(1988) 02 CAL CK 0029

Calcutta High Court

Case No: A.O.D. No. 348 of 1987 with O.T. No. 3421 of 1987

Sadhan Kumar Roy		APPELLANT
	Vs	
Sm. Saswati Roy (Banerjee)		RESPONDENT

Date of Decision: Feb. 11, 1988

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11, 12, 13(2), 15, 18
- Constitution of India, 1950 - Article 134A
- Special Marriage Act, 1954 - Section 11, 12(2), 15, 15(f), 16

Citation: 92 CWN 881

Hon'ble Judges: Sankari Prasad Das Ghosh, J; L.M. Ghosh, J

Bench: Division Bench

Advocate: Sailendra Bhusan Bakshi and Sachidananda Sinha, for the Appellant;Ashoke Kumar Sengupta, N. Basu, Binayak Kumar Ghoshal and S.K. Debnath, for the Respondent

Final Decision: Dismissed

Judgement

Sankari Prasad Das Ghosh, J.

This is an appeal by the husband against a decree for dissolution of marriage on the ground of cruelty. It is not disputed that a marriage between the parties was solemnised on 14.7.78 under the Special Marriage Act, 1954 (hereinafter called the "Act" for the sake of convenience) before a Marriage Officer, Shri Sisir Sen, for the District of Calcutta and 24-Parganas. Subsequently, on 28.1.80, the wife, Saswati alias Munu, brought a Matrimonial Suit, being Matrimonial Suit No. 58 of 1980, in the court of the District Judge at Alipore for dissolution of the marriage by a decree of divorce on the grounds of crulety and desertion. There was an alternative prayer in that suit for a dec(sic)e for judicial separation between the parties. In that suit, there was a petition by the husband-appellant in July, 1980 about lack of territorial jurisdiction of the District Judge, Alipore to try that suit on the ground that both the husband-appelant and the respondent-wife admittedly resided outside the

jurisdiction of the District Judge at Alipore and that the marriage was solemnised at Shyamacharan Dey Street, Calutta, outside the jurisdiction of the District Judge, Alipore. On the basis of this petition by the husband-appellant that Matrimonial Suit No. 58 of 1980 was dismissed for non-prosecution on 25.7.80. The appellant had also filed another suit, being Matrimonial Suit No. 58 of 1980, in the Court of the District Judge, Chinsurah, Hooghly, against the respondent for passing of a decree for restitution of conjugal rights between the parties. That suit was dismissed for default on 3.12.80. Subsequently, the respondent filed another suit, being Matrimonial Suit No. 41 of 1984, in the Court of the District Judge, Hooghly on 18.4.84 for annulment of the marriage by a decree of nullity and for passing, in the alternative, a decree for divorce between the parties.

2. The respondent alleged in the plaint that both the parties had been residing at Village Chanditala under P.S. Chanditala in the District of Hooghly since their birth. They had never resided for any period of time within the territorial jurisdiction of the Marriage Officer, who solemnised the marriage on 14.7.78. Any statements made by either the respondent or the appellant in the notice of the intended marriage u/s 5 of the Act or in the declaration to be made by the bridegroom and bride u/s 11 of the act were false and baseless. The respondent had to sign such notice and/or declaration on the threat, coercion and undue influence of the appellant. On 20.3.84 on enquiry the respondent first came to know of the contents of the notice u/s 5 of the Act which she was made to sign under threat and coercion on the part of the appellant. Besides making out this case for annulment of the marriage between the parties by a decree of nullity, the respondent made out a case for dissolution of the marriage by a decree of divorce on the grounds of cruelty and desertion, in the alternative.

3. The appellant filed a written statement denying the averments in paragraph 3 of the plaint that on enquiry the respondent came to know on 20.3.84 about the contents of the notice u/s 5 of the Act. It was alleged that the respondent married the appellant out of her free will and that there was no user of any threat or coercion or undue influence on the respondent for signing of the notice u/s 5 of the declaration u/s 11 of the Act. The appellant also denied any desertion of the respondent by him. He contested the prayer for dissolution of marriage also on the ground of cruelty.

4. The respondent examined seven witnesses including herself as P.W. 1. The appellant examined five witnesses including himself as P.W. 1. On a consideration of the evidences of these witnesses as well as the documentary evidences on record, the learned District Judge, Hooghly was of the opinion that the respondent could not claim to get a decree of nullity of the marriage on the ground of exercise of fraud, coercion or undue influence on her. According to him, the ground of desertion was not proved. The learned Judge held that the respondent had by sufficient evidence proved that she had been a helpless victim of utter cruelty in the hands of her

husband. Accordingly, he passed a decree for dissolution of marriage between the parties.

5. Being aggrieved, the husband has preferred this appeal. The wife-respondent has filed a cross-objection challenging the finding of the court below that the respondent had failed to prove the exercise of fraud, coercion and undue influence on her by the husband at the time of solemnisation of marriage.

6. Before taking up the question of the alternative prayer for dissolution of the marriage by a decree of divorce, we propose to take up the question of annulment of the marriage by a decree of nullity. The averments in paragraph 1 of the plaint that the respondent and the appellant have been residing in the same village, viz. Village Chanditala under P.S. Chanditals in the District of Hooghly since their birth have been admitted to be true in paragraph 5 of the written statement. It is not also disputed in the written statement Chat the parties have never lived within the territorial jurisdiction of the Marriage Officer for Calcutta. The evidence of P.W. 1 that before their marriage her husband or she never lived at any place within Calcutta or in the District of 24-Parganas goes unchallenged in cross-examination of P.W. 1. in these circumstances, there can be no doubt that both the parties never lived at any place within Calcutta or in the District of 24-Parganas at the time of granting of the Certificate of Marriage, Ext. 2, by the Marriage Officer on 14.7.78. u/s 5 of the Act, when a marriage is intended to be solemnised under the Act, the parties to the marriage shall give notice thereof in writing, in the form specified in the Second Schedule, to the Marriage Officer of the District in which at least one of the parties to the Marriage has resided for a period of not less than 30 days immediately proceeding the date on which such notice is given. In the notice of intended marriage u/s 5 read with the Second Schedule of the Act, the dwelling-place, permanent dwelling-place, if present dwelling place if not permanent and the length of residence are to be mentioned. Similarly, before the solemnisation of the marriage under the Act. the parties and three witnesses are to sign in presence of the Marriage Officer in a declaration in the form specified in the Third Schedule to the Act and the declaration is to be counter-signed by the Marriage Officer. In this declaration u/s 11 read with the Third Schedule of the Act, there is one paragraph, being paragraph No. 4, about the liability for imprisonment and also fine if any statement in the declaration is false. This penal liability is mentioned in section 45 of the Act. When none of the parties resided within the territorial jurisdiction of the Marriage Officer, who gave the certificate of marriage on 14.7.78, the certificate of marriage will be without jurisdiction for contravention of section 5 of the Act under which atleast one of the parties to the marriage has to reside for a period of not less then 30 days immediately preceding the date on which notice of intended marriage is given. As the certificate of marriage was granted without jurisdiction by the Marriage Officer for contravention of section 5 of the Act, marriage between the parties is to be declared void.

7. Mr. Baksi, the learned Advocate for the appellant, has advanced three-fold arguments for showing that the marriage is not void on this score. His first contention is that section 5 of the Act, in so far as it relates to the requirement of residence by at least one of the parties for a period of not less than 30 days immediately preceding the date of giving of the notice under that section, corresponds to section 15(f) of the Act. According to him, the registration of a marriage under Chapter III of the Act may be declared to be of no effect if the registration was in contravention of any conditions specified in clauses (a) to (e) of section 15 of the Act. In none of these clauses (a) to (e) of section 15 of the Act, there is any requirement of residence by at least one of the parties to the marriage for a period of not less than 30 days, which is mentioned only in section 15(f) of the Act. As such, the contention is that a marriage cannot be void for contravention of the condition of residence by at least one of the parties for a period of not less than 30 days, as mentioned in section 5 of the Act, read with section 15(f) of the Act. The second contention is that the Act is a self-contained Act and does not admit of any declaration of marriage as void apart from the provision of section 26 of the Act, under which a marriage may be declared a nullity for contravention of any of the conditions mentioned in clauses (a), (b), (c) and (d) of section 4 of the Act or on the ground of importancy and not on any other ground. The last contention is that there will be difficulty regarding legitimacy of children in case a marriage solemnised under the Act is declared to be void on the ground of non-residence for at least 30 days prior to the date of giving of the notice u/s 5 of the Act. We have carefully considered these contentions of Mr. Baksi and we are unable to accept any of these contentions.

8. Chapter II of the Act relates to solemnisation of special marriages. Chapter III of the Act relates to registration of marriage celebrated in other forms. The word, "solemnisation", in the context of the Act, means celebration of marriage on the conditions relating to solemnisation of Special marriages, mentioned in section 4 of the Act and on compliance with the other requirements in Chapter II of the Act relating to residence by at least one of the parties to the marriage for a period of not less than 30 days immediately proceeding the date of giving notice of intended marriage u/s 5 of the Act. It is to be stated in this connection, that the word, "solemnisation" means, under the Hindu Marriage Act, 1955, celebration of marriage with proper ceremonies and in due form on the basis of the provisions in section 7 of that Act. The performance of a ceremony of marriage between the parties and living Together of the parties as husband and wife ever since the performance of the ceremony of marriage is one of the essential conditions for registration of marriage celebrated in other forms under Chapter III of the Act. Section 12(2) of the Act enjoins that solemnisation of special marriage under Chapter II of the Act may be in any four, which the parties may choose to adopt, provided that it shall not be completed and binding on the parties unless each party says to the other in presence of the Marriage Officer and three witnesses that one is

taking the other to be his/her lawful wife or husband. As no performance of any ceremony and living together as husband and wife ever since the performance of such a ceremony is requisite condition for solemnisation of special marriage under Chapter II of the Act, as contracted with section 15 in Chapter III of the Act, the requirement of residence by at least one of the parties, as stated in section 5 of the Act, is a mandatory requirement. It is to be stated in this connection, that in so far as the conditions for solemnisation of special marriages, as mentioned in section 4 of the Act, are concerned, there is similarity of clauses (a), (c) and (d) of section 4 with the provisions in clasues (b), (d) and (e) of section 15 of the Act respectively. So far as clause (c) of section 15 of the Act is concerned, it is to he stated that there was a similar clause in Clause (b) of section 4 of the Act prior to its amendment by the Marriage Laws (Amendment) Act, 1976. The result is that a performance of ceremony of marriage and living together of the parties as husband and wife ever since the performance of ceremony of marriage, mentioned in clause (a) to section 15 of the Act, is the distinguishing condition for registration of marriage, when there is no such condition in section 4 of the Act. In this context, the provisions in sections 4 and 5 of the Act regarding the conditions of marriage and requirement of residence by at least one of the parties for a period of not less than 30 days in the district of the Marriage Officer where the marriage is to be solemnised, are to be complied with before there can be any valid solemnisation of special marriages under Chapter II of the Art. As no ceremony of marriage is to be performed for solemnisatior, of special marriages under Chapter II of the Act, the procedure for solemnisation of special marriages and the procedure for registration of marriage celebrated in other forms are different. Section 16 of the Act deals with the procedure for registration of marriage celebrated in other forms. The procedure for solemnisation of Special marriages under Chapter If of the Act is enumerated in sections 5, 6, 7 and 8 of the Act. On a comparison of the provisions in section 16 along with the provisions in sections 5, 6, 7 and 8 of the Act, it appears that for registration of marriages celebrated in other forms, there is no necessity of maintaining any marriage notice books and publication of notice of marriage as mentioned in section 6 of the Act or for recording in writing the nature of objection by the Marriage Officer in the Marriage Notice Book and reading over of this objection to the Objector as per section 7(3) of the Act. Moreover, if any of the parties to the intended marriage does not reside permanently within the local limits of the district of the Marriage Officer to whom a notice u/s 5 of the Act is given, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place of his office. There is no such provision, contained in section 6(3) of the Act, in Chapter III of the Act. The powers of Marriage Officer in respect of enquiries u/s 9 and for enquiry u/s 16 of the Act vary. For the purpose of an enquiry u/s 8 of the Act, the Marriage Officer has all the powers vested in civil court for some purposes. There is no such power of any Marriage

Officer for registration of marriage celebrated in other forms. For the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the Marriage Officer shall be the local limits of his district under the Explanation to section 9 of the Act. A Marriage Officer holding enquiries u/s 8 of the Act, cannot thus enforce attendance of witness living outside his jurisdiction. In those circumstances, the requirement of residence by at least one of the parties in section 5 read with the Second Schedule of the Act is a mandatory requirment. The effect of non-compliance with these requirements varies, as compared with the absence of compliance of the conditions for registration of marriage celebrated in other forms. Any marriage solemnised under Chapter II of the Act shall be null and void and may be so declared by decree of nullity for non-compliance of any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 of the Act. A marriage which is registered under Chapter III of the Act, after being celebrated in other forms, cannot be declared as null and void if any of the conditions enumerated in any of the clauses (a) to (e) of section 15 of the Act is not complied with. This is evident from section 24(2) read with section 18 of the Act. Whereas the effect of non-compliance of any of the conditions mentioned in clauses (a) to (e) of section 15 of the Act is only a declaration that the registration of such marriage under Chapter III will be of no effect, the effect of non-compliance of any of the conditions in sections Ma) to 4(d) of the Act will be declaration of nullity of the marriage solemnised under Chapter II of the Act. As the effects vary, the framers of the Act have used expression, "deemed to be solemnised under this Act within the meaning of section 18", in section 24(2) of the Act, as compared with solemnisation of special, marriages under Chapter II of the Act. On the basis that violation of clause (f) to section 15 of the Act, regarding requirment of residence does not render a marriage null and void, it cannot be argued that the requirment or residence in Section 5 of the Act for solemnisation of special marriages will have similar effect. A scrutiny of the provision in section 26 of the Act shows that a decree of nullity can be granted not only under the provisions of section 24(1) of the Act but also in other cases. The user of the expression, "whether or not the marriage is held to be void otherwise than on a petition under this Act", in section 26(1) of the Act shows that a marriage can be declared void otherwise than on a petition u/s 24(1) of the Act. In these circumstances, the contention of Mr. Baksi that non-residence in a district by at least one of the parties to the marriage for a period of not less than 30 days immediately preceding the date on which notice of intended marriage is given to the Marriage Officer of that district does not make a marriage void, cannot be accepted.

9. The Act is no doubt a self-contained act, even then the provisions in section 26 of the Act show that apart from the provisions in section 24(1) of the Act for declaration of a marriage solemnised under Chapter II of the Act a nullity, a marriage so solemnised under Chapter II of the Act can be void otherwise than on a petition u/s 24(1) of the Act. Moreover, Civil Court has jurisdiction to decide whether the provisions of any Act have been complied with or not. Section 31 of the Act is to the

effect that every petition under Chapter V or Chapter VI of the Act shall be presented to the District Court, which is a civil court In view of the provisions in section 9 of the CPC the declaration that a marriage solemnised under Chapter II of the is void for non-compliance with the provision of that Chapter of the Act, can be given by the Civil court. In the circumstances, the contention that no declaration can granted that the marriage is for non-compliance of the requirement of residence mentioned in section 5 of the Act, cannot be accepted,

10. There will be no difficulty regarding legitimacy of children in case a marriage solemnised under Chapter II of Act is declared to be void for non-compliance of the requirement of residence mentioned in section 5 of the Act. So far as registration of marriage celebrated in other forms is conceded, the provisions in section 18 of the Act show that all children born after the date of the ceremony of marriage, as mentioned in clause (a) to section 15 of the Act, shall in all respect be deemed to be and always to have been the legitimate children of their parents. Similarly, notwithstanding the declaration of a special marriage solemnised under Chapter II of the Act as a nullity any child of such marriage would be legitimate u/s 26(1) of the Act Where a decree of nullity is granted in respect of avoidable marriage u/s 25 of nullity any child begotten or conceived before the decree is made, is also to be deemed to be legitimate child, notwithstanding the decree of nullity, u/s 26(2) of he Act The provisions in section 26(3) of the Act correspond to the proviso to section 18 of the Act. There will thus be no difficulty regarding legitimacy of child if a special marriage solemnised under Chapter II of the Act is declared as void apart from the provisions in section 24(1) of the Act.

11. Mr. Baksi has next contended that once a certificate of solemnisation of special marriage under Chapter II of the Act is given, as in the present case, the certificate shall be deemed to be conclusive evidence of the fact that the marriage under the Act has been solemnised and all formalities respecting the signatures of the witnesses have been complied with. He has drawn our attention to the case of Purabi v. Basudeb (AIR 1969 Cal 293) and has contended that when a certificate of marriage u/s 13(2) of the Act is conclusive proof of marriage, no declaration can be given that the marriage in this case is void for non-compliance with the requirement of residence mentioned in section 5 of the Act. Mr. Baksi has submitted that in case this court does not follow the Division Bench decision in the case of Purabi (supra), the matter should be referred to a larger Bench. It, however, appears that the question involved in the case of Purabi is not the question involved in this appeal. As such, there is no question of referring the matter to a larger Bench. In the case of Purabi, the question was whether the address given by a witness presumably in the notice of intended marriage u/s 5 read with the Second Schedule of the Act, was correctly given or not. It appears that three witnesses are to put their signatures in the declaration to be made by the bridge room and bride u/s II read with the. Third Schedule of the Act. Even if the address of any of such witnesses was Incorrectly given in the declaration or in the notice of intended marriage, the parties in that

case resided, for a period of not less than 30 days immediately preceding the date on which the notice of intended marriage was given to the Marriage Officer, in the district where the marriage was solemnised. As the question of territorial jurisdiction of the Marriage Officer to solemnise the marriage between the parties was not involved in that case, that case cannot be an authority for the proposition that even if a special marriage is solemnised by a Marriage Officer in a district within his jurisdiction, though none of the parties was residing in that district for a period of not Jess than 30 days immediately preceding the date of giving of notice of intended marriage to him u/s 5 of the Act, the certificate of marriage granted by him, without his territorial jurisdiction to solemnise the marriage, will still be conclusive evidence of solemnisation of marriage under the Act. Section 12 of the Act shows that place of solemnisation is an important matter for consideration by court for deciding if a marriage solemnised under Chapter II of the Act is void or not. When none of the parties of this appeal resided at any point of time within the jurisdiction of the Marriage Officer who solemnised the marriage in this case, the marriage cannot but be void for contravention of section 5 of the Act. It appears that in another Division Bench decision of this court in the case of Sasanka Bhowmik v. Amiya Bhowmik (78 CWN 1011), a certificate of marriage given under the Special Marriage Act, 1872 was treated as conclusive evidence to prove that the marriage had been solemnised and that all the formalities under that Act had been complied with. That case of Sasanka (supra) arose out of a suit for partition between a widow, a son and the widow of a predeceased son of a person. The widow of the pre-deceased son had re-married. One of the questions involved in that case was whether the widow of the predeceased son could inherit in spite of the re-marriage. Naturally, one of the objections of her son was that the marriage was not duly solemnised under the Special Marriage Act, 1872. It was in that context that it was observed by Their Lordships in the case of Sasanka (supra) that no adverse inference could be drawn against the widow of the pre-deceased son because of non-production of the declarations required to be made before the solemnisation of the marriage. The view of the Division Bench in that case was that it was for the son, who challenged the marriage, to show from the records in the custody of the Marriage Registrar that no such declaration was made or was properly made. That Division Bench decision goes to show that though a special marriage is solemnised, it can be challenged by showing that the declarations were not properly made. In this case also the particulars u/s 5 read with the Second Schedule of the Act were not properly given as none of the parties admittedly resided within the territorial jurisdiction of the Marriage Officer, who solemnised the special marriage between the parties of this case. The provisions of section 13(2) of the Act show that a certificate of solemnisation of special marriage will be conclusive evidence of solemnisation of the marriage and compliance of ail the formalities regarding the signatures of witnesses. The marriage between the parties in this case was undoubtedly solemnised in a district wherein none of the parties ever resided. Though the formalities in respect of signatures of witnesses may have been

complied with in the declaration u/s 11 read with the Third Schedule of the Act, these formalities will not make the marriage binding between the parties as the marriage was solemnised in a district where none of the parties ever resided, in spite of the mandatory provision in section 5 read with the Second Schedule of the Act. The marriage is, accordingly, to be declared void.

12. As the marriage is to be declared void, there is no question of granting any decree for dissolution of marriage, though evidences have been adduced by both the parties regarding the grounds on which divorce has been sought for, We are, however, to deal, in a mutshell, with these evidences not for the purpose of granting a decree for divorce but for the purpose of discussing two other contentions raised by Mr. Baksi viz. condonation of cruelty, if any, and unnecessary and improper delay in filing the suit.

13. Divorce was sought for on the grounds of desertion and cruelty. So far as desertion is concerned, the learned Judge in the court below was of the view that the ground of desertion was not proved. We have carefully scrutinised the evidences and we find nothing to interfere with this finding of the learned Judge in the court below. As regards cruelty, Mr. Baksi has contended that the husband was not guilty of any cruelty. His next contention is that even assuming that there was cruelty, it was not of such a magnitude a to justify divorce. According to him, if the court came to the conclusion that there was cruelty, there should be, in the facts and circumstances of the case, a decree for judicial separation and not a decree of divorce. The learned Judge discussed the evidence of P.Ws. and R.Ws. relating to cruelty and he was satisfied from the evidences that the respondent was a helpless victim of utter cruelty in the hands of her husband. We do not also find anything to interfere with this finding of the learned Judge. Ext. 3 series are some letters, stated to be written by the appellant. Out of these letters P.W. 1 the respondent, has proved three letters, Exts. 3, 3(a) and 3(b), and the envelopes, Exts. 4(a), 4 and 4(b) respectively, as being in the hand-writing of her husband, the appellant. She has not been cross-examined so far as the writings of the envelopes or the writings of these letters are concerned. The other letter, Ext. 3(c) and the corresponding envelope, Ext. 4(c), were proved by P.W. 7, Swapan Chatterjee, Exts. 3(c) and 4(c) have not been properly proved as P.W. 7 has nowhere stated that he knows the hand-writing of the appellant. The envelope, Ext. 4(a) bears postal seal on 29.12.79 when it was registered. Ext. 4, another envelope, was registered at Chanditala Post Office on 9.10.79. Ext. 4(b), another envelope, was registered at Chanditala Post Office on 6.11.79, as per the postal seal. We are leaving out of consideration the other letter, Ext. 3(c) and the other envelope, Ext. 4(c), which were not properly proved. We do not go to the extent of comparing the hand-writings in these letters, Exts. 3, 3(a) and 3(b), with the signature of the appellant in the written statement, as done by the learned Judge, presumbly on the basis of the provisions in section 73 of the Evidence Act. Considering the evidences, we are satisfied with the evidence of P.W. 1 that these letters, Exts. 3, 3(a) and 3(b), are written by the appellant, though denied

vaguely and not specifically by the appellant (R.W. 1), whose nick-name is Raju. The marriage was solemnised on 14.7.78. The evidence of Sasanka Sekhar Banerjee, the elder brother of the respondent (P.W. 6), who is also called as Khoka as per evidence, is that in July, 1979 he came to know of the marriage. The evidences of P.W. 1 show that after the solemnisation of the marriage on 14.7.78, she kept the marriage a secret from her parents. The letters, Exts. B series, show to what extent the respondent used to love the appellant. The learned Judge discussed the letters, Exts. B series and particularly the letters, Exts. B(11), B(12) and B(13), for the purpose of showing that the marriage was kept a secret after 14.7.78 and that it was only after July, 1979 when P.W. 6 came to know about the marriage, that the troubles began. Swapan Chaterjee, P.W. 7, was a tutor of P.W. 1, who had two other teachers, Nishit Ghosh and Kamakshya Chatterjee. The appellant road upto Class VI or Class VII (vide P.W. 1). P.W. 1 has stated that at the time of solemnisation of marriage on 14.7.78, she was aged 17 years, though in the School Certificate her age was shown as 19 years. P.W. 1 pased the School Final Examination in 1979 and B.A. Examination in 1984. She was a student of Master of Arts at the time of giving evidence on 2.5.86. It is in the evidence of P.W. 6 that after coming to know of the marriage in July, 1979, he gave up all connections with the appellant, who happened to be his friend. His evidence shows that his father died in April, 1979. The marriage was kept a secret before the parents and relatives of Saswati, as per the evidences of P.W. 1 and P.W. 6. It was after July, 1979 when P.W. 6 came to know of the marriage that trouble began to grow up. P.W. 4 has spoken of an inident in August or September, 1979. According to him, on one day at about 9-30 or 10-00 a.m. in August or September, 1979 he saw that Saswati was detained on the road by the appellant, Sadhan and was abused by the appellant in filthy language in front of the cloth-shop of the father of the appellant. The evidence shows that the appellant was a salesman in his father''s cloth-shop and that Saswati had to pass along the road beside that shop. P.W. 4 has stated that at the time the appellant called Saswati a prostitute and also used other objectionable language. The learned Judge relied on these evidences of P.W. 4 and we find nothing to disbelieve these evidences of P.W. 4. After this occurrence, the appellant wrote the letter, Ext. 3(a), on 9.10.79, as per the envelope, Ext. 4, to Saroj, the brother of P.W. 7, Swapan Chatterjee. In this letter written to Saroj, the appellant went to the extent of describing the respondent as a prosititute engaged in normal connection with two or three boys. On 6.11.79, the appellant wrote another letter, Ext. 3(b), to Santosh, father of P.W. 7, going to the extent of threatening that he would break the legs of Swapan (P.W. 7), if he got any opportunity in the matter. On 29.12.79, the appellant wrote another letter, Ext. 3, to Swapan (P.W. 7) describing the respondent as a prostitute. The evidences of P.Ws. 1 and 7 and R.W. 1 go to show that the appellant did, not like that Swapan (P.W. 7) would teach Saswati and he had warned Swapan in the matter and for that reason Swapan (P.W. 7) had to give up ultimately the coaching of Saswati by him. The evidences show that the appellant went to the extent of assaulting Swapan (P.W. 7). P.W. 7 has stated that he used to coach Saswati as a private tutor from August 1978

to April, 1980 in her School Final and Higher Secondary Classes. R.W. 1, the appellant, has admitted that he warned Swapan for coaching Saswati. It was, in these circumstances, that P.W. 1 filed the Matrimonial Suit No. 58 of 1980 on 28.1.80, seeking a decree for dissolution of marriage and a decree, in the alternative for judicial separation on the grounds of cruelty and desertion. Considering the evidences, we find nothing to disbelieve the evidence of P.W. 1 that even after the filing of that suit there were assaults and abuses by the appellant. P.W. 5 has spoken of one incident on 1980. According to P.W. 6, there was bursting of bomb in his car in May or June, 1980. The description of Saswati as a prostitute by the appellant on the letters, abuse of appellant in the fifthly language, allegation of Saswati''s having illicit connection with other boys as per the letters, abuse of and assault on Swapan for his coaching Saswati and the prosecution of further studies in Higher Secondary classes by Saswati while staying at the house of her sister''s husband (P.W. 3), as per evidences, because of abuses by the appellant, go to prove satisfactorily that the appellant behaved with cruelty with the respondent not only before the filing of the Matrimonial Suit No, 58 of 1980 by Saswati, but also thereafter before filing of this present suit. The evidences are that P.W. 1 had to write a latter to the Chief Minister''s Secretariat and that under police protection the plaint of the present suit was filed. Ext. 1 acknowledgment card, shows that letter was received by the Chief Minister''s Secretariat on 14.8.83. Considering the evidences, we are of the opinion that the appellant behaved with the respondent with cruelty and that the cruelty was of such magnitude as to justify divorce, though no decree of divorce should be passed in this suit as the marriage itself is void for the reasons already stated. We are also of the opinion that there is no question of passing a decree for judicial separation, in spite of such instances of cruelty.

14. The contention of Mr. Basak about condonation of cruelty cannot be accepted. P.W. 1 has stated that she did not condone the cruelty perpetrated on her husband. As an instance of condonation of cruelty, Mr. Baksi referred us to the dismissal of Matrimonial Suit No. 58 of 1980, brought by Saswati against her husband, for non-prosecution on 25.7.80, vide High Court Ext, II. Evidences have been adduced by R.W. 1 to the effect that Saswati''s suit as well a his suit, bearing the same number, being Matrimonial Suit No. 58 of 1980, were compromised. These evidences of R.W. 1 and R.W. 5 are not at all convincing as R.W. 1 filed a petition in Duly, 1980 in the court of the District Judge, Alipore about the lack of territorial jurisdiction of the learned District Judge, Alipore, to try that suit (Matrimonial Suit No. 58 of 1980) was thereafter dismissed for non-prosecution on 25.7.80. It is to be stated, in this connection, that the other suit, being Matrimonial Suit No. 58 of 1980, filed by the appellant against the respondent for restitution of conjugal rights was also dismissed for default on 3.12.80. There is no convincing evidence to show that any of these suits was dismissed in view of any compromise between the parties. The very fact that both before and after the dismissal of the appellant''s suit on 3.12.80, the respondent had to prosecute studies, while staying in the house of her sister''s

husband (P.W. 3), goes to show that there cannot be any compromise as a result of which previous suit by the wife or the suit by the husband was dismissed. It is to be stated, in this connection, that R.Ws. speaking about stay of the appellant with the respondent, are not also witnesses of truth. Whereas the case by the appellant in the plaint of the Matimonial Suit No. 58 of 1980 (Ext. 5) was that after the solemnisation of marriage on 14.7.78, the parties lived together for 11 days upto 24.7.78 at the house of the appellant the evidence of R.W. 1 is that they stayed as husband and wife for two years. The evidences of R.W. 3 and R.W. 5 are that Saswati and the appellant stayed as husband and wife for six months, On a consideration of the evidences, we have no hesitation to agree with the finding of the learned Judge in the court below that after 14.7.78, when the marriage was solemnised, the parties did not stay together as husband and wife for a single day either at the house of the appellant or at the father''s house of the respondent. There was no compromise, The wife''s suit was dismissed for non-prosecution because of objection by the husband about lack of teritorial jurisdiction of the District Judge at Alipore. The evidence of P.W. 1 is that she did not know of the husband''s suit before getting the certified copy of the order of dismissal of that suit. Condonation implies forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the offence was committed. There is nothing to show that there was restoration between the parties. In these circumstance there can be no condonation of cruelty u/s 34(1)(b) of the Act.

15. As for delay, it is to be stated that there is no question of limitation for filing a suit for relief in a matrimonial cause under the Act, This is evident from section 29(3) of the Limitation Act, 1963. The question whether there has been unnecessary or improper delay in instituting a proceeding in a matrimonial cause u/s 34(1)(d) of the Act is to be judged in the facts and circumstances of each case. No hard and fast rule can be laid down for determining when there will be unnecessary and improper delay in instituting a proceeding. Several considerations are, however, to weigh with the court in the matter. One of these considerations is whether the offended spouse held the weapon of redress over the head of the other party to the marriage. Another consideration will be the duty of the matrimonial court to strike a balance between respect for binding sanctity of marriage and social consideration which make it contrary o pubic policy to insist on maintenance of an union which has utterly broken down. In this case, Saswati did not hold the weapon of redress over the head of the husband when there was a continuous course of cruely which was being perpetrated by the husband even after the dismissal of the wife''s previous suit for non-prosecution. Instead of dismissing that suit for non-prosecution, the learned District Judge, Alipore ought to have returned back the plaint to the wife for being presented in proper court. Even then, when the husband was continuing in the acts of cruelty towards the wife, it cannot be stated that the wife was holding the weapon of redress over the head of the husband before the institution of the present suit on 10.4.84. We have already shown that the marriage was kept a secret

by Saswati and the appellant became known only to P.W. 6, elder brother of Saswati, in July, 1979 after which all the troubles between the parties began. The marriage between the parties has broken down because of difference in status and difference in mental wavelengths between the parties. As already stated, the appellant read upto Class VI or VII, whereas the respondent was a student of M.A. at the time of giving evidence in the court below on 2.5.86. The case in the written statement was that there was difference in status between the parties. According to R.W. 1, the appellant belongs to lower middle class whereas the respondent belongs to middle class family. There were acts of crulty by the husband even after the dismissal of the previous suit by the wife on 25.7.80 for non-prosecution. In these circumstances, the marriage has broken down. Irretrievable break down of marriage has not yet found place in the statute as a ground for divorce or judicial separation, though such a ground has been hinted by the Supreme Court in the case of Ms Jorden Diengdeh Vs. S.S. Chopra, . Even then, irretrievable break down of marriage can be considered for deciding whether there has been unnecessary or improper delay in instituting a matrimonial proceeding. As the marriage has irretrievably broken down and as the wife did not hold the weapon of redress over the head of the husband prior to instituting the present suit, there is no unnecessary or improper delay in filing the suit on 18.4.84 by the wife.

16. We are, accordingly, of the opinion that the marriage, though, solemnised on 14.7.78, is to be declared void for contravention of requirement regarding residence in section 5 of the Act. The Cross-Objection is to be allowed, though on a different ground, as there is no evidence that any fraud or undue influence or coercion was exercised by the husband on the wife at the time of giving notice of intended marriage u/s 5 read with the Second Schedule to the Act or at the time of making the declaration u/s 11 read with the Third Schedule to the Act.

17. The appeal is, accordingly, dismissed. The Cross-Objection is allowed, though on a different ground. The suit itself in the court below is decreed, in so far declaration of the marriage as void is concerned. It is declared that the marriage solemnised between the parties on 14.7.78 is void. The judgment and decree of the court below are modified accordingly.

18. In the facts and circumstances of this case, the parties to bear their own costs of the suit in the court below and of this appeal.

19. Mr. Baksi submits for issuing a certificate under Article 134A of the Constitution. Mr. Sengupta opposes this verbal prayer by Mr. Baksi. Let a certificate issue that the case is a fit case for appeal to the Supreme Court as it involves a substantial question of law of general importance, which needs to be decided by the Supreme Court.

Let certified copies of the judgment be given to the parties as early as possible.

L.M. Ghosh, J.

I agree