about 18 months after the order to execute it, and it was ordered to be rectified on 17th November 1921. The deed was elaborately drawn providing no doubt for all the contingencies that the conveyancing counsel could foresee. Obviously a deed so elaborately drafted could not be altered from time to time in the same manner as a simple order that fixed sums should be paid periodically. Considerations making orders under Section 34 unalterable do not therefore assist the decision of this case.

20. It was then argued that Davar, J. could have derived jurisdiction to make the order only under Section 34; and that unless it can be brought under that section, it was made without jurisdiction. The question whether Davar, J.'s order was within his jurisdiction does not however arise before us. Neither party can question its validity. The respondent could have, but did not, appeal from it. Moreover, he relied upon it as a valid order when he applied to the Court for a reduction under it The appellant obviously cannot object that the order in her favour was without jurisdiction. Had the question been open to the parties, it would, it seems to me, have depended on two subsidiary questions: (1) whether by the substantive law applicable to the Parsis an order for payment of periodical payments by way of permanent maintenance can be made against a man in favour of a woman after the marriage between them has been dissolved. If this question is answered in the affirmative, then (2) whether the Parsi Chief Matrimonial Court by its constitution was authorised to exercise jurisdiction in respect of such substantive rights and liabilities.

21. As it is, I need not express any opinion on the question whether an order by the Parsi Chief Matrimonial Court at Bombay for periodical payments of money by way of permanent maintenance after dissolution of marriage can be justified on any grounds such as that the preamble of the Act refers to the customs of the Parsi community, and that the practice has been to make such orders in a Court in which the customs of the Parsis would be known; and whether the terms of Section 35 contemplate a decree or order for periodical payments by way of permanent maintenance after divorce. As between the parties, it must, it seems to me, be assumed that the Court presided over by Davar, J., had jurisdiction to make an order on the husband for payment to the wife of such monthly [or weekly] sums for her maintenance and support as the Court may think reasonable, and that the jurisdiction was validly exercised by an order being made in chambers. The words in which I have formulated the jurisdiction attributable to the Court are taken from Section 37, Divorce Act, (4 of

1869) which itself is derived from the Matrimonial Causes Act of 1866 (29 and 30 Vic. c. 32. Section 1). The earlier part of Section 37, Divorce Act, corresponds with Section 34, Parsi Marriage and Divorce Act. But the clause, which formulates the authority to order such periodical payments as Davar, J. ordered, does not form part of Section 34, Parsi Marriage and Divorce Act. Nor do the powers expressly conferred on the Parsi Chief Matrimonial Court includeas the examination of Sections 34 and 35 showsany powers that may be expressed in terms of that clause. Nevertheless, for the reasons that I have stated, as between the parties to the present appeal, Section 34 must, in my opinion, be read as though such a clause were included in it. The jurisdiction of a Court having power to order periodical payments for maintenance in addition to the power contained in Section 34, Parsi Marriage and Divorce Act, must therefore be considered with reference to the power of modifying orders for periodical payments. It was strenuously argued that judicial orders must, on general principles, be final: that the Court cannot assume jurisdiction to modify orders after they have been made. The position in England prior to 1907 is thus stated by Lord Russell (p. 358):

Accordingly, in 1869, the position under the English Acts, in relation to making provision for the permanent maintenance of a wife after a dissolution decree stood thus: there was power to order such provision in the form of securing a gross sum or an annual sum; there was a further power to order such provision in the form of ordering payment by the husband of monthly or weekly sums; there was power in the husband to apply for a modification in his favour of this last-mentioned order; there was no power in the wife to apply for any increase in the provision made for her. Such a power was conferred upon the wife for the first time [in England] by the Matrimonial Causes Act, 1907.

22. The effect of a power in the Court to order periodical payments was explained by Lord Russell on pp. 355-56 in view of general principles. Applying therefore the language of Lord Russell as far as possible to the position with which I conceive that we have to deal, I may say that the power which I must attribute to the Court in this case is a power to make an order on the husband to pay to the wife monthly sums for her maintenance and support. The amount thereof is made to depend upon the Court's opinion of what is reasonablean opinion which must obviously depend upon facts which may vary from time to timea power of this nature is prima facie not one which ought to be exercisable once and once only. Lord Russell proceeds (p. 356):

and, unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

23. He next examines the two features of the Act which according to the contention of the then appellant indicated that the power once exercised was spent and gone for ever, and the conclusion is that relevant though the two features were to the appellant's contention, they were insufficient to sustain it. One of these relevant but insufficient features was that while an express proviso for reduction had been inserted 'in favour of the husband, no similar provision had been inserted in favour of the wife for enhancement. The proviso (to Section 37, Divorce Act) in favour of the husband is to this effect (p. 355):

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

24. As to this proviso, Lord Russell said (p. 356):

The express proviso, while it may be said to suggest the exclusion of a power to increase in favour of the wife, is certainly not conclusive. Indeed, its insertion in the section might well be accounted for on the following ground: namely, that, but for its presence, it might have been argued that husbands could not be applicants to the Court under a section the sole object of which was to benefit wives.

25. I must refer here to the observations of Lord Russell on the other branch of the questionalimony after judicial separationfor though we have to deal with maintenance after divorce, one feature is common to the case now before us and to the jurisdiction to grant alimony after judicial separation possessed by the Court in England. In both cases the jurisdiction is derived not under the express wording of a statute, but in England under the old Ecclesiastical law, and in the case before us in the indeterminate manner that I have explained. Lord Russell at p. 360 says:

If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lord ships feel that this intention would have been declared in express and unequivocal terms.

26. Lord Russell also points out that since the Indian Divorce Act 4 of 1869 includes alimony after judicial separation and maintenance after divorce, in the same provision, the section may have conferred in 1869 upon the Courts in India a power to increase maintenance, a power which the Court in England did not enjoy until 1907. As the result of the general considerations applicable to a power to order periodical payments their Lordships were of opinion (pp. 356-57) that upon the true construction of Section 37, where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order op the husband for payment to the wife of a monthly or a weekly sum by way of permanent alimony, there is still power in the Court to make an order or orders for the payment of larger sums by the husband if the circumstances are such as to justify an increase in the amount of the alimony.

27. This result, I have already stated, was arrived at on the principle that a poweu to make an order on the husband periodically to pay to the wife sums for her maintenance and support,the amount depending upon the Court's opinion of what is reasonablean opinion that must depend on facts which may vary from time to time, that a power of this nature is prima facie not one which ought to be exercisable once and once only. And this general principle was held to prevail so as to permit an enhancement in spite of the express statutory provisions in favour of the husband that the amount may be reduced, and in spite of the absence of any such provision in favour of the wife that it may be

enhanced. The principle is applicable irrespective of the consideration whether there was a divorce or judicial separation: and irrespective of whether the form of the order provided for a subsequent application for variation of the amount ordered to be paid. It seems to me that the general principle stated by Lord Russell must govern the power authorizing orders for payment of maintenance against the husband, whether the power is derived from the legislature or from custom governing the Parsis oras in the present casewhere the source whence it is to be derived is in doubt and dispute, and the Court must leave the source of the power undetermined, but must proceed on the basis that such a power exists, howsoever derived. This view seems to me to be strengthened by some of the observations based on historical considerations which were made by Lord Russell as being confirmatory of the view formed by their Lordships simply on the true construction of the section corresponding to Section 34, Parsi Marriage and Divorce Act (viz., Section 37. Divorce Act, 1869). Lord Russell in dealing with orders for alimony after judicial separation pointed out that such orders differed from orders for maintenance after divorce in that orders for alimony were made under an old jurisdiction exercised by the Ecclesiastical Courts, but orders for maintenance were made under a new jurisdiction created for the first time in 1857. Under the old jurisdiction for granting alimony after judicial separation (p. 359):

The Ecclesiastical Courts had and exercised power to order variations in the amount of alimony from time to time, either by way of increase or reduction. 'Where there is a material alteration of circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and if the husband is lapsus facullatibus; the wife's allowance ought to be reduced': De Blaquiere v. De Blaquiere (1830) 3 Hagg Ecc Rule 322.

28. I need not refer in detail to the decisions on which Sir Jamshed Kanga relied. Their effect is stated in Lord Russell's observations which I have cited so fully. I have cited them to preclude misapprehension. The Court cannot be lightly assumed to have powers of modifying its final orders. These particular orders (even though made in a form of seeming finality) have in themselves elements of periodicity and liability to reduction and enhancement. It is only necessary to refer to the inferences counsel wishes us to draw from the authorities. His argument shortly was that, (1) the powers of the Chief Matrimonial Court are strictly confined within the terms of the Act, (2) that the Court has no jurisdiction beyond that conferred on it by the Act, (3) that, therefore, the order of Davar, J. (since as between the parties its validity cannot be questioned) must be brought within the terms of the Act, (4) that the order can be brought only under Section 34, and (5) that Section 34 authorizes only one order which cannot be subsequently altered. The first two heads of this argument seem at first sight incontrovertible: the Court can have only the powers conferred on it by the Act constituting it. It cannot arrogate to itself any other powers. But the proposition is sought to be applied in a manner which loads it with the whole of the substantive law. The argument addressed to us on the basis of these propositions involves an assertion that it is not proper first to turn to the Act for determining whether the jurisdiction to deal with questions relating to alimony and maintenance is conferred on the Court, and if so, then in the second place, to adjudicate upon the questions over which it has jurisdiction in accordance with the substantive law. The Act, it is true, contains provisions of both kinds, substantive as well as adjective. But that is no ground for assuming against the clear indications of the Act, that because Section 34 provides for the case where the husband has property on which the payment of a gross or annual sum may be secured,

therefore in no other case and in no other manner can the husband be held liable for rovidingalimony or maintenance. Whether under the substantive law there are any such rights and liabilities as are claimed in respect of maintenance and alimony, must be determined by the Court having jurisdiction over the matter; what the substantive law is in respect of these rights must be determined no doubt consistently with the Act, but not on the basis that the Act itself contains the whole of that law.

29. It is argued that the Parsis are governed by the English law under the terms of the Acts applicable to them in Bombay, and that the English law as applicable to them must be the law prevailing in England before 1774; that obviously the statute of 1907 could not be deemed to be a part of that English law by which the Parsis are by the operation of the Indian statute passed in the middle of the previous century deemed to be governed. This (it is argued) must be the more so with reference to a statute like that of 1907, under which for the first time a new powerthe power to increase the amount of permanent maintenance ordered to be paid on a decree for dissolution, was conferred on the Matrimonial Courts established in England 50 years beforein 1857; that consequently the jurisdiction to alter the order of maintenance, once it has been made, is not conferred upon the Parsi Matrimonial Court.

30. The jurisdiction of the Parsi Chief Matrimonial Court must no doubt be confined to matters falling within the terms of the Act constituting it, in the sense that it cannot exercise jurisdiction in respect of any matters with which it is not authorized to deal. But the substantive law delivered to that Court by the SovereignI am using the language that Sir Erskine Perry, C.J. used in 1847for guidance as to the manner in which the jurisdiction conferred on it should be exercised is quite a distinct question. There is not only nothing to show that the Act is exhaustive in respect of the substantive law: the indications are the other way. The argument for the appellant also overlooks the facts some of which are adverted to by Lord Russell: (1) that the Ecclesiastical Courts had and they exercised the jurisdiction of granting permanent alimony after judicial separation, (2) that the question relating to maintenance after dissolution of marriage stands on a totally different footing, from alimony after judicial separation, equally in regard to the substantive law, in regard to the jurisdiction of the Court and in regard to the historical development in England; and (3) that the Parsi Marriage and Divorce Act deals with the two situations that arise after divorce and after judicial separation in the same sections and in the same terms, in terms which would be appropriate if the two situations had always been the same so far as the Parsis were concerned, both in regard to the substantive law and in the procedure to be followed for enforcing the rights relating to them. So far as England is concerned the jurisdiction to grant alimony was inherited by the Divorce Courts when they were created; and the jurisdiction was new with reference to maintenance after divorce, the power to divorce being itself a new jurisdiction created by statute. This development of jurisdiction between 1857 and 1907 in regard to grant of maintenance after divorce till it came abreast of the jurisdiction to grant alimony after judicial separation, is a matter in regard to which the Parsi law had no necessary parallel with the English law. The Parsi substantive law (in India) must stand on its own statutory provisions and the customs of the Parsis.

31. In short the attempt to strangle the respondent's case by subjecting orders for maintenance to the rigidity of S 34 fails, because it cannot be assumed that such orders may not find an avenue for

themselves in the substantive law of the Parsis without traversing Section 34. When an application is made to the Court that an order for periodical payments of money be made, the Court, (after satisfying itself that its constitution permits it to deal with the question at all) must turn to the substantive law for determining whether such an order as is prayed for ought to be made in the particular case. Lord Russell deduces from the very nature of orders for periodical payments by way of maintenance that the jurisdiction to make them is of such a nature that it ought not to be exercisable once and once only: in the absence of express provisions to the contrary, if the Court has the power to order such periodical payments, it must have the power to vary the orders from time to time. Since as between the parties it must be assumed that the Parsi Chief Matrimonial Court had power to order payments of periodical sums by way of permanent maintenance by the respondent whose marriage had been dissolved, therefore it must, in my opinion, be assumed that the Court had power also from time to time to increase or decrease the amount so ordered to be periodically paid. If the power to reduce the amount existed in the Court, then no reason has been shown to us for interfering with the learned Judge's exercise of his jurisdiction. In my opinion the appeal ought to be dismissed with costs.