

PERERA
v
CALDERA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 1096/96 (F)
DC HOMAGAMA 235/P
AUGUST 27, 2007

Civil Procedure Code – S114 (3) – S154 (3) – S187 – Documents marked become part of the record – Should Court call for documents? Answering of issues – Bare answers – adequate ?

Held:

- (1) The absence of answering the points of contest in a judgment – would amount to a clear breach of S187.
- (2) The points of determination and the decision thereon needs to be embodied in the judgment which would refer to the reasons for such decision.

- (3) There is a duty on Court to take the documents tendered and marked at the trial to the custody and keep them filed of record – documents marked in evidence become part of the record.

Per Anil Gooneratne, J.

“There seems to be a serious lapse in this case where a judgment has been pronounced without documents being considered by the original Court, and it would be no excuse for a trial Court Judge to observe on the judgment that the defendant had not tendered the marked documents to Court. The District Judge should call for those documents”.

APPEAL from the judgment of the District Court of Homagama.

Case referred to:-

- (1) *Podiralahamy v Ran Banda* – 1993 – 2 Sri LR 20.
- (2) *Dona Lucihamy v Ciciliyanahamy* – 59 NLR 214
- (3) *Warnakula v Ramani Jayawardane* – 1990 1 Sri LR 207

November 27, 2007

ANIL GOONERATNE, J.

This appeal arises in a partition case from the Judgment of District Judge, Homagama dated 4. 10. 1996. In the Judgment it is stated that parties proceeded to trial on 7 points of contest. Plaintiff had produced plan marked ‘x’ and two deeds marked P1 & P2. In the Judgment the learned District Judge states that the documents produced in evidence by the defendants had not been tendered to Court. In the petition of Appeal it is also averred *inter alia* that the learned trial Court Judge had not given due consideration to the evidence led by the defendants and the Judgment had been delivered in the absence of the document of the defendants. It is the position of the appellants that the Judge had failed to call for the defendant-appellants’ documents.

On a perusal of the Judgment I find that the learned Trial Court Judge had not considered the points of contest. In the absence of answering the points of contest in a judgment would amount to a clear breach of section 187 of the Civil Procedure Code.

In paragraph 7C of the Petition of Appeal it is averred that court made order for *lis pendens* on 21. 7. 1988 and 9. 3. 1989 but there is no compliance with the court order.

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There seems to be a serious lapse in this case where a judgment had been pronounced without documents being considered by the Original Court and it would be no excuse for a trial Court Judge to observe in the Judgment that the defendant had not tendered the marked documents to Court. The District Judge should call for those documents. In *Podiralahamy v Ran Banda*.⁽¹⁾ 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," and

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At pg. 21 - The provision of section 154 (3) reads as follows:-

"The document or writing or being admitted in evidence the Court, after marking it with a distinguishing mark or letter by which it should when necessary be ever after referred to throughout the trial." . . .

The explanation to the subsection reads as follows:-

" Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it and if not earlier marked on the account, it must at least be marked when the Court decides upon admitting it".

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In the instant case the defendant-appellant's documents D1 to D10 were not only marked but also led in evidence without any objection from the opposing party. Those documents have been admitted; therefore the Court in terms of the provisions of section 114(3) should have kept them in its custody. If was for convenience the Court had allowed the Attorney-at-Law to the defendant-appellant to retain the documents during the trial, there was a duty cast on the learned District Judge to call for the documents.

The learned Counsel or the appellant cited an unreported authority CA/SC No. 63/76(F) D.C. Kurunegala No. 357/LCA minutes of 25.10.1984, where Justice Atukorala observed: "we are of the view that documents once marked in evidence become part of the record and should remain the custody of Court."

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The Judgment gives no indication to the points of contest raised at the trial. Even the bare answers to points of contest although not permissible and not suggested or answered by the original court would make this a bare judgment without the required requisites in term of section 187 of the Civil Procedure Code. The Appellate Court should be in a position to glance through the answers given to the points of contest before examining the reasons for same, and should not be called upon to re-write the judgment of the Original Court to fill in the gaps by suggesting that no prejudice would be caused to the parties notwithstanding the bare answers to issues. In the instant case not even the bare answers are incorporated in the judgment of the Original Court. Section 187 of the Code reads thus....

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"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."

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The points for determination and the decision thereon needs to be embodied in the Judgment, which should refer to the reasons for such decision. I am inclined to follow the decision on requisites of Judgment reported in *Lucyhamy's Case*⁽²⁾ and *Warnakula v Ramani Jayawardene*⁽³⁾.

The Court is not inclined to deviate from the usual and normal practice of answering the issues or points of contest.

In the circumstances there is no need to examine the merits of this case in the absence of mandatory requirements which have not been complied with by the Original Court. Therefore I set aside the Judgment of the learned District Judge and send the case back for trial *de novo*. Subject to this direction this appeal is allowed with cost.

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EKANAYAKE, J. - I agree.

Appeal allowed.

Trial de novo ordered.