CALENDAR
v.
FERNANDO

COURT OF APPEAL
WIGNESWARAN, J.
TILAKAWARDENA, J.
C.A. 283/89(F)
D.C. MT. LAVINIA 345/SPL
MARCH 16, 1999
JUNE 29, 1999
OCTOBER 4, 1999

Divorce - Deed of Gift - Husband and wife - setting aside the Deed of Gift - Assault on Donor - Gross ingratitude - Issues in a Civil case - Duty of court to raise issues - Res Judicata.

In 1978 certain properties were gifted by the Plaintiff Appellant (Husband) to the Defendant Respondent (wife). In 1983 action was filed by the husband seeking divorce and divorce was granted on the ground of malicious desertion on the part of the wife. In 1984 action was filed to set aside the Deed of Gift on grounds of gross ingratitude. The District Court dismissed the Plaintiff's action.

On Appeal :

Held :

(i) The Plaint in the present case was filed on 2.1.1984 nearly an year after institution of the divorce action and four days before the answer was filed in the divorce action. Nothing in law barred, the Plaintiff from filing such an action.

(ii) The failure to seek relief to enforce forfeiture in the Divorce Action cannot therefore be held to have operated as Res Judicata against him. The Defendant has reserved his rights to enforce forfeiture separately when he filed his answer. This is in accordance with the law and there was no question of Res Judicata affecting his rights.

Wigneswaran J.,

"It was the duty of the Judge in the first instance to have raised the issues. According to practice Counsel on both sides were allowed to raise issues, but the moment objections were raised it was incuibent

on the part of the Judge to have made a proper order either accepting the issues or rejecting the issue or suggesting a fresh issue. The trial Judge had very coveniently laid liability on the Plaintiff that the Plaintiff that the Plaintiff had failed to call upon the Court to make an order with regard to the acceptance/rejection of the issue. The framing of issues is the duty of Court.

(iii) Donor was entitled to revoke a donation on account of ingratitude, ingratitude is a form of mind which had to be inferred from the donees conduct and such an attitude of mind will be indicated either by a single act or a series of acts.

(iv) There is no rule that a revocation may not be granted on the commission of a single act of ingratitude.

Appeal from the Judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. Dona Padinona Ranaweera Menike vs. Rohini Senanayake - 1992 - 2 SLR 180.
2. Fernando vs. Fernando - 63 NLR 416.
3. Krishnasamy vs. Thilaimpalan - 59 NLR 265 at 269.
4. Mulligan vs. Mulligan - 11 - 1925 WLD 178 at 182.

Gamini Marapana P.C., with Sanath Abeyratne for Plaintiff Appellant.

Faiz Musthapha P.C., with Gastan Jayakody for Defendant Respondent.

Cur. adv. vult.

January 24, 2000
WIGNESWARAN, J.

The Plaintiff-Appellant, an Eurasian, married the Defendant-Respondent, a Sinhalese, on 07.06.1974. He was 45 years of age while the Defendant-Respondent was 24 years of age marriage. Subsequent to the marriage on 26.05.1978, deed of gift No. 1169 attested by B. Elmo St. Ivor Perera, Notary Public, Colombo was executed wherein the property mentioned in the second schedule to the said deed with rights of way over the lands mentioned in the third and fourth schedules to the said deed were donated by the Plaintiff-Appellant in

consideration of the natural love and affection he had for the Defendant-Respondent, his wife. There were no issues by this marriage.

D.C. Mt. Lavinia Case No. 2007/D was filed on 22.03.1983 by the Defendant-Respondent seeking divorce against the Plaintiff-Appellant. Divorce was granted not on the grounds enumerated in the plaint by the Defendant-Respondent but on the ground of her malicious desertion as referred to in the evidence of the Plaintiff-Appellant. Decree nisi was entered on 09.05.1986 which was made absolute thereafter.

Meanwhile on 02.01.1984 this action was filed by the Plaintiff-Appellant to set aside deed No. 1169 abovesaid. By the time this case came up for trial on 25.03.1987 divorce had been granted.

Inter alia the admissions recorded in this case related to the Defendant-Respondent admitting that she did maliciously desert the Plaintiff-Appellant as set out in paragraphs 7, 8, 10, 11, 12, 14, 15, 16 and 18 of the plaint. Paragraph 18 of the plaint referred to the Defendant-Respondent assaulting the Plaintiff-Appellant (a person 20 years older than her and about 54 years old at that time) on 17.07.1983 with a filled up bottle of sugar and a saucepan. Paragraph 19 (though not admitted) referred to the many facts enumerated earlier in the plaint (inclusive of paragraph 18) as the grounds of gross ingratitude to set aside the deed of gift. Though the learned Counsel for the Plaintiff-Appellant referred to an amendment which inserted paragraph 17 in place of paragraph 18 in the said admissions, the proceedings of 25.03.1987 do not reflect such an amendment nor are there any proceeding dated 28.03.1987 as referred to by the learned Counsel. The Counsel for the Defendant-Respondent in any event did not refer to any such amendment on 28.03.1987. Thereafter issues were raised as follows (translated):-

Plaintiff's issues

(1) Was the property referred to in the 2nd schedule to Deed of Gift No. 1169 dated 26.05.1978 attested by B.S. Perera, Notary Public, (sic) gifted by the Plaintiff to the Defendant ?

(2) Was such a gift granted by the Plaintiff on account of the natural love and affection for the Defendant ?

(3) If the answer to the above issues are in the affirmative is the Plaintiff entitled to have the said deed of gift No. 1169 set aside ?

(4) According to the decree entered in D.C. Mt. Lavinia Case No. 2007/D should the said deed of gift be set aside in law and/or the Defendant made disentitled to it ?

Defendant's issues

(5) Did the Defendant remove any articles in the custody of the Plaintiff ?

(6) (a) Was D.C. Mt. Lavinia Case No. 2007/D uncontested ?

(b) If so, has the Plaintiff not denied the contents of the plaint filed in that case ?

(7) In any event do the grounds depended upon by the Plaintiff amount to gross ingratitude under the law ?

(8) If the answer to Defendant's issues are in his favour, would the Defendant be entitled to the reliefs claimed in her answer ?

After trial the Additional District Judge, Mt. Lavinia on 11.07.1989 dismissed the Plaintiff's action.

The learned President's Counsel for the Plaintiff-Appellant has placed the following submissions before us for consideration:-

(1) The learned District Judge had failed to appreciate the fact that it is not necessary to raise issues on facts that are admitted.

(2) There had been no abandonment of the ground of ingratitude.

(3) Issue No. 7 was a legal issue which should have been answered.

(4) An assault on the donor by the donee would clearly constitute an act of gross ingratitude which would entitle the donor to have a deed of gift revoked. (Inter alia the decision in *Dona Podinona Ranaweera Menike Vs. Rohini Senanayake*[1] referred to).

(5) Issue 4 could not have been disallowed by Court at the stage of judgment having allowed it to stand from the stage of framing of issues.

(6) The right to enforce forfeiture was not lost by not claiming such a right in the divorce proceedings. In any event such a right was reserved in paragraph 8 of the answer filed in D.C. Mt. Lavinia Case No. 2007/D.

The Counsel appearing for the Plaintiff-Appellant consequently urged the setting aside of the judgment and decree and the entry of a judgment in favour of the Plaintiff-Appellant.

In supporting the judgment the learned President's Counsel appearing for the Defendant-Respondent argued that the Plaintiff had quite clearly abandoned the action based on the ground of gross ingratitude and had confined himself to a forfeiture of property based on the matrimonial decree of divorce. He pointed out that the decree of divorce acted as Res Judicata in respect of this remedy. In any event, he said, since the District Judge had reserved the right to the Plaintiff to agitate this issue in a fresh action, this Court should not interfere with the judgment.

These submissions would presently be examined.

The judgment dated 11.07.1989 of the Additional District Judge, Mt. Lavinia was most unfortunate. The fact that the Judge, who by that time probably had become District Judge, Negombo, went on to sign the judgment as "District Judge, Negombo" instead of "Additional District Judge, Mt. Lavinia" shows crass indifference on his part which is perceivable even during the course of the trial as well as in his judgment.

Framing of issues in a civil case is the duty of Court. [Vide Section 146(2) of the Civil Procedure Code]. It is the issues that determine the scope and content of a tral. If a Court does not give its fullest attention to the issues framed, all the evidence led laboriously for days and days could become useless or irrelevant. Yet again, if proper issues are not framed, parties could fail to lead evidence necessary for their case since they may presume that the Court is satisfied with regard to certain matters which otherwise would have to be supported by evidence.

In this case on 25.03.1987 issue No. 4 above referred to, was raised by the Counsel for the Plaintiff-Appellant. It related to the effect of the judgment and decree entered in D.C. Mt. Lavinia Case No. 2007/D between the same parties to this case in reference to the matter in issue in this case. Issue No. 4 was objected to. The order made by Court on this matter was that the issue was allowed subject to the condition that if an order becomes necessary in respect of the objections raised, the Court would later decide upon it. Thus it is to be noted that according to the order made the reasons for allowing the issue despite the objections were to be given later if necessary. The order did not contemplate disallowing the issue. The Court in any event did not deal with the objections thereafter except in the judgment. It is curious to note that the basis on which issue No. 4 had been finally rejected in the judgment at page 180 of the brief was the same ground recorded in the proceedings at the time of the raising of issues at pages 72 and 73 of the brief, despite which ground the Judge allowed the raising of that issue. The reason given was that the matter had not been referred to in the pleadings. In fact the learned Counsel for the Defendant in the

said case had stated to Court that if a matter unreferred to in the pleadings were to be raised in issue, the Plaintiff should amend his pleadings (Vide page 73). Otherwise, he said, prejudice would be caused to the Defendant. The conduct of the Judge in this instance seems to have caused prejudice to the Plaintiff ultimately, in that the Plaintiff had no opportunity of amending his pleadings nor of organising his case on the basis that issue No. 4 had been rejected. It was the duty of the Judge in the first instance to have raised the issues. Nevertheless according to practise Counsel on both sides were allowed to raise the issues in this instance. But the moment objections were raised it was incumbent on the part of the Judge to have made a proper order either accepting the issue or rejecting the issue or suggesting a fresh issue. In fact the order seems to give the impression that a considered determination had been made in favour of accepting the issue but that the reasons for his determination in favour of the Plaintiff-Appellant would be given later if necessary. But in fact what happened was that the Judge very conveniently laid liability on the Plaintiff by stating at page 180 of the brief that the Plaintiff had failed to call upon the Court to make an order with regard to the acceptance or rejection of the issue. There was nothing for the Plaintiff to call upon Court to make an appropriate order with regard to issue No. 4 because it had already been accepted by Court and not rejected. Therefore the rejection of issue No. 4 in his judgment after trial was over, was most perplexing. It is amusing to note that the ground given for rejection is the same ground urged by the Counsel for the Defendant on 25.03.1987 and recorded in the proceedings, despite which ground he had allowed issue No. 4 to be raised. This shows that the Judge never considered the objections raised by Counsel but merely recorded them and postponed giving his attention to it until the stage of delivering his judgment. He could have rejected the issue and postponed giving reasons. Instead, by doing what he did, he has prejudiced the rights of the Plaintiff immensely. Plaintiff had a right to believe that his issue had been accepted by Court. If it was rejected he would have advised himself as to how to proceed with the trial. The Judge's conduct in this instance was reprehensible since

he himself had barred the Plaintiff from supplementing his case with such other evidence necessary to strengthen his case. Having done so he placed the responsibility for such an impasse on the Plaintiff which was unbecoming of a judicial officer.

The Plaintiff in this case was the Defendant in the Divorce case. In his answer dated 06.01.1984 filed in the Divorce case, at paragraph 8, he had reserved his rights to claim his articles in the possession of the Defendant as well as gifts given to her. The plaint in the present case was filed on 02.01.1984 nearly an year after the filing of the Divorce action and four days before the answer was filed in the Divorce action. Nothing in law barred the Plaintiff from filing such an action. The failure to seek relief to enforce forfeiture in the Divorce action cannot therefore be held to have operated as Res Judicata against him. The Plaintiff in this action was only defending in the Divorce action. He had already filed action on 02.01.1984 when he filed his answer on 06.01.1984 in the Divorce action and he had reserved his rights to enforce forfeiture separately when he filed his answer. That means, the Plaintiff by reserving his right to enforce forfeiture had opted or elected to file a separate action on that cause of action (Vide Fernando vs. Fernando[2])

Having elected to file a fresh action and reserved his rights in that respect in the Divorce action, the Plaintiff-Appellant had conducted himself in accordance with the law. There was no question of Res Judicata affecting his rights. In any event, as soon as issue No. 4 was raised and allowed by Court to remain, the Defendant-Respondent was free to have raised a counter issue based on Res Judicata. In any event, the status of parties having changed after the filing of this action and the decree in the divorce action having been admitted by both parties by the recording of the second admission that the parties were earlier married (Vide page 71 of the Brief), there was nothing wrong in issue No. 4 being admitted. No prejudice was caused to the Defendant-Respondent because she was entitled to raise counter issues which in fact she did. It is to be noted that the decree itself in case No. 2007/D had not been disputed. But issue No. 6 raised by the Defendant-Respondent dealt with the question

of the Divorce action being not contested and consequently the averments in the Defendant-Respondent's plaint in that case too going uncontested. Amended issue 6(c) raised the question whether the acts of ingratitude mentioned in the plaint in this case were in fact put in issue in the Divorce case. Issue No. 7 raised the question of the adequacy or suitability of the acts mentioned to constitute gross ingratitude in law. This was a question of law directly posed in contra position to issue No. 4. In other words, the Plaintiff-Appellant sought to argue that the decree in case No. 2007/D entitled him a right to enforce forfeiture. Issue No. 7 countered this position by saying that the acts constituting malicious desertion in the Divorce case would not amount to acts of gross ingratitude to set aside Deed No. 1169.

Thus issue No. 4 should never have been rejected in the judgment but should have been answered since it was left on the record during trial judgment. The question of sufficient documents not being furnished by the Defendant-Respondent in respect of Case No. 2007/D (of the same Court) while issue No. 4 was still on record should not have been held against the Plaintiff-Appellant. Though the Judge referred to documents P5a to P5e not being furnished, we find P5a to P5d in the record with the initials and date inserted presumably by the Judge who heard the case on 25.03.1987 (Vide pages 59 to 68 of the Brief).

Having rejected issue No. 4 the Judge dealt thereafter with issue Nos. 1, 2 and 3. He answered Plaintiff's issues Nos. 1 and 2 in the affirmative.

Then the Judge refers to the fact that the Court could raise issues even at the stage of judgment since the exact nature of gross ingratitude had not been referred to in the issues and such raising of an issue was necessary. Yet, since the Plaintiff's documents were not before Court and since the Plaintiff had not proved adequately the exact grounds of ingratitude he avoids framing an issue in that regard. There was no reason for the Judge not to have raised an issue if he deemed it so necessary,

just because he was going to answer the issue against the Plaintiff. His argument seems to be that the Plaintiff had failed to prove an act of ingratitude and therefore he should not raise an issue. This is a case where a number of admissions were recorded. Paragraphs 7, 8, 10, 11, 12, 14, 15, 16 and 18 of the plaint were admitted by the Defendant. Paragraph 18 dealt with a specific act of ingratitude. The issues raised by the Plaintiff-Appellant's lawyer were based on the admissions. If the act of assault in paragraph 18 of the plaint was accepted by the Defendant and issue Nos. 1 an 2 were answered in the affirmative, the Judge was called upon to answer issue 3 as to whether on those grounds Deed No. 1169 had to be set aside. The fact of the Defendant-Respondent admitting the act of assault should have been taken into consideration by the Judge. Instead he refers to adequate evidence not being placed before Court. At page 126 of the Brief the Defendant-Respondent stated as follows:- "මම ඒ වෙලාවෙ සීනි බෝතලයෙන් සහ සාස්පානකින් ඔහුට ගැහුවා."

V2, being the police statement allegedly made after assault by the Defendant-Respondent, is not to be found in the case record nor is it included in the Brief. V1, V3 and V4 are available. In any event at page 140, again she stated as follows:- "ඔහු ගැහැණු කෙනෙක් එක්ක ඉන්නකොට නම් මා සහ අයියා පහර දුන්නා. එතකොට මා ගැහුවා සීනි බෝතලයෙන් සහ සාස්පානකින්."

If her statement that the Plaintiff-Appellant was seen with another woman was a serious allegation made by her, the plaint filed on 22.03.1983 in case No. 2007/D might have reflected the fact that the Plaintiff was of that type. No doubt the incident of assault took place around 17.06.1983 whereas the Divorce plaint was filed on 22.03.1983. But if the Plaintiff-Appellant was a person of loose morals that fact would have been reflected in her plaint. In any event having filed a plaint for divorce against the Plaintiff in March 1983, the Defendant-Respondent could not have reacted so violently against the Plaintiff-Appellant even if he was seen with another woman. In P3 (page 56 of the Brief) which was admittedly a letter sent by the Defendant-Respondent

dated 15.11.1980 to her sister, she wrote as follows:- "නාලනී මම අරක ගැන කැමති නෑ. ලංකාවෙ කෙනෙක්ව කරනව මිනිස්සු මට හිනාවේවි ඉන්දියන් කාරයෙක් බැන්ද කියල නේද? ධම්මි මල්ලි නම් කියනව ලංකාවෙ කොල්ලෙක් වගේ නිසා ගතිගුණත් හොඳ නිසා කරන්න කියල. මම හුඟක් කල්පනා කලා පස්සෙ දැන් රත්නසිරිත් හොඳ තැනකින් බදින්නෙ. අපි මේ වගේ දේවල් කරන එක හරි නෑ කියල මට හිතෙනවා."

This letter showed that the Defendant-Respondent was contemplating marriage with another person in November 1980 whilst her marriage with the Plaintiff-Appellant was subsisting. It was only around 1982-83 that the marriage broke up. She was therefore not the type of person who could have been expected to act violently just because the Plaintiff was seen with another woman after she had filed a divorce case against him. Her conduct in going to Dubai in defiance of the wishes of her husband itself was an act which spoke much about her character (Vide page 78 of the Brief). It is therefore more probable that the Plaintiff-Appellant's explanation of what happened on the date of assault is closer to the truth. At page 81 of the Brief he said that he asked the Defendant-Respondent to return his cousin sister's jewellery and that in return he would drop this case. This led to an argument and the Defendant-Respondent hit him with a sugar bottle and a saucepan. The act of assault in any event cannot be disputed.

As for the Defendant's case whatever she said about the Plaintiff during her evidence were never put to the Plaintiff when he gave evidence. For example, the question of the Plaintiff seeing the Defendant on the road and wanting to marry her, thereafter living for 4 months with him, her conceiving without marriage, his promising to give her monies and property and her consenting to marry thereafter were all matters that were not put to the Plaintiff. The cross examination of the Plaintiff was not on the basis of the defence taken up during the Defendant's evidence.

It is in this background that issue No. 3 should have been examined by the Judge. That is, the act of assault having been

admitted by the Defendant and her state of mind during the relevant time having been brought out by her conduct, the question arose whether her act constituted gross ingratitude. Instead of answering issue No. 3 the Judge states that those who witnessed the incident of assault were not called to give evidence. The relevancy of standers-by being called to give evidence when the Defendant herself had admitted the act of assault is unclear. Confusion is further confounded when the Judge couples legal issue No. 7 with Issue No. 3 and fails to answer both. He fails to answer issue No. 5 too.

In fact the Judge does not answer any issues except the Plaintiff's issues No. 1 and 2. This is a most unfortunate judgment as stated earlier. We have no doubt that this poor specimen of a judgment should not stand.

The next question is whether the issues could have been satisfactorily answered on the evidence led.

According to the learned President's Counsel appearing for the Defendant-Respondent the admission recorded was merely the fact that the Defendant had maliciously deserted the Plaintiff. But in fact the scope of the admission was much wider. The actual translation of admission No. 1 would read as follows:- "It is admitted that the Defendant deserted the Plaintiff committing the acts of ingratitude (sic) as stated in paragraphs 7, 8, 10, 11, 12, 14, 15, 16 and 18."

Probably it meant the Defendant maliciously deserted the Plaintiff as set out in the paragraphs abovesaid. As stated earlier, paragraph 18 specially referred to the act of violence which was the basis of gross ingratitude on which this action was filed. Once that act was admitted both in the abovesaid admission as well as in evidence the question was whether such an act on the part of the Defendant constituted an act of gross ingratitude in terms of the law. The Counsel for the Defendant-Respondent submitted that the ground of gross ingratitude was abandoned. If that be so issue No. 3 could not have read "If the answers to above issues are in the affirmative is the Plaintiff entitled to have

the Deed of Gift No. 1169 set aside"? If in fact issue No. 4 on forfeiture of property by reason of the matrimonial decree was the only ground limited to, then the earlier issue No. 3 could not have asked for the setting aside of the deed of gift on the basis of issues 1 and 2. Clearly the ground of gross ingratitude was very much a basis of this case. There was no abandonment of such a ground. The necessity to expatiate on the act of gross ingratitude the Plaintiff depended upon did not arise since the act itself was admitted. Thus the sequence of issues were (i) Was a deed of gift executed? (ii) Was it based on love and affection? (iii) If so, in view of the admission relating to an act of violence committed and the decree of divorce based on malicious desertion was the deed entitled to be set aside?

We may deal with this third issue at this stage. The examination of the third issue would necessitate an answer to legal issue No. 7 too which dealt with the adequacy of the act of violence mentioned amounting to an act of gross ingratitude.

In *Dona Podi Nona Ranaweera Menike vs. Rohini Senanayake* (supra) it was held by the Supreme Court that a donor was entitled to revoke a donation on account of ingratitude-

(i) if the donee lays manus impias (impious hands) on the donor and/or.

(ii) if he does him an atrocious injury and/or.

(iii) if he willfully causes him great loss of property and/or.

(iv) if he makes an attempt on his life and/or.

(v) if he does not fulfill the conditions attached to the gift and/ or.

(vi) other equally grave causes.

It was also held that ingratitude was a form of mind which had to be inferred from the donee's conduct and such an attitude of mind will be indicated either by a single act or a series of acts.

Chief Justice Basnayake stated in *Krishnasamy vs. Thilaiampalan*[3] at 269 as follows:-

"There is nothing in the books which lays down the rule that a revocation may not be granted on the commission of a single act of ingratitude."

In the background of the Defendant-Respondent leaving for Dubai much against the wish of the Plaintiff-Appellant, her considering another marriage when her first marriage was still subsisting, her removing articles belonging to the Plaintiff-Appellant (this fact being corroborated by witness Agalawatte) when the Plaintiff-Appellant was not at home, her failure to refer to plausible grounds for divorce in her plaint and divorce itself being granted on the evidence of the Plaintiff-Appellant on the ground of malicious desertion by the Defendant-Respondent, the assault on the Plaintiff-Appellant after the divorce action had already been filed by the Defendant-Respondent - there is no doubt that the Defendant-Respondent laid impious hands on the Plaintiff and wilfully caused the Plaintiff-Appellant great loss of property both of which are acts of gross ingratitude. The act of hitting a man 54 years' old and 21 years older than herself with a sugar filled bottle and saucepan could even be considered as an attempt on the life of the Plaintiff-Appellant though sufficient evidence in this regard was not furnished. The Judge therefore had ample grounds to hold that an act of ingratitude had been committed by the Defendant-Respondent. With the necessary intention to cause him harm established coupled with the decree of divorce based on malicious desertion granted in favour of the Plaintiff-Appellant D.C. Mt. Lavinia case No. 2007/D issue No. 3 should have been answered in the affirmative. [Vide *Mulligan vs. Mulligan*[4] at 182].

Issue No. 4 based on the matrimonial decree entered in D.C. Mt. Lavinia Case No. 2007/D was only an additional ground for setting aside deed No. 1169. In view of the adequate material in the form of admissions and evidence to answer issue No. 3 in the affirmative, the necessity to answer Issue No. 4 would not arise.

As for issue No. 5 there was the evidence of the Plaintiff corroborated by witness Agalawatte that all goods mentioned in the 2nd and 3rd schedules to the plaint were removed by the Defendant on 09.09.1982. (Vide pages 80 and 107 of the Brief). P4 and P7 confirm such evidence. Thus issue No. 5 could have been answered in favour of the Plaintiff-Appellant in the affirmative.

As for issue 6(a) there is evidence that the Divorce case was decided inter partes. Attorneys-at-Law had appeared on behalf of the Plaintiff and Defendant and parties themselves were present in Court when trial was concluded on 09.05.1986. (Vide P5c). Similar evidence given by the Defendant in that case could have been given by the Plaintiff in that case too if both were interested in a divorce, particularly because it was she who had filed the case. But we have to presume that the Defendant in that case (the Plaintiff-Appellant in this case) was not prepared to take any liability for the break down of the marriage and hence gave evidence himself. The fact that both had prayed for divorce and the Plaintiff was interested in going abroad in a hurry meant nothing. She could herself have given uncontested evidence and gone abroad. It is to be presumed that she could not do so because she was the guilty spouse and the innocent spouse was not prepared to give in. The Plaintiff in that case going to Dubai in January 1979 and on subsequent occasion too was objected to by the Defendant in that case. Yet she went.

On 09.09.1982 the Plaintiff in that case had left the matrimonial residence. Since all efforts to reconcile had failed, her act was construed as malicious desertion. The fact that the marriage failed because of the conduct of the Defendant-Respondent in this case was confirmed when as admission was entered accepting a number of paragraphs in the plaint filed in this case including paragraph 18 which dealt with the assault. Thus the answers to issues 6(a) and 6(b) would be "not proved." As for the benefit the decree in the Divorce case had in this case, [issue 6(c)] it was relevant only if Issue No. 4 was to be considered in earnest. Since the answer to issue No. 3 had

already been held in favour of the Plaintiff-Appellant the answer to issue 6(c) would be "irrelevant."

There is no doubt that the legal issue No. 7 should have been answered in the affirmative in favour of the Plaintiff-Appellant since it is related to issue No. 3. Case law have already been referred to in this regard. Issue No. 8 would then have to be answered in the negative.

Summarising our answers to the issues left unanswered by the Judge, we give them below on the basis of the evidence led:-

(3) Yes.

(4) Does not arise.

(5) Yes.

(6) (a) Not proved

(b) Does not arise

(c) Irrelevant

(7) Yes.

(8) No.

We therefore allow the appeal and set aside the judgment dated 11.07.1989 delivered by the Additional District Judge, Mt. Lavinia (erroneously referring to himself as District Judge, Negombo at the end of the judgment) and instead enter judgment as prayed for setting aside Deed of Gift No. 1169 dated 26.05.1978 attested by Brahmanage Elmo St. Ivor Perera, Notary Public, Colombo. The Defendant-Respondent shall pay the incurred costs of litigation both in the Original Court and the Court of Appeal. Enter decree accordingly.

TILAKAWARDANE, J. - I agree.

Appeal allowed.