

**STASSEN EXPORTS LIMITED V. BROOKE BOND GROUP LTD.,  
AND TWO OTHERS**

SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, J.

MARSOOF, P. C. J., AND

BALAPATABENDI, J.,

S. C. (CHC) APPEAL NO. 48/1999

H.C. NO. 33/96 (3)

D. C. (COLOMBO) NO. 3411/SPL.

OCTOBER 22<sup>ND</sup>, 2007

***High Court of the Provinces (Sp. Pro) Act -10 of 1996 - Section 2 (1), Section 10 - Code of Intellectual Property Act - Sections 130 (1), 130 (2), 172 (2), 172 (4), 174 and 176 - Evidence Ordinance - Sections 31, 61, 64, 65, 74, 77, 76, 167 and 176 - Civil Procedure Code - Section 110 - No belated objections to production of documents. - Best Evidence?***

This was an appeal from a decision of the Commercial High Court of Colombo dated 22.10.1999 whereby the learned High Court Judge dismissed the action filed by the plaintiff-appellant seeking to remove from the register maintained by the Registrar of Trade Marks under the now repealed Code of Intellectual Property Act No. 52 of 1979, as subsequently amended, the trade mark bearing No. 12307 registered in the name of the 1<sup>st</sup> Defendant - Respondent, Brooke Bond Group Ltd., of Watergate, London, United Kingdom, and currently licensed to the 2<sup>nd</sup> Defendant - Respondent, Brooke Bond (Ceylon) Pvt. Ltd.

The essence of the dispute was whether the words "Red Label" used with the 'Brooke Bond' trade mark bearing No. 12307 was sufficiently distinctive, so as to prevent the appellant using the words 'Red Medal' with its trade mark bearing No. 53509.

**Held**

- (1) An affidavit tendered in terms of Section 176 of the Code of Intellectual Property Act, is obviously much more than prima-facie evidence of the facts adverted therein, and in the absence of any objections to its admission in evidence and directions to the contrary made by Court, it has to be treated as the examination-in-chief of the witness.

- (2) As no objection was taken by the 1<sup>st</sup> defendant – respondent to the affidavit of D.H.S. Jayawardene dated 11.10.1997 which was tendered in evidence under Section 176 of the Intellectual Property Act along with documents marked A1 to A52 they add up to admissions recorded in favour of appellant.
- (3) Since the documents marked A1 to A52 had been read in evidence at the close of the appellant's case without any objection from Brooke Bond, they cannot legitimately be objected to thereafter on the next date.

Per Saleem Marsoof, J., -

“ . . . . . Jayawardana has in paragraph 1 of his affidavit expressly declared that he deposes to the facts contained therein from his personal knowledge and from documents available to him, copies of which he has produced marked A1 to A52. In his brief cross-examination of Jayawardana, learned Senior Counsel for Brooke Bond made no endeavor to probe the extent of the witness personal knowledge of matters deposed to by him in the affidavit, and the strange proposition that he had absolutely no personal knowledge of any of such matters was never put to him in cross-examination. In these circumstances, I am of the opinion that it is not reasonable to conclude from this cross-examination that Jayawardana had no personal knowledge of the matters he had deposed to in the affidavit, and to refuse to consider the contents thereof in deciding the case at hand. I hold that the learned Commercial High Court Judge had no justification for the rejection of the affidavit in this manner.”

- (4) Section 31 of the Evidence Ordinance which applies to informal or casual admissions, testimony relating to which may be led at the trial, has no relevance to formal or judicial admissions recorded at the trial.
- (5) Although according to Section 61 of the Evidence Ordinance, the contents of documents may be proved either by primary or by secondary evidence, it is expressly provided in Section 64 of the Ordinance, that the documents must be proved by primary evidence except in the specific instances provided in Section 65 of the Ordinance, as in cases in which secondary evidence relating to documents may be given.

- (6) It is trite law that as Samarakoon, C.J., observed in *Sri Lanka Ports Authority and another vs. Jugoliniya – Boat East* [1981] 1 SLR 18 at 23 – 24 that, “If no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law.” This is the *cursus curiae* of the original Courts.
- (7) Since judicial proceedings are conducted in public (except in exceptional cases where for some good reasons evidence has to be recorded in camera) the judicial process has to be transparent, a case record is very much a “public document” which any member of the public has the right to inspect. Accordingly, certified copies of whole or part of the record may legitimately be tendered in evidence under Section 77 of the Evidence Ordinance.
- (8) Certified copies issued by the Office of the Registrar of Patents and Trade Marks in terms of Section 174 of the Code of Intellectual Property Act, are available as prima facie evidence.

Per Saleem Marsoof, J., -

“Section 110 of the Civil Procedure Code makes it possible for a Court, of its own accord, or upon an application of any of the parties to an action, to send for, either from its own records, or from any other Court, the record of any other action or proceedings and inspect the same.” However, this provision has to be used sparingly and with caution. In fact the practice of calling for the record is not encouraged as the removal of the record from its proper place would make it impossible for others to use the record and there is also serious risk of loss of record or documents contained therein. . . . .”

**Cases referred to:-**

- (1) *Joses v. Randall*, Cowp. 17
- (2) *Hennet v. Lyon*, 1 B & Ald 182
- (3) *Mortimer v. M’Callan* 6 M & W 58
- (4) *Doe v. Roberts*, 13M & W 523
- (5) *Kowla Umma v. Mohideen* (1938) 39 NLR 454
- (6) *The Attorney General v. Geetin Singho* (1956) 57 NLR 280
- (7) *Buddhadasa v. Mahendran* (1957) 58 NLR 8

- (8) *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East* (1981) 1 SLR 18
- (9) *Silva v. Kindersle* (1915 – 1916) 18 NLR 85
- (10) *Adicappa Chettiar v. Thomas Cook and Son* (1930) 31 NLR 385
- (11) *Perera v. Seyed Mohomed* (1957) 58 NLR 246
- (12) *Balapitiya Gunananda Thero v. Talalle Methananda Thero* (1997) 2 SLR 101
- (13) *Cinemas Ltd., v. Sounderarajan* (1998) 2 SLR 16

**AN APPEAL** from the Judgment of the Commercial High Court of Colombo.

*Ben Eliyathambi, P.C., with Gomin Dayasiri and Priyanthi Goonerathne* for the Appellant.

*Avinda Rodrigo with Manoj de Silva* for the Respondent.

*Cur. adv. vult.*

March 15<sup>th</sup> 2010

**SALEEM MARSOOF, J.**

This is an appeal from a decision of the Commercial High Court of Colombo dated 22<sup>nd</sup> October 1999 dismissing the action filed by the Plaintiff-Appellant (hereinafter referred to as the “Appellant”), seeking *inter alia* to remove from the register maintained by the Registrar of Trade Mark under the now repealed Code of Intellectual Property Act No. 52 of 1979, as subsequently amended, the trade mark bearing No. 12307 registered in the name of the 1<sup>st</sup> Defendant-Respondent, Brooke Bond Group Ltd of Watergate, London, United Kingdom, and currently licensed to the 2<sup>nd</sup> Defendant-Respondent, Brooke Bond (Ceylon) Pvt Ltd. It is common ground that Brooke Bond Group Ltd is a company duly incorporated in the United Kingdom and was previously named and known

as Brooke Bond Liebig Ltd. and Brooke Bond Group PLC respectively. It is also an admitted fact that Brooke Bond (Ceylon) Pvt Ltd. was, on the date the original action was filed, a wholly owned subsidiary of Brooke Bond Group Ltd. The essence of the dispute was whether the words 'Red Lable' used with the 'Brooke Bond' trade mark bearing No. 12307 was sufficiently distinctive so as to prevent the Appellant using the words 'Red Medal' with its trade mark bearing No. 53509.

The action, which was originally filed in the District Court of Colombo in 1991 and was pending at the time of the "appointed date" specified in the order made under Section 2(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, stood "removed" to the Commercial High Court of Colombo as contemplated by Section 10 of the said Act. The Appellant in the main sought a declaration in terms of Section 130(1) of the Code of Intellectual Property Act that the registration of the said trade mark bearing No. 12307 is null and void and a further declaration in terms of Section 132(1) of the said Code that the said trade mark be removed from the Register of Trade Marks. Additionally, the Appellant had also prayed that the entries pertaining to the successive proprietorships of Brooks Bond Liebig Ltd., Brooke Bonds PLC and Brooke Bonds Group Ltd., of the said trade mark made respectively in the years 1983, 1985 and 1987 be expunged from the said Register under Section 172(2) of the said Code. The Appellant also sought the review, in terms of Section 172(2) of the said Code. The Appellant also sought the review, in terms of Section 172(4) of the Code, of any decision of the Registrar of Trade Mark relating to any purported entries in the said Register in respect of trade mark No. 12307. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondents (sometimes hereinafter collectively referred to as "Brooke Bond"), while

denying the position taken up by the Appellant, sought in their answer by way of claims in reconvention *inter alia* a declaration that the Appellant is not entitled to use the trade mark bearing No. 12307, a further declaration that the Appellant is not entitled to use the trade mark '*Red Label*', and a permanent injunction restraining the Appellant from using the said '*Red Label*' trademark bearing No. 12307 or any colorable imitation of the mark of Brooke Bond.

It is important to note that when the case was taken up for hearing in the District Court of Colombo, on 5<sup>th</sup> February 1993, the Court recorded 19 admissions, and thereafter 21 issues were formulated on behalf of the Appellant. 19 issues were raised by learned President's Counsel for Brooke Bonds, which prompted the Appellant to raise 2 more issues bringing the number of issues formulated by Court to 42. The hearing was thereafter postponed for several dates, but in the meantime, the case stood removed to the Commercial High Court of Colombo as noted already. On 3<sup>rd</sup> December 1996, when the case was called for the first time before the Commercial High Court, the proceedings that had taken place previously before the District Court of Colombo were expressly adopted, and accordingly, when the case was taken up for trial before the Commercial High Court on 13<sup>th</sup> October 1997, it abided by the admissions and issues recorded previously in the District Court of Colombo.

It appears from the admissions recorded in the District Court and adopted by the Commercial High Court that at the time the action from which this appeal arises was instituted, the name of Brooke Bond Group Ltd. appeared in the Register of Trade Marks maintained by the 3<sup>rd</sup> Defendant-Respondent as the proprietor of the '*Brooke Bond*' trade mark bearing No. 12307, while the name of Brooke Bond (Ceylon) Ltd. appeared as its licensee. It is also admitted that

while the former company did not at the relevant time engage directly in any trading activity in Sri Lanka, the latter was engaged in the business of blending, selling and distributing tea in and from Sri Lanka. It is an admitted fact that the said trade mark No. 12307 was first registered upon the application dated 24<sup>th</sup> July 1950 made by Brooke Bond (Ceylon) Ltd., which thereafter by the Deed of Assignment dated 27<sup>th</sup> March 1981 assigned the said trade mark along with 17 other trade-marks to Brooke Bond Liebig Ltd., which was registered as the proprietor of the said trade mark in terms of Section 119 of the Code of Intellectual property Act on or about 30<sup>th</sup> August 1983. It is also admitted that the said trade mark bearing No. 12307 was associated with trade mark Nos. 5557, 11989, 11837, 11838, 12306, 13101, 14378, 28955 and 27554, all of which contain the words "Brooke Bond". Consequent upon a licensing agreement being entered into between Brooke Bond Liebig Ltd and Brooke Bond (Ceylon) Ltd granting to the latter the right to use the said trade mark, and on the basis of an application made under Section 121 of the Code for this purpose, Brooke Bond (Ceylon) Ltd was also entered as licensee of the said trade mark No. 12307 in the Register of Trade Marks on or about 30<sup>th</sup> August 1983. It is common ground that when Brooke Bond Liebig Ltd's name was changed to Brooke Bond Group PLC, the name of the proprietor of the said trade mark No. 12307 was accordingly altered in favor of the latter company in the Register of Trade Marks on or about 25<sup>th</sup> March 1985, and that once again when the latter changed its name as Brooke Bond Group Ltd, the name of the proprietor of the said trade mark was accordingly altered in the said Register on or about 16<sup>th</sup> November 1987.

It is admitted that Brooke Bond Group Ltd is not a licensed dealer of tea under the Tea Control Act and is not a registered exporter of tea under the Tea Control Act Read

with the provisions of the Tea (Tax and Control of Export) Act and is therefore not entitled to sell or distribute tea from Sri Lanka. It is also an admitted fact that Brooke Bond Group Ltd has never registered with the Sri Lanka Tea Board a carton or packet containing the said trade mark No. 12307. It is common ground that although Brooke Bond Group Ltd is a company incorporated in the United Kingdom, it is not the owner of any trade mark registered in the United Kingdom containing the words "Brooke Bond Red Label Tea".

Amongst the admissions recorded in the District Court and adopted in the Commercial High Court, there is also an admission to the effect that the Appellant has for several years exported 'Pure Ceylon Tea' in cartons, and that the Appellant has also applied to register trade mark bearing No. 53509 with the words 'Red Medal'. It is further admitted that the Appellant has exported tea in cartons similar to 'P3' bearing the trade mark 'Red Medal' to several countries including Egypt, Saudi Arabia, Kuwait, Syria and Jordan. It is also an admitted fact that the Appellant's application for registration of the trade mark bearing No. 53509 has been opposed by Brook Bond Group Ltd. *inter alia* on the basis of the purported ownership of the said 'Brooke Bond' trade mark bearing No. 12307. It is also admitted that Brook Bond Group Ltd filed an application to register trade mark No. 55881 containing the words 'Red Label' and that the said application has been opposed by the Appellant.

It is on the basis of these admissions that several issues were formulated by the District Court, which were ultimately taken up for trial in the Commercial High Court. In view of the fact that there were altogether 42 issues to be tried, which issues may if reproduced in this judgment *verbatim*, result in tedious reading, I shall endeavor to highlight the main issues

with respect to which parties were at variance, to the extent that such issues may be relevant for the disposal of the present appeal. The 21 issues raised by the learned President's Counsel for the Appellant may conveniently be summarized as follows: Is the Appellant entitled to any or all of the relief prayed for by it by reason of -

- (a) The invalidity of the Deed of Assignment dated 27<sup>th</sup> March 1981 by which Brooke Bond (Ceylon) Pvt Ltd., purported to transfer the '*Brooke Bond*' trade mark bearing No. 12307 to Broke Bond Liebig Ltd., due to the fact that the Power of Attorney issued by the latter to M/s Julius & Creasy, Attorneys-at-law, to act as its authorized agent was not executed under its seal, and has only been signed by a person designated as its Secretary when the signature of two of its Directors or one Director and the Secretary was required for this purpose?; and /or
- (b) The consequent invalidity of the entries in the Register of Trade Marks made respectively on or about 30<sup>th</sup> August, 1983, 25<sup>th</sup> March 1985 and 16<sup>th</sup> November 1987; and / or
- (c) The total non-user by Broke Bond Group Ltd and the consistent non-user since 1983 by Brooke Bond (Ceylon) Pvt Ltd of the said '*Brooke Bond*' trade mark bearing No. 12307 for the sale and/ or export of tea from Sri Lanka?, and/or
- (d) The consequent inability arising from the said non-user, to distinguish the teas of Brooke Bond Group Ltd and Brooke Bond (Ceylon) Pvt Ltd from those of other Sri Lankan distributors and /or exporters?

In the same way, the 19 issues formulated by learned President's Counsel for Brooke Bond may be summarized as follows: Should the application filed by the Appellant be dismissed, and judgment entered in favor of Brooke Bond Group Ltd as prayed for in prayer (c) and (e) of its Answer for the reason that:-

- (e) Brooke Bond Group Ltd engaged in the business of blending, packeting, marketing, selling, and exporting tea through its subsidiary, Brooke Bond (Ceylon) Pvt Ltd under the supervision, direction and control of the former company?; and/or
- (f) The registration of the cartons and packets bearing the said '*Brooke Bond*' trade mark bearing No. 12307 with the Tea Board, and the use of the said trade mark, as well as the said cartons and packets, by Brooke Bond (Ceylon) Ltd amounted to use of the said mark by Brooke Bond Group Ltd? and/or
- (g) The '*Red Label*' trade mark has become distinctive of the tea blended, packeted, distributed and marketed by the subsidiaries of Brooke Bond Group Ltd, as a result of the use by Brooke Bond (India) Ltd, a company incorporated in India as a subsidiary of Brooke Bond Group Ltd, of the said trade mark for exporting tea from India? and/or
- (h) In any event, the action filed by the Appellant is time-barred and prescribed?

In response to (g) above, learned President's Counsel for the Appellant was permitted to raise two further issues as issues 41 and 42 as to whether the exports by Brooke Bond (India) Ltd, under a trade mark registered in India, would amount to the user of a trade mark registered in Sri Lanka.

Accordingly, when the case was taken up for further trial on 13<sup>th</sup> October 1997, the affidavit of Don Harold Stassen Jayawardene dated 11<sup>th</sup> October 1997 was tendered in evidence under Section 176 of the Code of Intellectual Property Act on behalf of the Appellant, along with the documents marked A1 to A52. Thereafter, a date was obtained by Brooke Bond for the cross - examination of the said Jayawardene. On 19<sup>th</sup> December 1997, the date fixed for such cross-examination, the said Jayawardene was very briefly cross-examined by learned Senior Counsel for Brooke Bond, and since there were no questions in re-examination and no other witness to be called on behalf of the Appellant, learned President's Counsel for the Appellant moved to close his case "reading in evidence A1 to A52". Thereafter, learned High Court Judge made order that the affidavit of the Brooke Bond should be filed on 16<sup>th</sup> February 1988. On that date, no affidavit was filed, and in fact, learned Senior Counsel for Brooke Bond informed Court that no evidence will be led on behalf of Brooke Bond. He also intimated to Court that he was objecting to the reception in evidence of the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 of A49, and thereafter moved to close his case without any evidence. The learned High Court Judge then gave a date for the written submission of both parties, which were filed in due course.

On 22<sup>nd</sup> October 1999 the learned Commercial High Court Judge delivered his judgment upholding the objection taken on behalf of Brook Bond to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 on the basis that the contents of the said documents have not been proved by primary evidence or secondary evidence as required by Section 61 of the Evidence Ordinance, nor are they duly certified copies by the public officer having custody

thereof as contemplated by Sections 76 and 77 of the Evidence Ordinance. In the result, the learned High Court Judge held that “the Court is left with no evidence to be considered” to substantiate the application of the Appellant. Accordingly, the High Court answered the several issues framed at the instance of the Appellant against it on the basis that there is “no proof” and dismissed the action filed by the Appellant, ostensibly for the same reason that he dismissed Brooke Bond’s claims-in reconvention, namely paucity of evidence. The latter decision of course is clearly justified as Brooke Bond had failed to file any affidavit or adduce any other evidence in support of its claims-in-reconvention. However, in the context that 19 admissions had been recorded and an affidavit had been filed with as much as 52 documents, by way of justification for his decision to dismiss the application of the Appellant the Learned High Court Judge was constrained to add that –

“Even though there are several admissions recorded, they are not conclusive proof of matters as provided for under Section 31 of the Evidence Ordinance. Though they may operate as estoppel against the defendants (Brooke Bond) a mere estoppel will not entitle the plaintiff (Appellant) to have an adjudication (sic) in its favor”

This is an astounding and most unacceptable proposition of law, to say the least. It is astounding because Section 31 of the Evidence Ordinance, which applies to informal or casual admissions, testimony relating to which may be led at the trial, has no relevance to formal or judicial admissions recorded at the trial. The learned Judge has altogether overlooked Section 58 of the Evidence Ordinance applicable to the latter category of admissions, which provides that –

*“No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. . . .” (italics added)*

It is clear that the learned High Court Judge has seriously misdirected himself in disregarding the vital admissions recorded at the trial, which learned President’s Counsel for the Appellant contends could have, along with the documents produced with Jayawardene’s affidavit to which no objections were taken by learned Senior Counsel for Brooke Bond, namely, the documents marked A1 to A4, A9, A10, A14, A29, A30, A42, A43 and A50 to A52, gone a long way in proving the Appellant’s case. I do not propose to consider in any depth the rather interesting issues of intellectual property law and arrive at any findings in regard to the questions relating to the use of certain trade-marks that this case gives rise to, as in my view this is neither necessary nor desirable for the disposal of the present appeal. I prefer to confine myself to the mundane questions of procedure and evidence which were the main focus of submissions of learned Counsel in this case. However, before considering these vital issues, it is necessary to refer to Section 176 of the Code of Intellectual Property Act in terms of which the affidavit of Don Harold Stassen Jayawardene was tendered in evidence by the Appellant in evidence. Sub-section 1 of this section provides that-

*“In any proceeding under this Code before the Registrar or the Court, the evidence shall be given by affidavit in the absence of directions to the contrary. But, in any case in which the Registrar or the Court shall think it right so to do, the Registrar or the Court may take evidence viva voce in lieu of, or in addition to, evidence by affidavit.”*

The above quoted provision has to be contrasted with Section 174 of the Code of Intellectual Property Act, which provides that a certificate purporting to be under the hand of the Registrar as to any entry, matter, or thing which he is authorized by the said Code or regulations made thereunder to make or do, “shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or not done.” The affidavit of Jayawardene tendered in terms of Section 176 of the Code is obviously much more than *prima facie* evidence of the facts adverted to therein, and in the absence of any objections to its admission in evidence and any directions to the contrary made by court, it has to be treated as the examination in-chief of the witness Don Harold Stassen Jayawatdene. Of course, the High Court had the power to take evidence *viva voce* in lieu of, or in addition to, evidence by affidavit”, which power it appears to have exercised, by affording Brooke Bond an opportunity to cross-examine Jayawardene. The documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 may therefore be equated to documents marked during the examination in-chief of a witness in the course of a regular trial.

It is in this context that the objection taken on behalf of Brooke Bond to the admission in evidence of the aforesaid documents has to be viewed. These documents broadly fall into two categories, namely, those sought by the Appellant to be admitted in terms of Section 77 of the Evidence Ordinance, and those sought to be tendered in terms of other provisions of law. A careful reading of the affidavit of Don Harold Stassen Jayawardene would reveal that only the documents marked A5 to A8, A15, A22 to A27, A33 to A37 and A39 to A41 were tendered as “true copies” of the pleadings, proceedings and judgement in D.C. Colombo 2955/Spl filed by

Brooke Bond Group Ltd against Akbar Brothers Exports (Pvt) Ltd in relation to which an appeal was pending in the Court of Appeal, fall within the first category to which the provisions of Sections 76 and 77 of the Evidence Ordinance are said to be applicable. Section 76 of the Ordinance provides that-

*“Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.” (italics added)*

Section 77 provides that-

*“Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.”*

It may be useful to pause here to explain that although according to Section 61 of the Evidence Ordinance, the contents of document may be proved either by primary or by secondary evidence, it is expressly provided in Section 64 of the Ordinance that documents *must* be proved by primary evidence, except in the specific instances listed in Section 65 of the Ordinance as cases in which secondary evidence may be given. This provision embodies the so called ‘Best Evidence’ rule, which postulates that it is in the interests of justice to produce the best evidence as opposed to inferior evidence, which in the case of a document would mean that it is desirable to produce in court the original rather than a copy thereof.

Where the document in question is a case record of another court or even the same court but relating to a different case, Section 110 of the Civil Procedure Code makes it possible for a court, of its own accord, or upon an application of any of the parties to an action, to “send for, either from its own records or from any other court, the record of any other action or proceeding, and inspect the same.” However, this provision has to be used sparingly and with caution. In fact, the practice of calling for the record has not been encouraged as the removal of the record from its proper place would make it impossible for others to use the record, and there is also a serious risk of loss of the record or document contained therein, and the attendant wear and tear involved in the movement of the record. *See, Joses v. Randall*, Cowp.<sup>(1)</sup> *per* Lord Mansfield; *Hennet v. Lyon*,<sup>(2)</sup> 182 at 184 *per* Lord Ellenborough; *Mortimer v. M’Callan*,<sup>(3)</sup> at 69 *per* Lord Abinger; *Doe v. Roberts*,<sup>(4)</sup> *per* Pollock C. B.

It is in view of practical difficulties of this nature that Section 65 of the Evidence Ordinance makes provision for the proof of a document through secondary evidence in the specific instances enumerated therein. Section 65(5) of the Ordinance permits the use of secondary evidence to prove the existence, condition, or contents of a document where “the original is a public documents within the meaning of section 74.” It appears from the catalogue of “public documents” found in Section 74 of the Evidence Ordinance that, amongst other things, documents forming the acts, or records of the acts of public officers, in the legislative, *judicial*, and executive spheres, whether in Sri Lanka or in a foreign country, may be regarded as public documents. The only Sri Lankan case which has considered the question whether judicial proceeding fall within this catalogue of

“public documents” in Section 76 of the Evidence Ordinance, is the decision of the Supreme Court in *Kowla Umma v. Mohideen* <sup>(5)</sup> but the document in question in that case was a foreign judgment which it was thought has to be certified under Section 78(6) rather than under Section 76 read with Section 77 of the Evidence Ordinance. There also appears to be a difference of judicial opinion in regard to the question of the extent to which a person has the “right to inspect” a public document. See, *The Attorney General v. Geetin Signho* <sup>(6)</sup>; *Buddhadasa v. Mahendran* <sup>(7)</sup>. However, as far as a case record maintained by a court of law is concerned, this is a distinction without a difference, and I am firmly of the opinion that since judicial proceedings are conducted in public (except in exceptional cases where for some good reason evidence has to be recorded in camera) and the judicial process has to be transparent, a case record is very much a “public document” which any member of the public has the right to inspect. Accordingly, certified copies of the whole or part of a case record may legitimately be tendered in evidence under Section 77 of the Evidence Ordinance.

The focus of the submissions of learned Counsel before the High Court as well as before this Court in this case was therefore on the issue whether the documents marked A5 to A8, A15, A22 to A27, A33 to A37 and A39 to A41 and produced with the affidavit of Jayawardene purportedly as part of the proceedings in D. C. Colombo 2955/Spl. had been “duly certified” in compliance with Section 77 read with Section 76 of the Evidence Ordinance. The certification relied upon by the Appellant for the purpose of having the aforesaid documents admitted in evidence, was in fact made by the Chief Clerk of the Court of Appeal “at the foot” of the document marked A39 in the following terms:-

"I do hereby certify that the foregoing is a true photo-copy of the proceedings page Nos. 140-145, 244, 250, 276, 277, 334-353, 408-411, 435, 440, 441, 448, 453, 463, 464, 467, 476, 490 – 492 filed of record in Court of Appeal Case No. 961/91(F) and D. C. Colombo No. 2955/Spl.

Sgd/-

10<sup>th</sup> October 1997

Chief Clerk, Court of Appeal"

It is relevant to note that the above certification has been made by the Chief Clerk of the Court of Appeal under the seal of the Court of Appeal placed on a stamp for the value of Rs. 10.00, and that the said seal has also been placed on every page of the proceedings so certified along with his initials. Several objections, albeit of a rather technical nature, have been taken to the reception in evidence of each of the document sought to be produced, such as that it is a certification by the Chief Clerk of the Court of Appeal instead of the Registrar of that Court, that it is not in due form as it merely purports to certify that the document is a "true photo-copy" and not as a "certified copy" and that it is not sufficiently descriptive of which case record it seeks to certify as it in fact refers to two case numbers, one of the District Court of Colombo and the other of the court of Appeal. Although the said certification is somewhat vague and does not clearly state that what is certified is part of the record of the proceedings in D. C. Colombo case No. 2955/Spl, the record of which was at the relevant time, in the *de jure* custody of the Registrar of the Court of Appeal and in the *de facto* custody of the Chief Clerk of that Court, the correct position has been clarified by Jayawardene in the affidavit with which the copies were tendered, and the words "true photo-copy" used in the certification appear to be appropriate and consistent with the language used in Section 76 of the Evidence Ordinance.

The main difficulty faced by the learned High Court Judge was that the said proceedings which learned President's Counsel claims have been "compendiously certified" by the Chief Clerk of the Court of Appeal have *not been compendiously presented* with the said affidavit. As the learned High Court Judge observes in the course of his judgement, the document marked A39 itself consists of a fewer number of pages (pages 490 - 492) than the pages of the proceedings which have been compendiously certified. Although the said certificate at the foot of A39 seeks to certify "that the *forgoing* is a true photocopy" certain parts of the document so certified have been attached to the relevant affidavit, marked A40 and A41 which cannot be regarded as "forgoing". Similarly, the other documents produced with the affidavit to which objection had been taken namely A5 to A8, A15, A22 to A27, A33 to A37, A40 and A41 did not have at the "foot" of such document a similar certification by the certifying officer although each page of said document bore the seal of the Court of Appeal with the initials of the Chief Clerk and the date of certification. In my opinion, when a document has been certified as a true copy of a public document, the entire document so certified should be tendered in evidence without physically breaking it into parts as the Appellant has done in this case, as such breaking up will have the effect of destroying the identity and character of the certified copy as one single document. I agree with the view of the learned Commercial High Court Judge that the documents marked A5 to A8, A15, A22 to A27, A33 to A37, A40 and A41 cannot in law be regarded as "certified copies" within the meaning of Sections 76 and 77 of the Evidence Ordinance, and that even the document marked A39 does not fully conform to the requirement of Section 76 as the said document does not contain all the page numbers or even the number of pages specified in the certification. Accordingly, I hold that the learned High Court Judge was perfectly right

when he held as a matter of law that none of the aforesaid documents were duly certified copies admissible under Section 77 read with Section 76 of the Evidence Ordinance.

However, in my considered opinion, this does not conclude the matter. As previously noted, there is another category of evidence to which Brooke Bond had objected to in 16<sup>th</sup> February 1998, namely those that were sought to be tendered not under Section 76 and 77 of the Evidence Ordinance, but under some other legal provisions. Unfortunately the learned High Court Judge has failed to consider the fact that only the documents marked A5 to A8, A15, A22 to A27, A33, A35 to A37, A39 to A41 were claimed in the affidavit of Jayawardene to be part of the record in D. C. Colombo case No. 2955/Spl. The documents marked A1 to A4, A9 to A14, A16 to A21 were clearly not part of the proceedings in the said case, and the learned High Court Judge has failed to adduce any reasons for rejecting them, possibly because he was laboring under the mistaken assumption that they too were purported certified copies of the said case record. In fact a reading of the affidavit of Jayawardene would reveal that A11 to A14, A19, A21, A44, A46, A47 were tendered as true copies of documents in the custody of, entries made by, or proceedings conducted in the office of, the Register of Patents and Trade Marks, purportedly certified by the Registrar to Trade Marks in terms of Section 174 of the Code of Intellectual Property, under which such certified copies are admissible as *prima facie* evidence of the same. I am firmly of the opinion that there was no legal basis for the rejection of these documents.

An even more fundamental error committed by the learned High Court Judge is his failure to consider the belatedness of the objection of Brooke Bond to the documents marked A5 to A8, A11 to A13, A15 to A28 A31 to A41 and A44 to A49. It is important to note that learned Senior Counsel for Brooke Bond had chosen to raise his objections to these documents

only on 16<sup>th</sup> February, 1988, which, as I have already noted, was the date for the tendering of the affidavit of Brooke Bond. However, on 19<sup>th</sup> December 1997, when the Appellant's case was closed reading in evidence documents marked A1 to A52, no objection was taken on behalf of Brooke Bond to their admission in evidence, and the learned High Court Judge made order as follows:-

“Plaintiff's case closed reading in evidence A1 to A52.

Affidavit by the defendants on 16<sup>th</sup> Feb: 1998.

Sgd./-

HIGH COURT JUDGE (CIVIL)”

Objection was for the first time taken to these documents only on 16<sup>th</sup> February 1998 as would appear from the proceedings of that date quoted below:-

'දිනය 1998.02.16

විත්තිය වෙනුවෙන් නීතිඥ එස්. එල්. ගුණසේකර මහතා පෙනී සිටී.

පැමිණිල්ල වෙනුවෙන් නීතිඥ එලියනම්බි මහතා පෙනී සිටී.

විත්තියේ සාක්ෂි ඉදිරිපත් නොකරන බව කියා සිටී. ලේඛන වලට විරෝධතා ඉදිරිපත් නොකරන බවද දන්වා සිටී.

ඒ 5 සිට ඒ 8 දක්වා ද ඒ 11 සිට ඒ 13 දක්වා ද, ඒ 15 සිට ඒ 19 දක්වා ද ඒ 31 සිට ඒ 41 දක්වා ද, ඒ 44 සිට ඒ 49 දක්වා ද ලේඛන වලට විරෝධතාවය දක්වා සිටී.

නිවරදි කිරීම් කරන ලදී. එයට පැමිණිල්ලෙන් විරෝධතා නැත.

විත්තිය වෙනුවෙන් පෙනී සිටින නීතිඥ එස්. එල්. ගුණසේකර මහතා විත්තියේ නඩුව අවසන් කරන බව දන්වා සිටී. දෙපක්ෂයේ ලිඛිත සැලකිලිම් 1998 මැයි 08.

අත්සන

මහාධිකරණ විනිසුරු”

It is clear from the above quoted proceedings of the Commercial High Court in this case that on 19<sup>th</sup> December 1998, when after the conclusion of the cross-examination and re-examination of witness Jayawardene, the case for the Appellant was closed by learned Counsel for the Appellant marking in evidence A1 to A52, *no objection was taken by Senior Counsel for Brooke Bond to the reception in evidence of the said documents*, and on the next date when Brooke Bond was expected to file its affidavit and/or call its witnesses, learned Senior Counsel for Brooke Bond had first informed Court that it is not intended to lead any evidence on behalf of Brooke Bond, and that it does not object to any of the documents of the Appellant except the ones marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49. Learned Senior Counsel for Brooke Bond also took the opportunity to correct the proceedings of the previous date, namely, that of 19<sup>th</sup> December 1995, and learned President's Counsel for the Appellant did not have any objections to these corrections, which fact was also recorded, after which learned Senior Counsel for Brooke Bond had closed the case for the Defence. It is trite law that as Samarakoon, C.J. observed in *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East*<sup>(8)</sup> at 23-24, "if no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law." This is the *cursum curiae* of the original courts. See, *Silva v. Kindersle*<sup>(9)</sup>; *Adaicappa Chettiar v. Thomas Cook and Son*<sup>(10)</sup> *Perera v. Seyed Mohamed*<sup>(11)</sup>; *Balapitiya Gunananda Thero v. Talalle Methananda Thero*<sup>(12)</sup>; *Cinemas Limited v. Sounderarajan*<sup>(13)</sup>. Since the documents marked A1 to A52 had been read in evidence on 19<sup>th</sup> December 1998 at the close of the Appellant's case without any objection from Brooke Bond, they cannot legitimately

be objected to on the next date, particularly because serious prejudice could thereby be caused to the Appellant by the belated nature of the Objection. I therefore hold that the learned High Court Judge erred in sustaining the said objection.

The learned High Court Judge has also inexplicably failed to consider the implication of the fact that the belated objection to the admissibility of the Appellant's documents being confined to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 which means that there were a large number of documents to which no-objection at all had been taken by Brooke Bond. In fact, documents marked A1 to A4, A9, A10, A14, A29, A30, A42, A43 and A50 to A52 were not objected to by learned Counsel for Brooke Bond even belatedly. It is noteworthy that when learned President's Counsel for the Appellant closed the case for the Appellant on 19<sup>th</sup> December 1997, no objection was taken on behalf of Brooke Bond to any of the documents marked A1 to A52 which were sought to be read in evidence. As such it was incumbent on the learned High Court Judge to consider whether on the basis of the admissions recorded, the contents of the affidavit of Jayawardene, and the aforesaid un-objected documents, it is possible to award one or more of the relief prayed for by the Appellant. The learned High Court Judge, regrettably, has not undertaken such an evaluation, and the only reason adduced in his judgment for not taking to consideration the affidavit of Jayawardene is that he "could not have had any personal knowledge relating to the several matters deposed to in the affidavit". The learned High Court Judge has formed this opinion on the basis of the very brief cross-examination of Jayawardene, in the course of which

it was elicited that the said Jayawardene had never been employed or had any dealings with Brooke Bond or Eastern Brokers Ltd. However, the said cross-examination clearly reveals that Jayawardene was the Managing Director of the Appellant Company since its incorporation in 1977, and was in the tea trade. Jayawardene has in paragraph 1 of his affidavit expressly declared that he deposed to the facts contained therein from his personal knowledge and from documents available to him, copies of which he has produced marked A1 to A52. In his brief cross-examination of Jayawardene, learned Senior Counsel for Brooke Bond made no endeavor to probe the extent of the witnesses personal knowledge of matters deposed to by him in the affidavit, and the strange proposition that he had absolutely no personal knowledge of any of such matters was never put to him in cross-examination. In these circumstances, I am of the opinion that it is not reasonable to conclude from this cross-examination that Jayawardene had no personal knowledge of the matters he had deposed to in the affidavit, and to refuse to consider the contents thereof in deciding the case at hand. I hold that the learned Commercial High Court Judge had no justification for the rejection of the affidavit of the affidavit in this manner.

I have at the commencement of this judgment summarized the facts admitted by the parties at the trial, and also summarized the primary issues regarding which the parties were at variance, and in view of my finding that the Commercial High Court had no justification in law for rejecting the affidavit of Jayawardene or any of the documents tendered with the said affidavit, the question arises as to whether if the rejected evidence had been received, the ultimate decision of the Commercial High Court would have been different. This is a

very material consideration particularly in the light of Section 167 of the Evidence Ordinance, which provides that –

“The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.”

Having examined the recorded admissions, the issues, as well as the documents marked A1 to A52, I am clearly of the opinion that had the learned Commercial High Court Judge taken the said documents into consideration, there was a strong likelihood that the Court would not have dismissed the application of the Appellant and would have granted one or more of the relief prayed for by the Appellant. I hasten to add that this is a view formed by me without the benefit of submissions of Counsel on the questions of intellectual property rights that arise in this case, and that therefore the Commercial High Court is free to arrive at its findings on the issues already raised, if they are adopted without objection, or on fresh issues that may be formulated by Court, at a fresh trial. For the aforesaid reasons, I am of the opinion that this case should be remitted to the commercial High Court for fresh trial.

Before parting with this judgment, I wish to add that although Notice of Appeal and Petition of Appeal in this case were issued respectively on 5<sup>th</sup> November 1999 and 17<sup>th</sup> December 1999, and the matter was first fixed for hearing

in the Supreme Court on 1<sup>st</sup> August 2003, argument has thereafter been repeatedly postponed in view of the submission made by learned President's Counsel for the Appellant, without any objection from the learned Counsel for Brook Bonds, that the outcome of the appeal then pending in the Court of Appeal in C.A. Appeal No. 961/91 (F), which arose from Brooke Bond's action against Akbar Brothers Exporters (Pvt) Ltd., would have a bearing on this appeal. However, there has been no intimation to this Court of the outcome of the said case, and the findings of the Court of Appeal in the said case could not be taken into consideration in determining this appeal.

Accordingly, I make order setting aside the judgement of the Commercial High Court of Colombo dated 22<sup>nd</sup> October 1999 and remitting the case back for fresh trial. I award to the Appellant a sum of Rs. 15,000 as the costs of this appeal.

**BANDARANAYAKA, J.** – I agree.

**BALAPATABENDI, J.** – I agree.

*appeal allowed.*

*Trial de Novo ordered.*