IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal from the Judgment of the Court of Appeal.

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Plaintiff

SC APPEAL No. 41/ 2008
SC / SPL/ LA No. 61/2008
Court of Appeal No. 1096/96 (F)
D.C.Homagama No. 235/P

Vs

1. M.P.Perera, 202/1, Hokandara North, Hokandara. (Deceased)
1A. T.Ariyawathie, 199/2, Kahantota Road, Malabe.
2. H. Nandawathie, 199/1, Kahantota Road, Malabe.
3. Meemanage Gunadasa Perera 191/1, Hokandara North, Hokandara.
4. H.E.Caldra, 229, Kanatte Road, Malabe. (Deceased)
4A. H. Sunil Caldera, 229, Kanatte Road, Malabe.

Defendants

AND BETWEEN

3. Meemanage Gunadasa Perera,
191/1, Hokandara North,
Hokandara.

4A. H. Sunil Caldera,229,Kanatta
Road, Malabe.

Defendant Appellants

Vs

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Plaintiff Respondent

1A. T.Ariyawathie, 199/2,
Kahantota Road, Malabe.

2. H. Nandawathie, 199/1,
Kahantota Road, Malabe.

Defendant Respondents

AND NOW BETWEEN

Vithanage Richard Perera,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.
(Deceased)

Perumbulli Achchige Sopihamy,
No. 268, Rathnarama Road,
Hokandara North, Hokandara.

Substituted Plaintiff Respondent Appellant

Vs

3. Meemanagamage Gunadasa Perera,
191/1, Hokandara North,
Hokandara.
4A. H. Sunil Caldera,229,Kanatta
Road, Malabe.

Defendant Appellant Respondents

1A. T.Ariyawathie, 199/2,
Kahantota Road, Malabe.
2. H. Nandawathie, 199/1,
Kahantota Road, Malabe.

Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
VIJITH K. MALALGODA PCJ. &
MURDU FERNANDO PCJ.

COUNSEL : Nihal Jayamanne PC with Dilhan de Silva for the Substituted Plaintiff Respondent Appellant.

Edward Ahangama for the 1A Defendant Respondent Respondent.

Dr. S.F.A. Cooray for the 3rd and 4A Defendant Appellant Respondents.

ARGUED ON : 02.07.2018.

DECIDED ON : 03.08.2018.

S. EVA WANASUNDERA PCJ.

This appeal arises out of a judgment of a Partition case before the District Court. The District Judge delivered the judgment as prayed for by the Plaintiff. Then being aggrieved by the said judgment the 3rd and 4A Defendants appealed to the Court of Appeal. The Court of Appeal delivered judgment setting aside the Judgment of the District Judge and directing that the case be sent back for trial de novo. The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) is now before this Court having obtained Special Leave to Appeal from this Court on 09.05.2008 on one question of law which was formulated before this court which reads as follows:

" Whether a party who fails to tender to Court the documents marked by him at the trial is entitled to assail the findings of the trial judge on the basis that such party's documents had not been considered?"

The Appeal was argued before this Court and the written submissions also have been filed by the contesting parties.

The Plaintiff filed action to partition a land in the Schedule to the Plaint. This Schedule contains three schedules to be taken together for partition. The first schedule does not refer to a survey plan but explains the extent as " a land with a length of 186 feet and with a with of 75 feet". The second schedule refers to a land of an extent of 09.03 Perches marked as Lot 1 of Plan 1801 dated 13.11.1982 made by E.A.Wijesuriya Licensed Surveyor. The third schedule refers to a land of an extent of 18.2 Perches marked as Lot 2 in Plan No. 25 dated 21.08.1984 made by D.S.S. Kuruppu Licensed Surveyor. Court issued a commission on a court commissioner surveyor and a Preliminary Plan was done.

The said Preliminary Plan is at page 64 of the Appeal brief. It is Plan No. H/4/ 87 dated 30.03.1987 and made by S.M.Bernard Joseph. The report of the surveyor is also annexed. This Plan was marked as X at the trial. Plan X comprises of three Lots marked as A, B and C. Lots A and B were claimed by the 1st and 2nd Defendants and Lot C was claimed by the Plaintiff. Lot A was 18.00 Perches, Lot B was 09.65 Perches and Lot C was 28.50 Perches. The whole land , which is the subject matter of the action was therefore of an extent of One Rood and 16.15 Perches. In Lots A and B,

there are two dwelling houses of the 1st and 2nd Defendants. When the case was taken up for trial parties had raised seven issues on which the District Judge had to determine the Partition action. The Plaintiff gave evidence and marked documents P1 to P7 and the wife of the 1st Defendant, the wife of the 3rd Defendant, the 4th Defendant H.E.Caldera himself as well as the Surveyor Wijesooriya gave evidence on behalf of the Defendants and altogether documents V1 to V5 were produced at the trial. The trial Judge ordered that Written Submissions of the Parties and Marked Documents should be filed by 25.01.1994.

The parties kept on moving for dates to file them and court also had granted time. The Court was informed of the death of the 4th Defendant and the substitution was done on 12.01.1995. The judge who heard the trial had been transferred. The same judge was appointed by the Judicial Service Commission on 09.07.1996 to write the judgment.

The **Defendants had filed written submissions *without the documents* on 09.01.1996** according to the Journal Entry No. 47. The **Plaintiff had filed written submissions *with the documents* P1 to P7** on 12.03.1996 according to the journal entry No. 49. The court record of the case was sent to the Judge to write the judgment.

The Judgment of the District Judge was pronounced in open Court on 10.10.1996. The Judge had granted relief as prayed for by the Plaintiff, namely an undivided ½ share to the Plaintiff, an undivided 9.3 Perches to the 1st Defendant and an undivided portion of an extent of " ½ share minus 9.3 Perches" to the 2nd Defendant. The dwelling houses should be included into the share on which they are situated. The Judge directed that decree be entered in that manner.

Within the body of the written judgment of the District Judge, the learned Judge had mentioned that **she had not considered the documents of the Defendants because they have failed to submit the same with the written submissions**.

The 3rd and 4A Defendants who did not get any shares in the judgment of the District Judge made an Appeal to the Court of Appeal submitting that the District Judge had not given due consideration to the evidence led by the Defendants and that the Judgment had been delivered in the absence of the documents of the

Defendants. It was the position of the Appellants before the Court of Appeal that the **Judge had failed to call for the Defendants' documents.**

When the Judge of the Court of Appeal who wrote the Judgment in the Court of Appeal had perused the record, he had found that the learned trial judge had not considered the points of contest before the District Court and had failed to answer them at all which is a breach of Section 187 of the Civil Procedure Code.

Section 187 of the Civil Procedure Code reads:

'The Judgment **shall** contain a concise statement of the case, **the points for determination, the decision thereon, and the reasons for such decision**; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.'

Accordingly, a trial judge **should answer the issues** raised. In the case in hand there had been 7 issues raised by both the Plaintiff and the Defendants, **none of which was specifically considered and** answered by the trial judge in her judgment.

In the case of ***Warnakula Vs Ramani Jayawardena 1990 1 SLR 206*** , it was held that "Bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil Procedure Code. The evidence germane to **each issue** must be reviewed or examined. The Judge must **evaluate and consider** the **totality** of the evidence. Giving a short summary of the evidence of the parties and witnesses and stating that he **prefers to accept the evidence of one party** without giving reasons **are insufficient**." In the case of ***Jamaldeen Abdul Latheef Vs Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** also, the same matters were further stressed on.

Even though the Appellants had not argued this point of the trial Judge not having answered the issues raised by both parties, any Court in Appeal cannot turn a blind eye to that fact. It is the very basic point in writing a judgment. It is so important that it is the accepted procedure that when **issues are raised**, the pleadings go to the background and the case is heard based on the points of contest meaning the issues raised by parties after putting down the admissions. It is a mandatory provision.

However, the trial judge in her judgment had stated that because of the fact that the Defendants had not tendered the documents marked at the trial through the witnesses of the Defendants with the written submissions filed in Court , she has had no opportunity to consider them and as such those documents have not been considered by her. It was argued before the Court of Appeal that it is the duty of the trial judge to call for the said documents. I am of the view that documents are the essential part of the evidence for any party to a case due to the reason that any genuine document proven at the trial speaks much more than the oral evidence. If and when the judge herself has stated that she has not considered the documents for whatever the reason adduced for acting in that manner, such a judgment has to be taken as flawed.

In the case of ***Podiralahamy Vs Ranbanda 1993 2 SLR 20***, it was held that;
" There is a duty on Court to take the documents tendered and marked at the trial to its custody and keep them filed of record. Documents marked in evidence become part of the record."

Section 154(1) of the Civil Procedure Code reads:

'Every document or writing which a party intends to use as evidence against his opponent **must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to** by a witness. If it is an original document already filed in the record for some other action, or the deposition of a witness made therein, it must previously be procured from that record by means of and under an order from, the court. If it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy thereof shall be used in evidence instead.'

Thus it is clear that the moment the witness speaks about the document, it should be marked and tendered by that party to Court. Thereafter it is part of the court record. Yet, in the recent past, the practice of court is that after marking the document through the witness, the marked document is then and there signed by the Judge and then given back to the Counsel/Attorney at Law who marks the document through the witness, to be submitted to Court later with the written submissions. That is what has happened in the present case.

Thereafter the Defendants lawyer tendered the written submissions without the documents. Yet, the judge should have acted according to the provisions of the Civil Procedure Code and should have recognized and kept in mind that the marked documents are held in law to be part and parcel of the record.

The trial Judge should have called for the Documents marked by the Defendants when she noticed that they had not been tendered to Court with the written submissions. If the trial Judge demanded the same from the Defendants or their Attorney at Law on record, the documents would have reached the Judge in no time. It is a lapse on the part of the Defendants but it is curable before the commencement of writing the judgment. It is in the hands of the trial Judge. Even though, in this instance, the Judge was physically away from the Court in which the trial in this case was heard, having had to work in another station on transfer, the Judge should have called for the Documents from the Defendants lawyer on record through the Registrar of the Court. I find that the Judge had not correctly recognized the position and had not made any effort to get down what the court was in law entitled to receive. She had failed in her duty.

Even though the parties are before Court with regard to problems regarding their private legal entitlements under the law, when any action is before Court, the Judge has to take charge of the matter and act according to procedural provisions as well as substantial law. The final word is held by the Judge and she had to get herself equipped with what was necessary to write the judgment. Unfortunately, the trial Judge had taken it as a lapse on the part of the Defendants and not considered the Documents which were not tendered and held against them as well.

The Defendants who were the Appellants before the Court of Appeal had even suggested to the Appellate Court to consider the documents which they had later tendered when the Appeal was filed. The Appellate Court cannot act as a trial court and therefore these documents have to be looked into by a trial judge. That is the correct reason for the Court of Appeal Judges to have ordered trial de novo.

The Defendants who had failed to tender the marked documents of theirs with the written submissions to Court for whatever reasons are yet entitled to assail the findings of the trial Judge for not having considered the documents marked by and on behalf of them before the trial Judge because the said documents had become part and parcel of the court record which the Judge should have taken care of from the day they were marked in Court. The Judge had failed to demand from the Defendants to submit them to Court at whatever stage before she launched to write the Judgment.

I answer the question of law aforementioned **against** the Substituted Plaintiff Respondent **Appellant** and in favour of the 3rd and 4A Defendant Appellant Respondents and 1A and 2nd Defendant Respondent Respondents. I affirm the judgment of the Court of Appeal.

The Appeal is dismissed . However I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.
I agree.

Judge of the Supreme Court