fact; as to the inferences to be drawn from these facts, an appellate tribunal is placed in no less advantageous a position than the Court below to arrive at a correct conclusion.

In my opinion there is one circumstance which tips the balance in favour of the defendant, and to which insufficient weight has been given by the learned Commissioner. Whereas on the one hand the tenant had signally failed in his endeavours to find alternative accommodation for himself and his family, the landlord has been more fortunate. Shortly after giving notice to quit, the landlord has succeeded in taking on rent a house in Talangama for his wife and daughter, and from there the child, who is a Roman Catholic, has attended St. Bridget's Convent as a student. Arrangements have been made for taking the child to and from school each day, and although these are not ideal they seem to me to be not inadequate having regard to the difficulties of the present time. Certain minor inconveniences which the plaintiff complains of are surely insignificant when they are compared with the hardships to which the defendant and his family would be subjected if they were ejected from their house with nowhere else to go. In my opinion the claims of a tenant who has failed, in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord whose family does at least possess a home in which they can continue to live. It was suggested at the trial that the defendant could take up residence in the house at Talangama which the plaintiff's wife and daughter now occupy. If that could have been definitely arranged, the defendant would have been unreasonable in refusing to vacate the house in Nugegoda. No such proposal was however made to the defendant before the trial commenced, and at the trial the owner of the Talangama house was extremely non-committal on the point.

In my opinion the plaintiff has failed to establish his claim to be restored to possession of the house in Nugegoda. I therefore allow the appeal and enter decree dismissing the plaintiff's action. The defendant is entitled to his costs of appeal, but as he failed in the lower Court to establish his claim in reconvention in regard to alleged "excess" rent, each party will bear his own costs of trial.

Appeal allowed.

1950 *Present:* Jayetileke C.J. and Pulle J.

ANNAMMAH, Appellant, *and* SUBRAMANIAM, Respondent

S. C. 436—D. C. Jaffna, 462

Divorce action—Non-appearance of defendant—Decree nisi—Requirement of personal service of notice—Civil Procedure Code, ss. 85, 596, 604.

Where owing to the non-appearance of defendant a decree *nisi* is entered in favour of the plaintiff in a matrimonial action the procedure laid down in section 85 of the Civil Procedure Code must be followed and notice of the decree *nisi* must be served personally on the defendant, unless the Court directs some other mode of service.

APPEAL from an order of the District Court, Jaffna.

H. V. Perera, K.C., with *T. Somasunderam*, for defendant appellant.

N. E. Weerasooria, K.C., with *V. K. Kandaswamy*, for plaintiff respondent.

Cur. adv. vult.

May 4, 1950. PULLE J.—

The appellant is the wife of one Sittampalam Subramaniam who instituted this action against her on 8th June, 1949, for dissolution of their marriage on the ground of malicious desertion. On the 27th August, 1948, after *ex parte* trial decree *nisi* dissolving the marriage was entered and it was made absolute on the 29th November, 1948.

On the 6th January, 1949, the appellant moved that the decree *nisi* and decree absolute be set aside and she be allowed to file answer on the ground that she was not aware of the institution of the action. The present appeal is from the order of the learned District Judge dismissing her application.

At the hearing the principal issue was whether summons was served on the appellant by the process server, Isthai Selvadurai, on the 23rd June, 1948, on being pointed out by the plaintiff. The learned District Judge, upon a consideration only of the evidence touching the facts immediately connected with the alleged service of summons and of the circumstances in which, according to the appellant, she became aware of the proceedings, held against the appellant. In appeal it was contended that the Judge confined himself to a narrow field of facts and failed to appreciate the relevancy of a cogent body of evidence which rendered it highly improbable that the appellant would not have contested the action had she been made aware of it by the service of summons.

The parties were married in 1920 and according to the respondent they lived as husband and wife happily till the end of September, 1942, when the defendant maliciously deserted him. It is admitted that at the time of the institution of the action the respondent was living in adultery with one Nagapper Parwathypillai by whom he had seven children. The adulterous association had lasted over a period of twenty years and it is not devoid of significance that both the plaint and the evidence given at the *ex parte* trial are silent as to the respondent's own infidelity. The position taken up by the respondent that he thought of obtaining a divorce because the appellant was not consenting to live with him had to be carefully tested by the learned Judge in the light of the admission that the respondent was about this time anxious to legalise by marriage his association with Parwathy. A desire on his part to avoid protracted proceedings in which he would have had not only to establish a charge of desertion against his wife but to justify his own misconduct was, in my opinion, a sufficient inducement to keep the appellant ignorant of the proceedings. The appellant's story sounds natural and true that she became aware of the case through the witness Kandiah only after the respondent had given notice of his marriage with Parwathy. Kandiah was a witness to the notice of marriage dated 3rd January, 1949. I find

it difficult to believe that on receiving summons the appellant remained indifferent to the assertion of her rights as the wife of the respondent. Having regard to all the circumstances of the case I am of opinion that the finding that summons was served on the appellant is unreasonable and cannot be supported.

At the argument in appeal the point was raised whether the decree *nisi* and the decree absolute entered under Chapter XLII of the Civil Procedure Code could stand in view of the failure to comply with section 85 of the Code which requires that upon an *ex parte* hearing the decree *nisi* shall be served personally on the defendant, unless the Court directs some other mode of service. It is conceded that after the *ex parte* hearing on the 27th August, 1948, the procedure laid down in section 85 was not followed. There is nothing in Chapter XLII from which one is entitled to infer that the imperative provisions in section 85 are not applicable to matrimonial cases. On the contrary section 596 provides that " the procedure generally in such matrimonial cases shall (subject to the provisions contained in this Chapter) follow the procedure hereinbefore set out with respect to ordinary civil actions ". If in an action respecting property it is necessary that a defendant should have notice of a decree passed against him in his absence, the grounds are very much stronger for holding that the same procedure should be followed in an action for dissolution of marriage resulting as it does in the alteration of the status of the parties. I am, therefore, of the opinion that the decree *nisi* and the decree absolute passed under section 604 are void and of no effect.

I would, therefore, set aside the decree *nisi* and the decree absolute dissolving the marriage and remit the case to the learned District Judge with directions to allow the appellant to file answer and to try the action in due course. The appellant will be entitled to the costs of appeal and the costs of the proceedings in the District Court on the 9th March, 1949.

JAYETILEKE C.J.—I agree.

Decree set aside.

1949 *Present* : **Basnayake J.**

EDIRISINGHE, Petitioner, *and* DISTRICT JUDGE OF MATARA, Respondent

S. C. 49—IN THE MATTER OF AN APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION AGAINST L. B. DE SILVA, THE DISTRICT JUDGE OF MATARA

Writs of Certiorari and Prohibition—Obstruction to Commissioner in partition action—Inquiry—Bail—Jurisdiction of District Court—Civil Procedure Code, s. 839.

Petitioner was alleged to have obstructed a Commissioner who had been directed to sell land in a partition action. The District Judge fixed the matter for inquiry and directed the petitioner to furnish bail in a sum of Rs. 500 to ensure his attendance in Court.

Held, that the Court had inherent jurisdiction under section 839 of the Civil Procedure Code to inquire into the matter.

Held further, that the Court had no power to order bail.