Bombay High Court
Ramesh Ramanlal Saraiya vs Kusum Madgaokar on 6 April, 1948
Equivalent citations: (1948) 50 BOMLR 426
Author: M Chagla
Bench: M Chagla, Tendolkar
JUDGMENT M.C. Chagla, C.J.

1. This is an appeal from an order of Mr. Justice Coyajee. The respondent, who is the wife, filed a petition against her husband for a declaration that the marriage between them was null and void on the ground of the impotency of her husband. The husband filed a counter petition also praying for a decree of nullity on the ground that the wife suffered from impotency. Mr. Justice Coyajee decreed the wife's petition and gave her a decree for nullity of marriage. The petition of the husband was dismissed. Having granted the decree Mr. Justice Coyajee proceeded to pass the order which is the subject of this appeal, viz. to order an inquiry for the purpose of fixing the amount of permanent alimony which should be given to the wife. It was contended before Mr. Justice Coyajee that the Court had no jurisdiction to grant permanent alimony to the wife in a case where a decree for nullity was passed. Mr. Justice Coyajee rejected that contention and held that the Court had jurisdiction and the necessary inquiry should be-made for the purposes of fixing the amount. Before us also Mr. Taraporewala has contended that the Court has no jurisdiction to grant permanent alimony to the wife in a suit where a decree is passed for nullity of marriage.

2. In order to understand and fully appreciate the submission made by Mr. Taraporewala it is necessary to consider the scheme of the Indian Divorce Act. The Act was passed in 1869 at a time when the jurisdiction of the Ecclesiastical Courts in England which used to deal with matrimonial cases had come to an end and that jurisdiction had been vested in the Court for Divorce and Matrimonial Causes by the passing of the Matrimonial Causes Act in 1857. Part II of the Indian Divorce Act deals with the jurisdiction of the Courts. Part III deals with dissolution of marriage on the grounds stated in Section 10. Part IV deals with nullity of marriage and enables the Court to pass a decree on the grounds stated in Section 19. Part V deals with judicial separation and a decree for judicial separation. Part VII deals with restitution of conjugal rights and part IX deals with alimony. Section 36 deals with alimony pendente lite and it is clear that under that section in terms the Court has been given the power to award alimony pendente lite in suits for dissolution of marriage and also for nullity of marriage. Then we come to Section 37 which deals with permanent alimony and that section gives the power to the High Court and to the District Judge after confirmation of the decree to grant permanent alimony only in those cases where a decree is passed declaring the marriage to be dissolved or a, decree for judicial separation. Section 37 does not enable or entitle the Court to grant permanent alimony where it passes a decree for nullity of marriage, and Mr. Taraporewala's contention is that looking at Sections 36 and 37 it is perfectly clear and patent that the Legislature did not intend to confer upon the Courts here the jurisdiction to award permanent alimony in cases of nullity of marriage. Mr. Taraporewala points out that Section 36 which deals with alimony pendente lite in terms gives the power to the Court even in eases of nullity of marriage. Section 37 which deals with permanent alimony restricts that power only to cases of dissolution of marriage and of judicial separation, and Mr. Taraporewala contends that the Legislature by expressly dealing with two classes of cases where permanent alimony can be granted has by

implication and a necessary implication excluded the jurisdiction of the Courts to award permanent alimony in the third class of cases, viz. eases of nullity of marriage. If Sections 36 and 37 stood alone in the Act, I think Mr. Taraporewala's argument would be irresistible and unanswerable. The well-known maxim expressio unius est exclusio alterius would apply to a case like this. But we have a section in the Act to which I shall presently refer, Section 7, which, as some Judges have pointed out, contains unusual provisions and, as other Judges have pointed out, contains remarkable provisions. There can be no doubt that Section 7 seems hardly to have any parallel in any other Indian legislation. Section 7 is in these terms:

Subject to the provisions contained in this Act, the High Courts, and. District Courts shall, in all suits and proceedings hereunder, not and give relief on principles and rules which, in the opinion of the said Courts, arc, as nearly as may be, conformable to the principles and rules on which, the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

3. This is a section that appears in the Part which deals with jurisdiction, and undoubtedly Section 7 confers jurisdiction upon the Court of the nature and character provided in that section. The Courts in India are empowered to act and give relief on the principles and rules which prevail in England, not only which prevailed at the time when the Divorce Act was passed in 1869 but which may prevail from time to time subsequently. The section does not deal with procedural matters because Section 45 of the Act which appears in the Part headed "Procedure" expressly deals with procedure and provides that all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure. It really deals with matters of substantive law and not adjective law, and, therefore, according to the principles and rules prevailing in England, even substantive law can be altered and modified under this section. Mr. Taraporewala has argued that it is only in giving relief that the principles and rules on which the English Court of Divorce and Matrimonial Causes acts that should be taken into consideration. Mr. Taraporewala says that as far as the relief itself is concerned, that relief must be expressly found in the statute, and when the Court here proceeds to grant that relief, then it must observe and conform to the rules and the principles of the English Court. That contention, in my opinion, is entirely untenable in view of the plain language of the section itself. The section does not speak that in giving relief the Court should act on principles and rules of the English Courts, but it directs the Courts here to act and to give relief on principles and rules prevailing in England. Of course, the section is prefaced by the opening words "subject to the provisions contained in this Act," and, therefore, it is not open to the Court here to give any relief or to act in any manner which is contrary to or inconsistent with any provision contained in the Act. The object of enacting this section was to make the Indian divorce law flexible and not static. The intention was that the law here should develop alongside with the English law. It may seem surprising that it should be left to the Legislature of another country to mould and modify the law of this country. It was surprising enough when India was a Dependency in the Empire. It seems to be even more surprising today that such a provision should find place in the Divorce Act of this country when India has now become a full-fledged Dominion as sovereign as England herself. In my opinion Section 7 lays down this rule of law that the Court must consider every time it proceeds to act or give relief what is the relevant English law on the subject, and unless it finds that the jurisdiction of the Court to grant the same relief or act in the same manner is expressly negatived by any provision of the Act, it must do so. There must be either a clear negativing of the jurisdiction of the Court or

there must be express and unequivocal terms in which the Legislature must have prevented and prohibited the Courts here from acting in the manner in which the English Courts would act or giving the same relief that the English Courts would give on the same facts and on the same materials.

4. In order to give proper effect to Sections 36 and 37 read with Section 7-and we must read these sections with Section 7, because, as has been pointed out by learned Judges, Section 7 is the dominating section in the Act-we have to consider what the state of the English law was in 1869 when the Divorce Act was passed. The Ecclesiastical Courts 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 those rare cases where they passed decrees for nullity. When, as I have stated earlier, 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 Ecclesiastical Courts, the English Court had the jurisdiction to grant permanent alimony in cases of judicial separation. With regard 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 1907 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 not only in suits for dissolution and judicial separation but also in suits for nullity. Therefore, we find that Sections 36 and 37 exactly reproduce the English law as it stood in 1869. There was no question of the Legislature providing for permanent alimony in nullity suits, because the English Court did not possess such jurisdiction or such power.

5. The question that, therefore, arises for determination and decision is whether, when in 1907 the English Court was given the jurisdiction of granting permanent alimony in nullity suits, by reason of Section 7 this Court also obtained the jurisdiction to grant permanent alimony in those cases. It is clear that Section 37 does not contain any express prohibition against the Court granting permanent alimony in nullity cases. All that we find in Section 37 is an omission to do so, and as I have pointed out that omission is explicable on historical grounds because of the state of the law in England in 1869. If my reading of Section 7 is correct and the object of the Legislature was to provide elasticity and the development of Indian law along with the English law, then I see no reason why when the English rules and principles were modified and English Courts assumed to themselves the jurisdiction of granting permanent alimony in nullity cases the Courts here also should not possess the same jurisdiction and the same power.

6. In the light of these observations which I have just made, I will consider the various cases which were cited at the Bar. There is a very old case as old as 1870 in Abbott v. Abbott (1868) 4 Beng. L.R. (O.C.J) 51 where Mr. Justice Macpherson had to consider the effect of Section 7. The question there was with regard to pleadings in a suit by the husband for divorce on the ground of his wife's adultery and Mr. Justice Macpherson held that Section 7 did not apply to points of procedure but to the

general principles and rules on which the Court was to act and give relief.

7. Then in Ramsay v. Boyle (1903) I.L.R. 30 Cal. 489, this case was followed by Chief Justice Maclean. The question that arose was whether in a wife's suit for divorce against her husband on the ground of incestuous adultery the adulteress had the right to intervene, and reliance was placed on the English law which permitted the adulteress to intervene, and the learned Chief Justice came to the conclusion that Section 7 did not apply to questions of procedure and, therefore, the English procedure could not be imported into cases here by reason of that section. There the only section that applied was Section 45.

8. In A. v. B (1898) I.L.R. 22 Bom. 612. an appeal was preferred from a decree absolute although the decree nisi had not been challenged, and it was contended that in England if you did not appeal from the decree nisi your right of appeal disappeared, and Sir Charles Farran and Mr. Justice Tyabji refused to apply the principles and rules regulating the English procedure and expressed the opinion that the principles and rules in Section 7 were quasi-substantive rather than of mere adjective law.

9. In A (Wife) v. B. (Husband) (1998) I.L.R. 23 Bom. 460 the question that arose for decision before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade and Mr. Justice Fulton was whether under the Indian Divorce Act a decree for nullity of marriage made by a District Court had to be confirmed by the High Court before the expiration of six months from the pronouncing thereof. The section dealing with nullity decrees did not expressly provide for confirmation. That was Section 19. The section that did provide for confirmation was Section 17 which applied to decrees for dissolution of marriage, but the Court held that by reason of Section 20 the relevant provisions of Section 17 were also imported into Section 19 and confirmation was necessary in a decree for nullity as much as a decree for dissolution. But Mr. Justice Ranade at p. 464 having come to that conclusion considered Section 7 and points out that apart from construction analogy with the corresponding provisions of English law under Section 7 also led him to the same conclusion.

10. Then we have a full bench decision of this Court reported in Wilkinson v. Wilkinson (1923) I.L.R. 47 Bom. 843 : S.C. 25 Bom. L.R. 945 F.B. Till this case was decided this Court took the view on a plain grammatical construction of Section 2 of the Act that residence gave jurisdiction to the Court in divorce cases. In 1921 the case of Keyes v. Keyes and Gray [1921] P.204 was decided and that Court took the view that the decrees passed by Indian Courts against persons who were not domiciled in India were not valid, and Sir Norman Macleod and Mr. Justice Marten and Mr. Justice Crump constituted a full bench to consider the effect of the decision in Keyes v. Keyes [1921] P. 204 and also to consider whether the previous view of this Court that residence conferred jurisdiction was the right view or not. With regard to jurisdiction the position in England was that the Ecclesiastical Courts entertained suits for judicial separation on the ground of residence and did not insist upon domicile. When the Matrimonial Causes Act of 1857 was passed with regard to dissolution of marriage domicle was made necessary in order to confer jurisdiction upon the English Court, and Sir Norman Macleod and Mr. Justice Marten really in effect came to this conclusion that whether the wider jurisdiction was or was not conferred upon this Court by Section 2 of the Indian Divorce Act, in view of the fact that the English Courts acted on the principle of domicile and not of residence in dissolution cases and considering the provisions of Section 7 the Courts here had no

jurisdiction in dissolution cases unless the parties were domiciled, but had jurisdiction in cases of judicial separation merely on the ground of residence. Mr. Justice Crump took a different view and dissented from the judgment of the majority. The observations made by the learned Judges in this case on the true construction of Section 7 and the effect of that section are both pertinent and significant. Sir Norman Macleod, Chief Justice, took the view that Section 7 of the Indian Divorce Act directly excluded the idea that the Act gave jurisdiction to decree divorce in the case of non-domiciled parties. Mr. Justice Marten, as he then was, referred to Section 7 as the dominating clause in the Act. He complimented the Indian Legislature on this skilful piece of legislation and he says (p. 870):

On the contrary the construction of the Act which I would adopt shews that the Indian Legislature dealt with a very difficult question in a most skilful manner, for by its flexibility it enabled all Courts in India and in England to act on the same principles, despite the passage of time and the change of circumstances.

11. At p. 867 the learned Judge says that the expression "subject to the provisions contained in this Act" in Section 7 must of course receive its full effect, and he considers the conditions precedent in Section 2 and the provision in Section 10, which entitles a wife to a divorce should her husband exchange his profession of Christianity for some other religion and go through the form of marriage with another woman, and points out that these examples show that the English divorce law is expressly varied. And Mr. Justice Crump looked upon Section 7 as the residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. Wilkinson v. Wilkinson provides a very extreme ease where our Courts had been taking a particular view as to the jurisdiction the Courts had to deal with matrimonial cases, and because the English Court took a different view in 1921, notwithstanding a long series of cases in the past, this Court in Wilkinson v. Wilkinson changed its view and brought the law into conformity with the law prevailing in England.

12. We have a decision of the Privy Council which is very much in point and that is Iswarayya v. Iswarayya (1931) L.R. 58 I.A. 350 : S.C. 33 Bom. L.R. 1402. The question that the Privy Council had to consider was whether the Indian Courts had the jurisdiction to increase maintenance which had been granted to a wife on a decree for judicial separation. It was contended before their Lordships that on a proper construction of Section 87 once an order for maintenance was made the Court had no jurisdiction to increase the maintenance. Their Lordships in the first place came to the conclusion that the section did not lend itself to that interpretation and the section itself gave the power to the Courts not merely to fix maintenance once only but the Courts could vary it from time to time as the circumstances changed.' Having decided this, the judgment of the Privy Council, which was delivered by Lord Russell of Killowen, went on to deal with the position under Section 7 as confirmatory of the opinion which the Privy Council had formed on the construction of the section itself, and in considering Section 7 they considered what the English law was at the time. Under the English law the Ecclesiastical Courts had the power to grant maintenance to the wife on a decree for judicial separation and also to vary it from time to time. With regard to dissolution of marriage as the Ecclesiastical Court never had the power to dissolve marriages, naturally there was no power in them to grant maintenance or alimony. The power to grant maintenance or alimony was

conferred upon the English Court in 1857, but it was only in 1907 that the power to increase maintenance following upon a decree for dissolution was granted to the Court. Therefore, in 1869 when the Indian Divorce Act was passed, the Legislature had before it the fact that the English Court could increase maintenance which it had awarded on the passing of a decree for judicial separation. Notwithstanding this the Indian Legislature failed to make any express provision in Section 87 for increase of maintenance at least in cases of judicial separation, and one should have thought that no argument would have been stronger than this that the Legislature knowing the English practice had deliberately departed from it in the Indian law when it enacted the Divorce Act of 1869. Even so their Lordships of the Privy Council refused to accept that contention and took the view that if it was the intention of the Legislature to prohibit and prevent the Indian Courts from increasing maintenance in cases of judicial separation, that intention should have been declared in express and unequivocal terms. In that case, as I have just said, the Indian Legislature failed to make provision with regard to increased maintenance following upon a decree of judicial separation although the English Courts had the jurisdiction to do so. In the case before us the Indian Legislature in Section 37 has failed to make any provision with regard to permanent alimony following a decree of nullity, because at the time when the Act was passed the English Courts had no such jurisdiction.

13. Mr. Taraporewala has very strongly relied on a decision of the Calcutta High Court in Turner v. Turner (1921) I.L.R. 48 Cal. 636. In that ease a successful petitioner in a suit for dissolution of marriage married within six months from the decree for dissolution of marriage becoming absolute, and the Court held that the second marriage was null and void. Then the question arose whether the reputed wife was entitled to permanent alimony and the Court consisting of Chief Justice Sanderson, Mr. Justice Woodroffe and Mr. Justice Richardson came to the conclusion that under Section 37 the power of the Court was limited to making an order for permanent alimony to cases in which a decree had been made declaring a marriage to be dissolved or where a decree for judicial separation had been obtained by the wife. Undoubtedly, if this case represents good law, then Mr. Taraporewala is right in his contention. But one or two facts, and important facts, must be borne in mind with regard to this decision. In the first place this' decision was given ten years before the Privy Council case to which I have just referred and, although Section 7 was referred to at the bar, with very great respect to the learned Chief Justice and his two colleagues, there is no reference whatsoever to this section in the judgment either of the Chief Justice or of Mr. Justice Woodroffe. In the judgment of the Chief Justice the correct view is taken that Section 37 omitted to give power to the Court, where the decree declared the marriage null and void, to grant permanent alimony. With great respect again, the learned Chief Justice failed to draw the necessary conclusion that, if Section 37 merely omitted to give power to the Court, it was open to the Court to assume that power under Section 7 of the Act. In my opinion, therefore, Turner v. Turner does not lay down the correct law.

14. But there is a decision of the Madras High Court which was delivered after the Privy Council case and which takes the same view of Section 7 which I have been suggesting. That is the case reported in Sumathi Ammal v. Paul (1935) I.L.R. 59 Mad. 518 F.B. Under the Divorce Act Section 16 provides for a decree nisi being passed in a suit for dissolution. There is no such provision with regard to the passing of a decree in a suit for nullity and the full bench of the Madras High Court held that notwithstanding the fact that the Legislature had made no provision for the passing of a decree nisi in a suit for nullity of marriage the English rule should be followed and a decree nisi should be

passed. It is pointed out in the judgment that at the time the Indian Divorce Act was passed the practice in England was to pass a decree nisi in the case of a suit for dissolution of marriage and a plain decree in the case of a suit for nullity of marriage. It was only in 1873 that the practice with regard to decrees in dissolution suits was extended to nullity suits, and at p. 528 Mr. Justice Stone observes that when there is a statutory change in England, the Matrimonial Courts in this country must also follow the change unless there is a provision in the Indian Divorce Act to the contrary, and Mr. Justice Mockett at p. 531 takes the view that the intention of Section 7 was to prevent the principles and rules on which the Indian Courts were to give relief from being rigidly fixed. He also points out that the meaning of the expression "subject to the provisions contained in the Act" is that the Court cannot give any relief which is contrary to the provisions of the Act, and as an illustration he indicates that although in England now a wife can get dissolution of marriage on proof of adultery alone, she cannot do so under the Indian Divorce Act, because Section 10 requires that adultery must be coupled with cruelty or with desertion. He also opines that the whole object of Section 7 was to keep the practice of the Indian Divorce Court as nearly as possible in line with that of the English Court; otherwise this exceptional but most useful provision would lose much of its force, and he finally comes to the conclusion that as there was no provision in the Act that a decree for nullity should be nisi or absolute, the Act was silent, and it was open to the Court to import the rule prevaling in England.

15. I stated earlier in my judgment that there was no parallel legislation which I was aware of in India corresponding to Section 7 of the Divorce Act, but I should have added that there is a somewhat analogous legislation in England on which really Section 7 itself is based. When the English Court took over the jurisdiction of the Ecclesiastical Courts and the Matrimonial Causes Act was passed in 1857, Section 22 was enacted. That section is identical in terms with Section 7 with this vital and important distinction that whereas Section 22 directs the English Court to proceed and act and give relief on principles and rules which were in operation before the passing of the Act of 1857, the Indian legislation goes further and makes the Indian law dependent upon the developing and changing English law. Section 22 merely speaks of the past; it does not in any way refer to conditions in the future. Our Section 7 in terms refers to English rules and principles for the time being. But the construction of Section 22 by the English Courts must be of considerable assistance to us also, and we have a decision of the English Court in Goodden v. Goodden [1892] P. 1 on the construction of this section. The question that arose before Lord Justices Lindley, Bowen and Kay was whether in a suit by a husband for judicial separation the wife was entitled to permanent alimony. It was contended that under Section 17 of the Matrimonial Causes Act although applications for restitution of conjugal rights or for judicial separation could be made either by the husband or the wife, it was only as the section itself expressly stated when the application was by the wife that the Court could make any order for alimony. Notwithstanding the clear language of the section, the Probate Court came to the conclusion that inasmuch as the Ecclesiastical Court had the power to grant alimony to a wife even when a decree was passed in favour of the husband for judicial separation, that power had not been taken away from the English Court by reason of Section 22 of the Matrimonial Causes Act, 1857. Lord Justice Kay says (p. 5):

It would be giving extraordinary and unnatural force to the language of Section 17 to say that it takes away or even negatives the jurisdiction of the Court to grant alimony where the decree for

separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision.

16. A very similar case arose in one of our own Courts. Our Section 37 also in terms provides that permanent alimony can be awarded in a case of judicial separation when the decree is obtained by the wife, and the question arose before the Oudh Court in Mrs. Niblett v. Mr. Niblett [1933] A.I.R. Oudh 133 whether a wife was entitled to alimony when the husband obtained the decree for judicial separation, the same question which was considered by the English Probate Court, and the Court held that Section 37 did not limit the granting of alimony to a wife to cases of dissolution of marriage and decrees of judicial separation obtained by the wife. The Court had authority to grant permanent alimony to the wife even where the husband was granted a decree for judicial separation. In coming to that conclusion the Court invoked the assistance of Section 7 and considered the principles and rules followed by the English Divorce Courts.

17. Mr. Taraporewala has relied on the Indian and Colonial Divorce Jurisdiction Act, 1926, as affording some assistance for the construction of Section 7. That Act gives power to the Courts in India to dissolve marriages and pass decrees for nullity of marriage in the case of British subjects domiciled in England or in Scotland. Section l(a) of the Act provided that the grounds on which a decree for dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England, and Sub-section (b) reproduces in terms Section 7 of the Act.

18. Now, says Mr. Taraporewala, that, if Section 7 and Sub-section (b) of Section 1 cover cases of granting reliefs which are not provided for under the Indian Act but which is done in pursuance of the rules followed by the English Courts, then Sub-section (a) was unnecessary and superfluous. Mr. Taraporewala says that the very fact that the Legislature in this Act has expressly provided that the Indian Courts should grant a decree for dissolution on the same grounds as granted by the High Court in England shows that Section 7 has a very limited application. Surely Mr. Taraporewala is guilty of a fallacy because Section l(a) refers to grounds, Sub-section (b) refers to reliefs, and there is a fundamental distinction between the two. A decree for dissolution is the relief which a Court grants on certain grounds. The grounds are mentioned in Section 10 of the Divorce Act. It may be-I am not deciding this questionthat under Section 7 it would not be open to the Court to add to or change those grounds. But it is entirely a different thing to say that once a decree for dissolution is passed or a decree for nullity is passed the Court is not entitled to grant the same relief which the Court in England can grant or would grant; and the subsequent legislation makes this position clear. A declaratory Act was passed in 1940. That was done for removal of doubts, and it was provided that in considering what were the grounds on which a decree for the dissolution of any marriage may be granted by the High Court in England and what were the principles and rules on which, in the exercise of its jurisdiction to make decrees for the dissolution of a marriage, and, as incidental thereto, to make orders as to damages, alimony or maintenance, custody of children and costs, the High Court in England for the time being acts and gives relief, certain amendments effected by the Matrimonial Causes Act, 1987, were to be taken into account. This Act clearly shows the distinction between grounds on which a dissolution of marriage may be granted and the principles and rules on which reliefs may be granted which are incidental to decrees for dissolution of marriage. Therefore,

relief in the nature of alimony is really a relief which is incidental to the passing of the decree in the suit which is a decree for dissolution or a decree for nullity. I, therefore, agree with the learned Judge below that this Court has jurisdiction to grant permanent alimony consequent upon the passing of a decree for nullity and this power and jurisdiction is derived not from Section 37 but from Section 7 of the Act. The omission of the Legislature to provide for this under Section 87 does not in any way militate against the power of this Court to follow the principle and rule followed in England and to give the necessary relief under Section 7 of the Act.

19. The appeal, therefore, fails and must be dismissed with costs.

Tendolkae, J.

20. This appeal raises an important question of law under the Indian Divorce Act, being Act IV of 1869. The question is whether under the said Act, after a decree for nullity of marriage has been passed, the Court has jurisdiction to grant permanent alimony. I have not used the phrase "permanent alimony" in the narrow sense in which it is sometimes used by the Matrimonial Courts in England. In England it is usual to differentiate between the allowance made after a decree for judicial separation or for divorce or nullity of marriage or for restitution of conjugal rights. The allowance made after a decree for judicial separation is termed "permanent alimony," that made after a decree for divorce or nullity of marriage is termed "maintenance" and that after a decree for restitution of conjugal rights is termed "periodical payments." All these allownces, so far as the Indian Divorce Act is concerned, are included in the comprehensive phrase "permanent alimony." The provisions of the Indian Divorce Act relating to alimony are to be found in Sections 86 and 87 thereof. Section 36 deals with alimony pendente lite only; and it is not disputed that under that section the Court has jurisdiction to grant alimony pendente. lite even in eases of nullity of marriage. Under Section 87 of the Indian Divorce Act the Court is enabled in terms to grant permanent alimony only on a decree for dissolution of marriage or a decree for judicial separation. These two sections in effect enact the law as it stood in England when the Divorce Act was enacted in 1869. If these sections stood by themselves, there can be no doubt at all that the Court has no jurisdiction to grant permanent alimony after a decree for nullity of marriage. But it is argued that the Court has such jurisdiction by reason of a somewhat extraordinary provision which is to be found under Section 7 of the Indian Divorce Act. That section is in these terms:

Subject to the provisions contained in this Act, the High Courts, and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules 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 Causes in England for the time being acts and gives relief.

21. Now, this provision is certainly an extremely unusual one. There is no parallel to it in any legislation that I am aware of. It is an attempt to incorporate into the laws of this country the principles and procedure followed by the Matrimonial Courts of another country, viz. England from time to timeto what extent of course is a matter in dispute before us with which I will deal later. I may point out that the operative words of this section, unusual as the section is, have been borrowed verbatim from Section 22 of the Matrimonial Causes Act, 1857. That section required the Court of

Divorce and Matrimonial Causes, which superseded the Ecclesiastical Courts in England, to act and give relief on principles and rules of the Ecclesiastical Courts; but there is this important difference between that section and the section in the Indian Divorce Act : Section 22 of the English Act required the Courts to follow the principles and rules on which "the Ecclesiastical Courts have heretofore acted and given relief," while in India the Courts have to follow the principles and rules which are followed by the Courts in England for the time being. There is also another important distinction, viz. that the English Act only contemplated incorporating into English law rules of their own Courts which were in existence before the Court of Divorce and Matrimonial Causes was established, while under the Indian Act, the provision incorporates into the law of this country the principles and rules followed in another country altogether.

22. It is contended that under Section 7 of the Indian Divorce Act this Court must ascertain whether under the principles and rules followed by the Matrimonial Courts in England permanent alimony can be granted after a decree for nullity of marriage, In England there was no such provision until 1907 when that provision was included by Section 1 of the Matrimonial Causes Act, 1907. That has been continued in force by Section 100(7) of the Judicature Consolidation Act, 1925. That being so, it is argued that by reason of Section 7 of the Divorce Act the Courts in India, acting on the principles and rules which are followed by the Courts in England, have power to grant permanent alimony after a decree for nullity of marriage.

23. I have, therefore, to consider what is the true meaning to be given to Section 7 of the Indian Divorce Act. It is well established by several authorities of the High Courts in India that this section does not deal with procedure only but deals with quasi-substantive or substantive rights. Indeed the Calcutta High Court has held that it does not deal with procedure at all. But in that respect I prefer the opinion of our own High Court expressed by Farran C.J. in Mayhew v. Mayhew (1894) I.L.R. 19 Bom. 293 that in so far as procedure is not adequately provided for under the Civil Procedure Code which is made applicable by Section 45 of the Act, the Courts in India can follow the English practice and procedure under Section 7. But that point does not arise for determination in this suit. It is sufficient to say that this section does not deal with procedure only. It is equally clear that the principles and rules that are to be applied are not the principles and rules which applied in England at the date when the Indian Divorce Act was enacted, but they are the principles and rules that are applied by the English Courts from time to time. There is one important limitation to the application of such principles and rules in India. That limitation is to be found in the opening words of the section, viz. "subject to the provisions contained in this Act." Those words to my mind mean that no principle or rule of English law can be applied which violates any of the provisions of the Indian Divorce Act. It does not mean that where the Indian Divorce Act is merely silent on any particular matter, the principles and rules governing such matter in England cannot be applied in India. But the real contest is as to the meaning of the operative words of this section. Those words are "act and give relief." It is contended by Mr. Taraporewala for the appellant that before Section 7 can come in at all the relief must be found in the Act itself. The Court can then proceed to give that relief according to the principles and rules followed in England. It is also contended by him that this section appears under the general heading "jurisdiction"; and the principles and rules of the English Courts which are contemplated by this section are principles and rules dealing with jurisdiction only. I am unable to agree with either of those contentions. To hold that the relief must first be

found in the Act itself is to my mind doing violence to the language of the section. The words used in the section are not "in giving relief the Court shall act," the words are "act and give relief," so that it is for the purpose of giving relief itself that the principles and rules of English law have got to be applied. Similarly, the fact that Section 7 appears under the general heading "jurisdiction", to my mind, does not limit the plain words of that section to principles and rules dealing with jurisdiction only. The words are general and they must apply to all eases of giving relief. I am, however, of opinion that before a Court can act or give relief under this section there must be a litigant who is entitled to invoke the jurisdiction of the Court to grant him relief, in other words, a litigant who has a proper cause of action under the Indian Divorce Act. It is only when a litigant who has a cause of action comes to a Court that the Court can act or give relief to him; and, therefore, I am not inclined to read these words as including the application of the principles and rules of English law to the creation of a cause of action, but only to the granting of reliefs where a litigant has a cause of action given to him under the Act.

24. It is urged by Mr. Taraporewala that the interpretation which I am inclnerd to put on this section may bring about some startling results. It is for example pointed out by him that the grounds on which divorce can be obtained under the Indian Divorce Act are set out in Section 10. They are substantially different from the grounds of divorce allowed in England under the Matrimonial Causes Act, 1937, Section 2, and indeed there are some additional grounds under the English law. Similarly, the grounds for nullity of marriage, which are to be found in Section 19 of the Indian Divorce Act, are different from the grounds for nullity of marriage under Section 7 of the Matrimonial Causes Act, 1937, which introduced several new grounds for nullity under the English law. Mr. Taraporewala contends that if the principles and rules of English law had to be introduced for the purpose of granting relief, then grounds either for nullity of marriage or for divorce not recognised under the Indian Divorce Act would be introduced into the Indian law. I must resist the temptation of expressing an opinion on this somewhat fascinating question because it does not arise for decision before us. Prima facie, with the qualification that I feel inclined to place on the interpretation of Section 7, viz. that it cannot be utilised for the purpose of inventing a cause of action for a litigant, I would be inclined to think that such grounds could not be introduced into India. But if they have to be as a result of what I consider to be the correct interpretation of Section 7, that is a consequence which to my mind has got to be faced; and that cannot deter us from putting the correct construction on Section 7 of the Indian Divorce Act. If, then, that is the correct interpretation to be placed on Section 7, 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 not in any manner change the cause of action of the party in whose favour the decree for nullity has been granted.

25. I will next proceed to consider how far the decision I have arrived at is in consonance with the decided cases. I will first deal shortly with the cases of our own High Court which of course are binding upon us. The first of these cases is a case reported in A. v. B (1898) I.L.R. 22 Bom. 612. That case was decided by a Division Bench of this Court. The question for decision was whether an appeal lies from a decree absolute although the decree nisi had been left unchallenged. Chief Justice Farran in dealing with Section 7 of the Indian Divorce Act observed as follows (p. 615):

The principles and rules here referred to arc not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent Sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief-rules of (quasi-substantive rather than mete adjective law. Exactly the same language was used in giving the Matrimonial Court in England jurisdiction to deal with eases over which the Ecclesiastical Courts had theretofore such jurisdiction : Sections 20 & 21 Vict., Clause 85, Section 22. The above was the view taken in Abbott v. Abbott, and is, we think, the correct view.

26. We next have another Bombay ease reported in A (Wife) v. B (Husband) (1898) I.L.R. Bom. 460 In this case the question for decision was whether a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof. At the date when the Indian Divorce Act was passed, a decree for nullity was made absolute at once in England. But the English practice had subsequently been modified by providing for a decree nisi; and at the date when this case was actually decided, the position in England was that a decree nisi had to be passed and that a decree absolute could only be made six months thereafter. This substantive period of limitation was introduced by legislation in England. It was held that that period of limitation and the provision that a decree nisi must be made applied equally in India. The decision was arrived at on an interpretation of the sections of the Indian Divorce Act itself; but Ranade J. also came to the same conclusion by a consideration of Section 7 of the Indian Divorce Act and used it as an argument confirmatory of the decision that he arrived at on an interpretation of the relevant provisions of the Divorce Act. The learned Judge pointed out how the law in this respect had developed in England and said that by virtue of Section 7 it must be held that there should now be in India a decree nisi and a period of six months before the decree became absolute.

27. The last decision of our Courts is a decision of a Full Bench in Wilkinson v. Wilkinson (1923) I.L.R. . 47 Bom. 843 : S.C. 25 Bom. L.R. 945 F.B. This was a case dealing with the jurisdiction of the Divorce Court in India. That jurisdiction under Section 2 rested on residence; and the question was whether residence by itself was sufficient to confer jurisdiction or whether the principles of English law that domicile is necessary in some cases should be introduced into the Indian law by reason of Section 7 of the Indian Divorce Act. In delivering judgment Marten J. pointed out that the law in England was not well settled at the time when the Indian Divorce Act was enacted, and he proceeded to observe (p. 865):

In my opinion the Indian Legislature intended by this clause to ensure reasonable uniformity between the various High Courts of this country and the English Courts, and as far as practicable to avoid the scandal of parties being regarded as married persons in India, though not in England, or perhaps as married persons in one Indian Province but not in another. I think it also intended to provide for the then uncertainty of the law on the subject, and for the possibility that the principles of the English Courts might be modified in course of time. Accordingly the Indian Courts are to give relief 'on principles and rules which...are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.' I draw particulars attention to the words "for the time being". In my opinion, they were

inserted to prevent the principles of law being rigidly fixed as at 1869.

28. Crump J. differed from the majority so far as the particular question before the Bench was concerned, but in his differing judgment at p. 906 the learned Judge observed:

...it may be said what is then the scope of section 7? It is, in my opinion, a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act.

29. We next have a decision of the Privy Council which of course is binding on all Courts in British India. That decision is to be found in Iswarayya v. Iswarayya (1931) L.R. 58 I.A. 350 : S.C. 33 Bom. L.R. 1402. The question that arose for determination was whether under the provisions of Section 37 of the Indian Divorce Act where maintenance had been once fixed the Court had jurisdiction subsequently to increase it. The District Judge who tried the case held that there was no such jurisdiction under Section 37 but that such jurisdiction should be implied by reason of Section 7, as such jurisdiction existed in England. Their Lordships of the Privy Council held that upon a true construction of Section 37 there was such jurisdiction under the Indian Divorce Act itself. But having done so, Lord Russell of Killowen, who delivered the judgment of their Lordships, proceeded to consider the position under Section 7 of the Indian Divorce Act as confirmatory of the opinion which their Lordships had formed as to the construction of Section 87. His Lordship then points out (p. 360):

Their Lordships fully realise that an Indian Act does not fall to be construed in the light of statutes enacted by another legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relative jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. 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 Lordships feel that this intention would have been declared in express and unequivocal terms.

30. This decision to my mind is of very great importance in determining the question for decision before us. Here we have a power under the English law which was not conferred upon the Courts in India, or for the purpose of this argument at least was assumed not to have been conferred, by Section 37 of the Divorce Act. One would have thought that under those circumstances it would be arguable that the Indian Legislature had deliberately excluded such power from the provisions of the Indian Divorce Act itself. Not only was such an argument negatived, but their Lordships proceeded further to point out that if it was sought to exclude a power which existed in England at the date of the enactment of the Indian Divorce Act, there must be express words to that effect. To my mind, therefore, in a case like the present one, where at the date when the Indian Divorce Act was enacted there was no power in the Courts in England to grant permanent alimony in cases of nullity of marriage, if such a power which would come in under Section 7 was sought to be excluded, there must be clear words of exclusion.

31. We next have two decisions of the Calcutta High Court. The first decision is to be found in Ramsay v. Boyle (1903) I.L.R. 30 Cal. 489. The question for decision was whether on a petition for divorce on the ground of incestuous adultery, the alleged adulteress could be allowed to intervene. Such a power existed under the English law at the date when the Indian Divorce Act was passed but was not to be found in the Indian Divorce Act itself. The Calcutta High Court held that the alleged adulteress could not intervene. Chief Justice Maclean in delivering the judgment put the decision on two grounds, firstly, that the matter was of procedure only and, therefore, Section 7 of the Divorce Act did not apply, and, secondly, on the ground that where a power given expressly in the English Act is not inserted in the Indian Act, it could not be said to have been given by implication. So far as the first part of the argument is concerned, as I have said before, with respect to the learned Judge, I prefer the Bombay view that in matters of procedure in so far as procedure is not sufficiently prescribed by the Civil Procedure Code which applies under Section 45 of the Divorce Act, the Courts are entitled to apply the procedure and practice of the Court of matrimonial jurisdiction in England. So far as the judgment rests on the other ground that an express proviso in the English Act had not been inserted in the Indian Act, in my opinion, the judgment of their Lordships of the Privy Council in Ishwarayya v. Iswarayya, to which I have just referred, disposes of that argument. With respect, therefore, to the learned Judges of the Calcutta High Court I am of opinion that this decision does not lay down good law.

32. We next have a Full Bench decision of the Calcutta High Court, Rajani Nath Das v. Nitai Chandra Dey (1920) I.L.R. 48 Cal. 643 F.B., a decision on which Mr. Taraporewala has strongly relied, as it is a decision directly on the question that we have got to determine. In that case the second marriage of an individual was held to be null and void; and the question arose whether the Court had power to give permanent alimony to the reputed wife. A Full Bench of the Calcutta High Court held that they had no jurisdiction to make such an order. The decision was put on the ground that Section 37 omits to give such a power. It appears from the report that Section 7 of the Divorce Act was referred to in argument; but it is strange that Section 7 is not even casually mentioned in the judgment of their Lordships. We have, therefore, no guide to determine what view their Lordships took of Section 7 of the Divorce Act. Moreover, it must be remembered that this case was decided in 1921, that is full ten years before their Lordships of the Privy Council had expressed an opinion as to the true meaning to be given to Section 7 of the Indian Divorce Act in Iswarayya v. Iswarayya, and indeed it was also given before the decision of a Full Bench of this Court in Wilkinson v. Wilkinson (1923) I.L.R. 47 Bom. 843 : S.C. 25 Bom. L.R. 945 F.B., which I have referred to earlier. With very great respect, therefore, to their Lordships of the Calcutta High Court, I am not prepared to follow this decision and it affords little assistance to us in coming to a conclusion in the matter before us.

33. Lastly a decision of the Madras High Court was relied upon, Sumathi Ammal v. Paul (1935) I.L.R. 59 Mad. 518. There, a Full Bench, Mr. Justice Wadsworth dissenting, held that a decree that should be passed by the High Court in its original matrimonial jurisdiction in a petition for nullity of marriage should in the first instance be a decree nisi and not a decree absolute. Stone J. set out at great length the Privy Council case of Iswarayya v. Iswarayya and the observations of their Lordships therein and proceeded to apply the principles and rules of English law under Section 7 for the determination of the issue before them. In dealing with the argument that such an interpretation of Section 7 may involve importing into the Indian law grounds for divorce which are contrary to the

provisions of the Indian Divorce Act the learned Judge pointed out that since adultery, cruelty or desertion had been dealt with as grounds for divorce in India on a somewhat different footing than that from which they were dealt with as grounds for divorce in England, it would be contrary to the provisions of the Indian Divorce Act to import the grounds as understood in England into the Indian Divorce Act. But his Lordship proceeded to observe at p. 529 : "Had there not been a provision to the contrary, we could have followed even that important change." It is not necessary for the purpose of the ease before us to go to that length. But that was the view which Stone J. was prepared to take. Mockett J. observed (p. 533):

Section 7 obviously contemplates that the principles and rules of the Indian Divorce Act should be subject to change and development because the words 'principles and rules on which the Court...acts' are qualified by the words 'for the time being'.

34. It is clear, therefore, that the view of the Madras High Court was that the object of Section 7 was to procure that the law of divorce under the Indian-Divorce Act should keep pace with the law as it develops in England so far as such development does not violate any of the specific provisions of the Indian Divorce Act.

35. Those are the Indian cases that have been cited before us with regard to the correct interpretation of Section 7 of the Indian Divorce Act. But there is a case of the English Courts relied upon by Mr. Manekshaw which is of great assistance to us in that it was a case in which the analogous provision in Section 22 of the Matrimonial Causes Act, 1857, was interpreted. That is the case of Goodden v. Goodden [1892] P. 1. Under Section 17 of the Matrimonial Causes Act it was provided that permanent alimony could be granted by the Court where the decree was upon an application by the wife and the question that arose for decision was as to whether such permanent alimony could be granted where the application was by the husband, no such right having been specifically given under Section 17 of the Matrimonial Causes Act, 1857. Kay L.J. held that having regard to Section 22, as such a remedy had been granted by the Ecclesiastical Courts in the past, the Court was empowered to grant such a remedy notwithstanding the words of Section 17. At p. 8, the learned Judge observed:

Unless there is something in them expressly taking away powers before exercised by the Ecclesiastical Courts, we should be reluctant to hold that the Divorce Court has a more limited authority than they had.

36. And again at p. 5 the learned Judge observed :

It would be giving extraordinary and unnatural force to the language of Section 17 to say that it takes away or even negatives the jurisdiction of the Court to grant alimony where the decree for separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision.

37. To my mind, this is a case almost on all fours with the case before us; and following the same line of reasoning, although Section 37 does not in terms confer upon the Court power to grant

permanent alimony in cases of nullity of marriage, since such power is to be found in the principles and rules on which the English Courts act to-day by virtue of Section 7, that power must be included amongst the powers given to us under the Indian Divorce Act.

38. The same view was taken in a decision of the Oudh Court in Mrs. Niblett v. Mr. Niblett [1935] A.I.R. Oudh 133. The question there was whether Section 37 limited the jurisdiction of these Courts to grant alimony to a wife to eases of dissolution of marriage and decrees of judicial separation obtained by the wife only, since the words used in s.37 are "any decree of judicial separation obtained by the wife." It was held that in a case of dissolution of marriage or judicial separation at the instance of the husband a similar order could be made. At p. 188 of the judgment the effect of Section 7 of the Divorce Act has been considered and it is pointed out that by reason of Section 7 the principles and rules which are applicable in the Divorce and Matrimonial Courts in England to-day must be given effect to.

39. I am, therefore, of opinion that this Court has power to grant permanent alimony after a decree for nullity of marriage has been passed.

40. Before concluding I will refer to an argument which was advanced by Mr. Taraporewala at the conclusion of his address. That argument was that the present case arises for determination under the Special Marriage Act. Section 17 of that Act provides that the Indian Divorce Act shall apply to all marriages contracted under this Act and any such marriage may be declared null or dissolved in the manner therein provided. The contention of Mr. Taraporewala is that the Divorce Act is in the first instance intended to apply to Christians only, while the Special Marriage Act applies to many other communities residing in India; and it would be a strange result if the provisions of Section 7 of the Divorce Act were to be made applicable by reason of Section 17 to parties who were married under the provisions of the Speical Marriage Act. I realise that such consequences may well follow. But the remedy for it surely must be found by the Legislature and not by the law Courts. Section 7, as I have pointed out above, is a very extraordinary and an unusual section; and it is for the Legislature of a Free India to consider whether that section should be allowed to remain in an Indian Act so that we are for ever bound to the apron strings of English law so far as divorce under the Indian Divorce Act is concerned. It is further a matter for their consideration whether, assuming that Section 7 continues to remain a part of the Divorce Act, that section should be made applicable to parties who are governed in the first instance by the Special Marriage Act and to whom the Indian Divorce Act was made applicable as a mere matter of convenience. That, however, cannot affect the decision as to the true interpretation of Section 7 of the Indian Divorce Act.

41. The result must, therefore, be, as the learned Chief Justice has pointed out, that the appeal shall be dismissed with costs.