Delhi High Court
Ashok Ratti Lal Trivedi vs Anjani Madhusudan Oza on 16 May, 1967
Equivalent citations: 4 (1968) DLT 235
Author: M Ismail
Bench: M Ismail
JUDGMENT M.M. Ismail, J.

(1) This Civil revision petition filed under section 115, Civil Procedure Code, raises an important question regarding the construction of section 25 of the. Hindu Marriage Act, 1955 (Central Act 25 of 1955). The petitioner married the respondent herein in May, 1864. On a petition filed by the respondent herein in January, 1965, the marriage was annulled uner section 12(1)(a) of the Hindu Marrriaga Act, 1965 (hereinafter referred to as the Act by a decree of mullity passed by learned Additional District Judge, Delhi, on 26th April, 1966. On. 9th June, 1966, the respondent herin applied for an order for payment of permanent alimony to her. That application of the respondent wa resisted by the petitioner herein on the ground that the marriage having been declared to be a nullity, the relationship of husband and wife never existed between the parties and hence, in any event, it ceased with the passing of the said decree and in consequence 237. the petition filed by the respondent was nto maintainable. It was contended by the petitioner herein, in the alternative, that the petition filed by the respondent herein for permanent maintenance would nto lie because it was made after the passing of the decree of nullity. This being a question regarding the maintainability of the petition itself, the questions were tried as preliminary issues by the learned Additional District judge, Delhi; they being- 1. Whether the present petition is maintainable in view of the objection raised in paragraph 1 of the written statement? 2. Whether the petition does nto lie because it was filed after the final decree of nullity?

(2) Before the learned Additional District Judge the present petitioner herein, in support of his contention as to the petition filed by the respondent for the award of permanent alimony nto being maintainable, relied on a decision of the Gujarat High Court in Guntantrary v. Baim Prabha, and certain observations of the Madres High Court in the decision in Narayanasuami v Padmanabhan. The learned Additional District Judge, after carefully considering the contentions raised on behalf of the petitioner herein, by his order dated 22nd February, 1967,overruled the objetions of the petitioner herein and held that the petition was maintainable. It is against this order of the learned Additional District Judge Delhi, that the petitioner herein has filed the present civil revision petition before this Court.

(3) Before me the learned counsel repeated the contentions put forward before the Court below and relied upon the same two decisions. The contention of the learned counsel is that sectiont 25 of the Hindu Marriage Act, 1955, contemplates an application being filed by the husband or the wife, as the case may be, for the grant of maintenance and that necessarily indicates that the person applying for the grant of maintenance must have the status of the husband or the wife. 'In the case of a marriage which has been declared to be a nullity it is as If no marriage has taken place at all and consequently the parties to that marriage could nto have been described as the husband and the wire. In the alternative, he conferded that with reference to an application filed after the passing of the decree of nullity the parties to the marriage, which was the subject-matter of that decree, could nto be

described as continuing to be husband and wife and consequently the description of husband or wife will nto be applicable to the man or woman whose marriage has been annulled, subsequent to the decree of nullity and, therefore,an application for the award of maintenance cannto be made by such person after the decree. Belore considering the validity and soundness of these contentions, it is necessary to have regard to the saliant features of the Hindu Marriage Act, 1955. The Act to the extent to which it makes provisions for anything overrides all text, rules or interpretation of Hindu law or any law in force immediately prior to the Act. Section 5 enumenates the essential conditions which have to be fulfillled before a marriage cab be solemnized between any two Hindus. Section 9 of the Act provices for passing of a decree for restitution of conjugal rights. Section 10 of the Act enumerates the grounds on which a decree for judicial separation can be obtained. Section 11 of the Act stipulates that a marriage solemnized in contravention of certain conditions enumerated in section 5 shall be null and void and be so declared by a decree of nullity on a petition presented by any party to the marriage. section 12 enumerates the grounds on which a marriage is voidable and provides that the marriage can be annulled by a decree of nullity. Section 13 of the Act provides for the grounds on which a marriage can be dissolved by a decree of divorce. After certain provisions regarding procedure and jurisdiction there occur the following two sections, namely, sections 24 and 25, which are as follows - "24.Maintenance pendents Me and expanses of proceedings: Wherein any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceedings, and monthly during the proceedings such sum as, having regard to the petitioner's own income and the income of the respondent, it: may seem to the court to be reasonable. 25. Permanent alimony and maintenance.-(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, an application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant fur her or his maintenance and support such gross sum or such monthly or periodical sum for a term nto exceeding the life of the applicant, as, having reward to the respondent's own income and toher property if any, the income and toher property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (i) it may, at the instance of either party, vary, modify or resond any such order in such manner as the court may deem just. (3) If the court is satisfied that the party in whose favor an order has been made under this section has re married, or, if such party is the wife, that she has nto remained chaste, or, if such party is the husband, that he has had secual intercourse with any woman outside wedlock, it shall rescind the order."

It is against this background that the scope of section 25 has to be understood and I have referred to section 24 also in this context since buth the sections constitute the provisions, at to different stages, as part of the same scheme. As has been mentioned above, the Act contemplates four types of decreess, namely, a decrcee for restitution of conjugal rights, a decree for judicial separation, a decree of divorce, and a decree of nullity-either on the ground that the marriage is null and void or on the ground that the marriage is voidable. In this context when section 24 speaks of "where in any

proceeding under this Act" it certainly contemplates all proceedings, namely, proceedings for obtaining any one of the decrees mentioned above and there can be no doubt whatever that as far as section 24 is concerned, which provides for the award of maintenance pendents lites and for the expenses of proceedings, it covers every proceeding under the Act. Then the question arises whether the next section, namely, section 25, providing for the payment of permanet alimony and maintenance, is in any way narrower or is whittled down in scope than section 24. Section 25(1) opens with the expressions "any court exercising Jurisdiction under this Act" and this expression, though refers to the Court exercising jurisdication, covers from the very width of the expression all proceedings under the Act. The section also uses the expression "at the time of passing any decree" and this again clerarly emphasises that the power of the Court under this section is applicable to all kinds of proceedings covered by the Act, namely, proceedings for obtaining any of the four decrees already referred to. With reference to the scope of this section an argument had been advanced at the bar in the past that ntowithstanding the apparent width of this jurisdiction still the expression "any decree" occurring in the section must be confined only to decrees of divorce and decrees of nullity and nto to toher to two decrees. This argument was sought to be supported from the use of the expression occuning in the section, namely, "while the applicant remains unmarried". The argument was that the question of the applicant remaining unmarried can arise subsequent to the decree only in two cases, namely, the decree of divorce and the decree of nullity, and it cannto occur in the case of the toher two decrees, namely, the decree for restitution of conjugal rights and the decree for judicial separation. However this argument has nto been countenanced by the Courts. In a decision in Harilal v. Litavah, the learned Judges K. T. Desai, C. J. and V. B Raju, J after referring to section 24, 25 and 26 of the Act and the principles of interpretation contained in Maxwell on Interpretation of Statutes in this behalf obser ved as follows:- "THECourts have always been extremely reluctant to substitute words in a statute or add words to it. A court would do so where there is a repugnancy to good sense The Hindu Marriage Act, 1955, cannto be regarded as a work of art. It is nto ntoed for good draf. ting. It contains several provisions which present difficulties while interpretting the same. The words used in some sections are far from happy and difficulties are experienced in gathering the true meaning of the legislature. There is however one thing clear that the main- object and intention of the enactment was to amend the modify the law relating to marriage among Hindus. The intention was nto to restrict the powers of the Court in granting permanent alimony and maintenance to extremely limited class of cases, namely where the Court had passed a decree for divorce or of nullity of marriage. The words used in section are 'at the time of passing any decree'. The words any decree' would nto have been used if it was the intention of the legislature to restrict the operation of the section only to cases where a decree for divorce or of nullity of marriage was passed. The power was "intented to be exercised at the time of the passing of any of the decrees referred to in the earlier provisions of the Act or at any time subsequent thereto, The legislature however has in serted the words 'while the applicant remains unmarried'. The legislature could only have intended to make those words applicable in those cases where a party was in a position to contract a marriage. Those words could nto, with any properiety, be used in respect of these cases where the marriage bond remains unserved. The legislature, in enacting section 25, has even sought to go beyond the ordinaiy provions of law relating to alimony and maintenance as applicable to toher communities. It has sought to provide permanent alimony and maintenance even for a husband. when the legislature was seeking to extend the provisions relating to permanent alimony and maintenance so as even to make a husband eligible for receiving permant

alimony and maintenance, it would be extremely difficult for us to bold that the legislature intended to take away from a Court dealing with matrimonial matters the power to provide permanent alimony to a wife when passing a decree for judicial separation ration in her favor. It is our irresistible conviction that the legislature could net have intended to take away such a right. It would be "more correct to held that these wores have appeared in section 25 in the form in which they appear due to unskilfulnese in drafting, and that if would nto be proper for us to confine the operation of the section to cases where a decree for divorce or of fullity has been passed. We would confine the operation e;f the welds while the applicant remains unmarried to those cases where the applicant is in a position to contract a lawful marriage. In such cases the order must be made conditional, its operation being dependent upon the applicant remaining unmarried."

In antoher decision in Minarani v. Dasarath, with reference to the similer argument it was observed by Bachawat, J. (as he then was) as follows :- "ANorder for separate maintenance under section 25 may be passed in favor of a married woman living apart from her husband, e.g. on the passing of a decree of judicial separation or of the passing a decree for restitution of conjugal rights in the event of the decree nto being complied with. The expression , decree in section 25 is broad enough to cover any decree of divorce or nuility or of judicial separation or for restitution of conjugal rights. J he heading and the body of the section refer , 'maintenance', 'parmanent alimony' and 'payment of periodical sums' which under the English practice are respectively the names of allowances granted after the passing of a decree of divorce or nullity, a decree of judicial separation and a decree for restitution of conjugal rights, see Matrimonial Causes Act, 1950, sections 19,20 and 22 and Rayden on Divorce, 8th Edition, page 707. The scheme of sections 24, 25 and 26 of the Hindu Marriage Act, 1955 appeals to be that the Court is vested with the power of passing orders lor maintenance of a spouse and for the custody, maintenance and education of miner children of the marriage during the pendency of any proceeding as also on the passing of any decree under section 9 to 14 of the Act. In a proper case the Court has, therefoee, the power under section 25 to pass an order for maintenance in favor of an applicant who is a married woman. The condition that the maintenance is to be paid 'while the applicant ' remains unmarried' is attached to every order for maintenance passed under section 25 In the context of section 25(1) the condition means 'while the applicant is nto remareied'. This condition recalls to our mind the clause 'dum solaet (asta vixeut' which means 'while she remains chaste and unmarried'. Under The English practice, formerly, it was "usual to attach those conditions to an order for maintenance of the wife after a decree of divorce or nullity, see Fisher v. Fisher", but now the insertion of either condition has become the exception rather than the rule. Halsbury's Laws of England, Articles 983, 984 and Rayden on Divorce, 8th Edition, pages 742-43. The rigid policy of section 25 of the Hindu Marriage Act, 1955, however, is that a party in whose favor an order for maintenance is passed cannto claim any maintenance under the order if subsequently the party has re-married or has become guilty of sxual immorality ; the Court has no discretion in the matter, upon the party's re-marriage the maintenance ceases and the Court must rescind the order on the party becoming guilty of sexual immorality as mentioned in the section. The word 'unmarried' has several meanings ..... Now the word 'unmarried' in section 25(1) cannto mean 'never having been married', because the applicant must have been a husband or a wife and therefore must have been married; nor can it mean 'nto married'; for an order under section 25 may be passed "in favor of a married woman on the passing of a decree of Judicial separation or for restitution of conjugal rights. In the context of section 25(1) the word means 'nto remarried', for this

reason section 25(3) provides inter alia for rescission of the order if she has remarried. The reason for attaching the condition 'while the applicant remains unmarried' to an order for maintenance passed in favor of a married woman after a decree of Judicial separation or for restitution of conjugal rights may be that the order will remain effective though she subsequently obtains a decree of divorce or nullity and becomes free to marry again"

Thus the attempt to restrict the scope of section 25 only to the cases or proceedings for obtaining a decree of divorce or of nullity did nto succeed. In the present case the attempt is to restrict the scope of section 25 only to the proceedings for obtaining a decree for judicial separation and a decree for restitution of conjugal righs. As I have pointed out already, this attempt is made relying upon the use of the words 'wife or the husband occurring in the section. The contention is that before a person can be said to be a husband or a wife, there must be a valid marriage. If a marriage is void ab initio, in the eye of law, it is as if no marriage had taken place and consequently the parties to the marriage were never husband and wife and in any event, with reference to the order to be made for the award of maintenance subsequent to a decree of nullity the persons whose marriage had been annulled lose the status of husband and wife as soon as the decree of rullity was passed and consequently there cannto be any application by a husband or a wife subsequent to the decree of nullity or any order in favor of such a person subsequent to the decree of nullity. In short, the question is whether the expression 'the wife or the 'husband' occurring in the section is merely descriptive and has been used in the general sense as to indicate a man or a woman who went through a form of marriage and which marriage was the subject-matter of a proceeding in the court or does it indicate a man or a woman enjoying the status of a husband or a wife by virtue of a valid and subsisting marriage ? For more than one reason, I am of the view that the expression 'the wife or the husband' in the section has nto been used in any such restricted sense. The use of the expression in toher provisions of the same Act will also confirm this view of mine. Section 9 dealing with the proceedings for restitution of conjugal rights uses the expression the husband or the wife. On the toher hand, section 10 dealing with the expression 'the husband or the wife' and merely uses the expression either party to a marriage Similarly, section 11 dealing with void marriages also uses the expression 'either party thereto (to the marriage)'. Section 12 dealing with the proceedings for obtaining a decree of a nullity in case of voidable marriage merely uses the words petitioner and respondent and does nto use the words husband and wife. On the toher hand, section 12(2)(a)(ii) may be of some significance where the expression 'husband or wife' occurs, that section is as follows : - "(2)Ntowithstanding anything contained in sub-section (1), no petition for annulling a marriage- (a) on the ground specified in clause (e) of sub-section (1) shall be entertained if- (1) * * * * (i) the petitioner has, with his or her full consent lived with the toher party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered."

Obviously the words 'husband or wife' here have nto been used in the sense contended for by the petitioner but merely indicating the cohabitation of the parties. Section 13 dealing with the proceedings for obtaining a decree of divorce uses the expression 'the husband or the wife*. Again, section 19 of the Act is as follows :- "19.Court to which petition should be made : Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together."

Clearly this section dealing with the jurisdiction of the Court covers every petition under the Act, including a petition for obtaining a decree of nullity. Even with reference to such a petition the section used the expression 'husband and wife certainly such an expression could nto have been used with reference to a petition for obtaining a decree of nullity in the sense contended for the petitioner herein. Thus from the provisions of the Act itself it cannto be contended that whenever the expression husband or wife has been used in the Act it has been used in the strict sense of a man or a woman enjoying the status of a husband or a wife resulting from a subsisting valid marriage. On the toher hand, the expression has been used in a general sense to dentoe a man or a woman who went through a form of marriage irrespective of the fact whether the marriage was valid, void or voidable, and again irrespective of the fact that proceedings with reference to the marriage were taken in the Court for obtaining a decree for restitution of conjugal rights, or a decree for judicial separation, or a decree of divorce or a decree of nullity. The strongest indication of this fact and the strongest refutation of the contention of the petitioner is found in section 25(3) itself. That sub-section has already been qutoed and the expression husband and wife in that sub-section clearly refers to the man and the woman after a decree of nullity has been passed with reference to their marriage which was the subject-matter of the proceedings before the Court. Therefore I am clearly of the view that on the scheme of the Act itself there is absolutely ntohing to warrant the contention put forward on behalf of the petitioner herein. I may also point out here that there is a statutory prece. dent that whenever a statute wanted to make a distinction between a marriage which was void ab initio and which was nto so, while referring to the parties to the marriage as husband and wife, it clearly said so. Section 5(1) of Matrimonial Causes (War Marriages) Act, 1944 of the English Parliament defined the word 'marriage' for the purpose of the Act as-"marriage" includes a purported marriage which was void ab initio, and "husband" and "wife" shall be construed accordingly." The Indian Matrimonial Causes (War Marriages) Act, 1948 also contained a similar definition as-'"marriage' includes a purposed marriage which was void ab initio, and 'husband and 'wife' shah be construed accordingly."

(4) Now I shall refer to the two decisions relied upon by the learned counsel for the petitioner in support of his contention. The first is a decision of a Single Judge of the Gujarat High Court, namely V. B. Raju, J., in Gunvantray v. Bai Prabha. It may be ntoed here that the learned Judge was a party to the decision already referred to, namely, the decision reported in Harilal v. Lilavati. The learned Judge first in conformity with that decision expressed the view that the expression 'while the applicant remains unmarried' occurring in the section does nto curtail the scope of the section. However, he went on to observe that with reference to an order to be passed by a Court subsequent to the decree to get such an order cannto be passed on an application made after the decree of nullity, and the learned Judge expressed himself as follows :- "THEexpression 'while the applicant remains unmarried' does nto cut down the scope of section 25 and restrict the application only to the last two types of proceedings, and the contention that in view of this expression an application may be made subsequent to the decree by a person whose marriage has been dissolved Or annulled cannto be accepted. Section 25 contemplates the passing of an order for permanent alimony either at the time of passing any decree or at any time subsequent thereto. But the section further provides that the application made for the purpose must be by either the wife or the husband. If the order for permanent alimony or maintenance is to be made at the time of passing the decree, the applicant is bound to be the husband or wife as the case may be, because the proceedings under the Act have nto

terminated in a decree for dissolution or annulment of marriage. But the section further provides that if the order for permanent alimony or maintenance is to be passed at any time subsequent to the decree, the applicant must be either the wit or the husband, ft is, therefore, clear that it permanent alimony or maintenance is claimed subsequent to the decree under the Act, the application must be by the wife or the husband as the case may be. In toher words, if the order js to be passed subsequent to the passing of the decree, the application can be made only in proceedings for the restitution of conjugal rights or for judicial separation. It an appliction for permanent alimony or maintenance is made subsequent to the passing of the decree, it cannto be made by a person who is a party to proceedings for divorce or for a decree of nullity, because after the decree the parties ceases to be related as hasband and wife. I am, therefore, of the view that under section 23 no application for permanent alimony or maintenance can be made subsequent to the passing of the decree for dissolution or anuulment of marriage, in proceeding for dissolution of marriage by divorce or for annulment of marriage by a decree of nuluty."

With great respect to the learned Judge I must point out that the learned Judge had simply assumed what he had to decide and on the basis of such an assumption the conclusion was clear to the learned Judge. The learned Judge has nto considered the scheme of the Act or the provisions of toher enactments or the law and practice in England which were available at the time when the Hindu Marriage Act, 1955, was passed so as to restrict the scope of the application of section 25 in the manner in which it is suggested by the learned Judge. The learned Judge also has nto considered whether there was any justification, either on principle or on authority, for giving a right to a husband or a wife to obtain an order for permanent alimony or maintenance at the time of obtaining a decree of nullity of the marriage and nto giving such a right to obtain an order on an application made sabsequent to the decree. However, as I shall show later in the judgment, there is absolutely no justification whatever for making such distinction. It is curious that the learned Judge, who was a party to a decision nto to cut down the scope of the section only to the cases of decrees of divorce and nullity of marriage, has in this decision cut down the scope even with regard to those decrees with reference to an order for permanent alimony or maintenance to be made after the decree.

(5) The second decision relied upon by the learned counsel for the petitioner is one reported in Narayanswami v. Padmanabhan. As the learned Judges themselves pointed out in the judgment, the observations in that judgment on which reliance was placed by the learned counl for the petitioner, were obiter. The observations are as follows :- "THROUGHit is nto necessary, for purposes of the present appeal, to decide the question, for, this is nto a case of an application under section 25 of the Hindu Marriage Act, nevertheless, we may express our view, having regard to the argument at the bar, that section 25 cannto be construed in such a manner as to hold that ntowithstanding the nullity of the marriage, the wife retains her status for purposes of applying for alimony and maintenance. The proper construction of section 25, in our view, would be that where a marriage is admittedly a nullity, the section will have an application. But where the question of nullity in the issue and in contentions, the Court has to proceed on the assumption untill the contrary is proved, that the applicant is the wife. It is in that sense that section 20 should be appreciated. A reference to the toher provisions of the Act, as we think, supports the construction we are inclined to place on the section. It is true, the opening words of sub section (i) of section 25, as the Gujarat High Court pointed out, are of wide amplitude, so as to attract all the provisions of the Act under which the

Court exercises jurisdiction, including section 11. But it does nto follow from it, that we can read the opening words in sub-section (1) de hores the context of the toher provisions, which declare a particular kind of marriage, which does nto conform to the conditions mentioned in section 5 as null and void."

For one thing the question did nto directly arise for consideration and decision by the learned Judges in that case. The appeal before the learned Judges arose from a suit for partition and maintenance by a wife and her three children against the tirst defendant, the husband. The defense of the husband was that the marriage between him and her was void since at the time of that marriage he had antoher wife of his living. It is is in that context the question arose whether the plaintiff- wife in that case was entitled to maintenance from the husband. Since an argument was put forward before the learned Judges with reference to sections 5(1), Ii and 25 of the Hindu Marriage Act and section 18(1) of the Hindu Adoptions and Maintenance Act that although a woman may nto be a wife in the context of a valid marriage, still she may be so regarded for certain purposes, the learned Judges had to make the above observation. As a matter of fact, the provision for payment of alimony and maintenance in section 25 of the Act is nto made in recognition of a woman having the status of a wife at any particular point of time but in recognition of the fact that she went through a form of marriage with the toher party and which marriage had been the subject-matter of a decree for judicial separation, or for restitution of conjugal rights, or of divorce, or of nullity. As a matter of fact, the learned Judges themselves state that when the question of the marriage being a nullity is in issue and is contentious, the Court has to proceed on the assumption, untill the contrary is proved, that the applicant is the wife. Probably, according to the learned Judges, in that event an order for permanent alimony and maintenance can be made. It is printed out by the learned counsel for the respondent that such a reasoning is neither logical nor sound. He points out that even in such a case as soon as the Court passes a decree of nullity then the result is that the marriage was originally void ab initio in which event the man and the woman were never husband and wife, or the marriage was voidable in which event also at least after the passing of the decree the man and the woman lose the status of husband and wife, and since an order for permanent alimony and maintenance can be passed only at the time when a decree of nullity is passed or subsequent thereto, it cannto be stated that such an order is passed only by virtue of a claim on the part of the woman having the status of a wife. For the reasons already mentioned above by me and on the admitted position that it was nto necessary for the learned Judges for the purpose of the case before them to decide this issue, I do nto consider that this observation of the learned Judges of the Madras High Court ' can be taken to support the contention of the learned counsel for the petitioner. The learned counsel for the respondent also invited my attention to a decision in Sivakami Immul v. Bangarnswami Reddi in support of his contention that the expression 'the wife or the husband' has nto been used in the section in such a narrow and restricted sense and relied upon the following observations in that decision :- "THEsecond contention was that the petitioner has ceased to be a wife the moment the lower Court passed the decree for dissolution of her marriage with the respondent, and that it is only a 'wife' who can apply for the relief under section 5(7) and so she cannto be given any relief. The argument is extremely ingenious but wholly unconvincing. Under our Law, no order of any Court is final. Until the last appeal, revision or review, or writ, allowed by law and filed in time, is decided. Therefore the lower Court's order dissolving the marriage is held in suspension during the pendency of the appeal, and the petitioner's

status as wife has nto ceased, as is argued. Under our law, certain phrases are used which have gto wider implications than they bear if literally interpreted. Thus, a man is continuous possession of land which became 'rytoi' land after the coming into operation of the Madras Estates Land Act or the amending Act of 1936 has been deemed to be in possession of rytoi land though at the time the possession began it had nto become 'rytoi' land. The Privy Council and several High Court decisions are to that effect. They interpret the term 'rytoi' as land which would be rytoi land under the Act subsequently passed. So too, the word 'wife' in section 5(7) must mean a person who would have been a wife but for the decree of divorce or dissolution passed in the trial Court. else,much of the meaning and content of section 5(7)(c) will be taken away, and section 5(7)(c) will remain as attenuated and anaemic provision."

The learned Judge there was considering section 5(7) of the Madras Hindu Bigamy Preventi

The learned counsel for the respondent submits that the learned Judges of the Madras Hig

The learned Judge also contemplated the possibility of the testator's daughter, after th

'THEdifficulty which might arise from this view has certainly occurred to me. It is obv

This decision also, in a general way, support the contention of the respondent. Thus, the only decision which actually supports the contention of the learned counsel for the petitioner is that reported in Gunvantary v. Bai Prahha. and for the reasons already mentioned by me I am unable to agree with that decision. The learned counsel for the respondent also pointed out to me that this decision has been doubted by the learned Editor of Mulla's Principles of Hindu Law, 13th Edition, at page 736, and by Shri P. S Bindra in his Book on the Hindu Marriage Act, Second Edition, at pages 510 and 511. So far, I have dealt with the question only on the basis of the language contained in the Hindu Marriage Act, 1955, and the scheme and structure of different provisions of the said Act. With reference to the decision reported in Gunvantary v. Bai Pabha I have also pointed out that the learned Judge in that case did nto indicate any reason or justification for making a distinction in respect of the award of permanent alimony and maintenance at the time of passing a decree and on application made subsequent thereto in cases where the decree is one of divorce or of nullity. Now I proceed to consider the question whether there is any such justification at all. When the Parliament enacted the Hindu Marriage Act of 1955 there were in force the Indian Divorce Act of 1869 the Matrimonial Causes Act 1950, of England, the Special Marriage Act, 1951, or our own country, and the practice, procedure and the provisions contained in all those enactments were before the Parliament. A? Chief Justice Chagla pointed out in Ramesh Ramunlal Saraiya v. Kusum Madgaokar the Ecclesiastical Courts in England had exercised the jurisdiction to grant decrees for judicial separation. In some exceptional cases they used to pass decrees of nullity of marriage, but they had no jurisdiction and they never exercised it of passing decrees for dissolution. They used to award permanent alimony in cases where they passed decrees for judicial separation, but they never granted permanent alimony even in these rare cases where they passed decrees for nullity. When in 1859 the Matrimonial Causes Act was passed, the whole jurisdiction of the Ecclesiastical Courts became vested in the Supreme Court of Judicature in England. Therefore. as the heir of the Ecclasiastical Courts, the English Court had the jurisdiction to grant permanent alimony in cases of judicial separation. With rgard to granting permanent alimony in cases of dissolution of marriage,

that power was expressly given to the English Courts by the Act of 1857. But as far as nullity suits were concerned, the English Courts never had that power till l907 when for the first time that jurisdiction was conferred upon the English Courts and the English Courts began granting permanent alimony in cases of nullity. As regards alimony pendente lite the English Courts had the jurisdiction to grant such alimony nto only in suits for dissolution and judicial separation but also in suits for nullity. The grant of permanent alimony and maintenance had all along been considered in England as merely incidental reliefs (see Halsbury's Laws of England, Third Edition, Volume 12, page 290.) In this context it is useful to refer to sections 37 and 37 of the Indian Divorce Act, 1869-

36.Alimony fendente lite -In any suit under this Act, whether it be instituted by a husband or a wife, and whether or nto she has obtained an order of prtoection, the wife may present a petition for alimony pending the suit. Such a petition shall be served on the husband; and the Court on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just : Provided that alimony pending the suit shall in no case exceed one-fith of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be. 37. Power to order permanent alimony : The High Court may, if it thinks fit, on any decree absolute declaring a mainage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District Judge may, if he thinks fit, on the confirmation of any decree of hi declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife; order that the husband shall, to the satistaction of the Court, occurs to the wife such gross sum of money, or such normal sum of money for any term nto exceeding her own life, as, having regard to her fortune (if any), to the. ability of the husband, and to the conduct of the parties, it thinks reasonable ; and for that purpose may cause a proper instrument to be executed by all necessary parties. Power to order monthly or wenkly payment. In every such case the Court may 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 ; 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."

It is significant to ntoe that section 36 provides for an order for payment of alimony pendente lite 'in any suit under this Act', while section 37 provides for ordering the husband to pay permanent alimony only in cases of 'any decree absolute declaring a marriage to be dissolved, or any decree of judicial separation obtained by the wife'. The provisions of sections 36 and 37 were enacted in such terms because, as pointed out above, in 1869 in England the Courts had powers to order payment of permanent alimony only in cases of Judicial separation and dissolution of marriage but nto in the case of nullity suits and the powers to order permanent alimony in nullity suits were conferred on English Courts, for the first time, only in 1907. Consequently, with reference to the provisions of the Indian Divorce Act a question arose whether in a nullity suit an order for permanent alimony could be made or nto and the same was considered in the decision already referred to, namely the decision reported in Ramesh Ramanlal Saraiya v. Kusum Madauker, A Bench of the Bombay High Court held in that case that because of section 7 of the Indian Divorce Act ntowithstanding a specific provision

in section 37 of the Act, such an order can be made in nullity slits. Section 7 of the Act read as follows .

"SUBJECTto the provisions contained in this Act, the High Coarts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rulea which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Casues in England for the time being acts and gives relief."

The argument advanced in that case was that this section authorised the Courts only to follow the principles and rules of the England Courts as were prevalent when the Act was passed, namely in IS69, and since at that tim the English Courts had no power to order permanent alimony in nullity suits, the Indian Courts also under the Indian Divorce Act had no power to do so. The learned Judges of the Bombay High Court negatived the contention on the ground that section 7 authorised the Courts to apply the law in England as in force on the relevant date, namely when the proceedings are instituted, and by the year 1907 the English Courts having acquired the power to order payment of permanent ali- moony in nullity suits, the Conits in India under the Indian Divorce Act can also make such an order. One sentence in the judgment of Tendolkar, J. may be of significance with reference to these reliefs being merely incidental relief. The learned Judge observed :- "IF,than, that is the correct interpretation to be placed on section it follows that this Court has jurisdiction to grant permanent alimony after a decree for nullity of marriage, because such relief is only incidental to the decree for nullity and does nto in any manner change the; cause of action of the party in whose favor the decree for nullity has been granted,"

(6) The relevant provision of the Matrimonial Causes Act, 1950, in England is Section 19, which is as follows : - "(1)On any petition for divorce or nullity "if marriage, the Court. may make such interim orders for the payment of alimony to the wife as the Court thinks just. (2) On any decree for divorce or nullity of marriage, the Court may, if it thinks fit, order that the husband shall, to the satisfactioni of the Court, secure to the wife such gross sum of money or annual sum of money for any term, nto exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable; and the Court may for that purpose order that it shall be referred to one of the conveyancing counsel of the Court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed. (3) On any decree for divorce oi nullity of marriage, the Court may, if it thinks fit, by order direct the husband to pay to the wife, during their Joint lives such monthly or weekly sum for the maintenance and support of the wife as the Court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section. (4)**** Similarly, section 20 of the Act provides for the payment of alimony in case of Judicial separation and section 22 provides for payment of alimony and periodical payments in case of restitution of conjugal rights. Two things may be ntoed here. One is that even in cases of decrees of divorce and nullity of marriage, there is a provision for payment of alimony and maintenance. Secondly, the provision contemplates the Court passing such an order 'on any decree for divorce or nullity of marriage This expression 'on any decree for divorce or nullity of marriage has all along been interpreted in England to mean 'on any decree or within a reasonable time thereafter'. Since the same expression

was used in section 37 of the Indian Divorce Act, 1869, that too has been construed by the Courts in India as meaning 'at the same time as or after a reasonable time after the passing of the decree', and the Courts have held that 'what is reasonable time' must be determined upon all the circumstances each case (See the decision of Madras High Court in Arthur Malcolm. Lloyd v. Kathleen Lloyd. Thus at the time when the Hindu Marriage Act, 1^55, was passed the position with regard to the law in England and under the Indian Divorce Act was that an order for payment of permanent alimony and maintenance could be made even in cases for nullity of marriage and the same could be made nto only at the time of passing of the decree but also within a reasonable time thereafter. However, the language contained in section 19 of the Matrimonial Causes Act, 1950, referred to above and the earlier statute, gave raise to a particular practice to England as illustrated by the decision in Simmonds v. Sim. monds. The practice wag that in order to comply with the requirements of the statute, within a reasonable time after a decree was passed the wife files an application for payment of alimony against the husband but does nto pursue the application because the husband's circumstances are nto such as to make an order against him beneficial or profitable to the wife and she waits for the husband's financial position to improve to obtain an order. It may be that the interval between the filling of the application and the obtaining of the actual order may be several years. Whether such a practice, though actually prevalent, was one strictly in accordance with the spirit of the law was the question discussed and debated in England. Therefore, with a view to make the position clear, the law was amended in England in 1958 by the Mataimonial Causes (Property and Maintenance) Act 1958. It was provided that any power of the Court under sub-sections (2) and (3) of section 19 and subsection (2) of section 20 of the Matrimonial Causes Act, 1950, to make an order 'on a decree for divorce, nullity of marriage or Judicial separation' shall be exercised either on pronouncing such a decree or at any time thereafter and the language of section 19(2) and (3) and section 20(3) of the Act was accordingly amended. However, the Indian Legislature, with a view to remove ambiguity and also to place the matter beyond all controversy, used in section 25 of the Act the express words- "at the time of passing any decree or at any time subsequent thereto".

One toher statute that can be taken ntoe of, and which will throw considerable light on this question, is the Special Marriage Act, 1954 The fact that that Act was enacted just one year prior to the Hindu Marriage Act, is also of significance in this behalf. Sections 36 and 37 of that Act are follows: - "36.Alimony pendent lite There in any proceedings under Chapter v or Chapter Vi it appears to the District Court that the wife, has no independent income sufficient turn her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the Court to be reasonable. 37. Permanent alimony and maintenance. (1) Any Court exercising jurisdiction under Chapter V or Chapter Vi may, at the time of passing any 'decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term nto exceeding her life, as, having regard to her own property, if any, her husband's property and ability and the conduct of the parties, it may seem to the Court to be just. (2) If the district Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under-sub-section (i), it may, at the instanca of either party, vary. modify or rescind any such order in such manner as it may seem to the Court to be just (3) It

the district Court is satisfied that the wife in whose favor an order has been made under this section has remarried or is nto leading a chaste life, it shall rescind the order."

Two things may be ntoed in this connection. Section 36 refers to 'any proceeding under Chapter V or Chapter VI' and section 37 refers to any Court exercising Jurisdiction under Chapter V or Chapter VI'. Chapter V deals with the provisions regarding restitution of conjugal rights and judicial separation while Chapter Vi deals with nullity of marriage and divorce. Thus the provisions for ordering payment of alimony pendente lite and payment of permanent alimony and maintenance were made applicable to all proceedings, that is, proceedings for restitution of conjugal rights, judicial separation, nullity of marriage and divorce. The second thing that has to be ntoiced is that section 37 again uses the expression at the time of passing any decree or at anytime subsequent to the decree". Thus, when these provisions of the Special Marriage Act, 1954 were before the Parliament it is difficult to hold that when the Parliament wanted to make similar provisions in the Hindu Marriage Act, 1955, it intended to make a departure with regard to the scope of the provisions. Really, there was no justification either in logic or on principle to make such a departure. One toher thing that may be ntoed in this context is that in England it was usual to differentiate between the allowances made after a decree for judicial separation, or for divorce, or for nullity of marriage, or for restitution of conjugal rights. The allowance made after a decree of conjugal separation is called 'permanent alimony', that made after a decree of divorce or nullity of marriage is described as 'maintenance' and that made after a decree for restitution of conjugal rights is termed 'periodical payments'. (vide Rayden on Divorce, Eighth Edition, page 707). Section 23 of the Hindu Marriage Act though contains the heading..."Permanent alimony and maintenance"-Uses the expression in the body of the section 'such gross sum or such monthly or periodical sum'; thus indicating that the provision itself has been made in the most comprehensive sense to be capable of being applied to all the cases covered by the Act. The entire position has been stated succinctly in the following passage found in the Mulla's Principles of Hindu Law at pages 894 and 895 of the 12th Edition and pages 735 and 736 of the 13th Edition:- "THEsection refers to the payments to be made under it by one spouse to antoher as maintenance and does nto use the expression permanent alimony though that expression is used in the marginal ntoe to the section. Permanent alimony is the expression used ander English Law in the context of provision ordered to be made by the Court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactments in England is a historic development of la.w. Before the first Divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce a manse et thoro (Judicial separation) and the allowance alltoted to her was named permanent alimony which was as a general rule one-third of the husband's income. The operation of the rule was extended and the same principle was applied in cases decided under the succeive Divorce Acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance alter a decree of divorce in her favor would Lave pecuniary interest in seeking such relief and that would nto accord with the policy of law. That view was discontenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent, alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nulliy of marriage was granted although in cases under the latter category she ceased to be the wife or was declared nto to have been the wife of the toher party and relinquished her character as wife and the name of the husband. It will be ntoiced that the law enacted in the present

section adopts those general Principles of English law and makes them applicable to the case of either spouse. I he basal thought is that a spouse who is compelled to seek relief by way of restitution of conjugal rights or judicial sepration or dissolution of marriage by divorce or secures annulment of it for no fault attributable to such spouse, should in the matter of maintenance and support be entitled to expect to be in the same position in which she or ha would have been it the toher spouse had properly discharged his or her merital obligations or had nto disabled himself or herself from discharging the same."

When the Indian Legislature had gone to the extent of providing for payment of permanent alimony and maintenance even to a husband in every type of decree it will be strong in attribute to that Legislature an intention to deny such a right to a wife, or even to a husband, simply because she or he happened to apply for the same after the decre of nullity.

(7) For all these, reasons, I am of the view that there is no substance whatever in the contention of the petitioner and I hold that the application filed by the respondent for an order against the petitioner for payment of permanent alimony is maintainable. Accordingly, I dismiss this civil revision petition with costs.