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

SC Appeal No. SC/CHC/37/2013
HC (Civil) Case No. 440/2008/MR

CENTRAL FINANCE COMPANY PLC
No. 84, Raja Veediya, Kandy.

PLAINTIFF

VS.

1. **SAPPANI CHANDRASEKERA**
   No. 22-E, Quarry Road, Colombo 12.
2. **SITTAMBARAM PILLEI SHANMUGAM**
   No. 23, Abdul Jabbar Mawatha, Colombo12.

DEFENDANTS

AND

CENTRAL FINANCE COMPANY PLC
No. 84, Raja Veediya, Kandy.

PLAINTIFF-APPELLANT

VS.

1. **SAPPANI CHANDRASEKERA**
   No. 22-E, Quarry Road, Colombo 12.
2. **SITTAMBARAM PILLEI SHANMUGAM**
   No. 23, Abdul Jabbar Mawatha, Colombo12.

DEFENDANTS-RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya, J.
Murdu N.B. Fernando, PC, J.

COUNSEL:	Harsha Amarasekera, PC, with Dhammika Welagedara instructed by M/S Paul Ratnayeke Associates for the Plaintiff-Appellant. S.P. Sriskantha with Nandun De Silva, Prassanna Sriskantha and Shawn Tissera instructed by N.Y. Kunaseelan for the Defendants-Respondents.
ARGUED ON:	01st November 2018.
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Appellant on 06th August 2013 and 30th November 2018. By the Defendant-Respondent on 30th November 2018.
DECIDED ON:	30th May 2019

Prasanna Jayawardena, PC, J,

This appeal is from a judgment of the High Court of the Western Province exercising Civil Jurisdiction [usually referred to as the "Commercial High Court"] dismissing the Plaintiff-Appellant's action. It is evident from the judgment that the sole reason for the High Court dismissing the action was that the affidavit by which the evidence-in chief of the Plaintiff-Appellant's principal witness was presented, was not in the Case Record when the judgment was being prepared and, therefore, the learned High Court Judge holding that there was no evidence to prove the Plaintiff-Appellant's case.

The Plaintiff-Appellant Company ["the plaintiff"] instituted this action seeking to recover a sum of Rs. 3,284,670/11 and interest thereon from the 1st and 2nd Defendants-Respondents ["the defendants"]. The defendants filed their answers. Admissions and issues were framed and the case was fixed for trial on 07th September 2011.

It is well known that, there has been, for many years, a salutary practice in the Commercial High Court for witnesses whose evidence-in-chief is likely to be lengthy if given *viva voce*, to submit their evidence-in-chief by way of an affidavit with annexed documents, subject to the right of the other parties to cross examine that witness *viva voce*. This is done where the parties consent to that procedure. In such cases, the affidavit setting out the evidence-in-chief of the witness with annexed documents has to be filed in the Court Registry before the trial. Copies of the affidavit are furnished to the other parties at the same time. On the trial date, that witness gives brief evidence-in-chief *viva voce* and the affidavit and annexed documents are marked and produced in

evidence. Thus, the recording of the evidence-in-chief of that witness which would otherwise be time consuming, is completed within a short space of time. Thereafter, counsel for the opposing parties cross examine the witness with counsel having the benefit of previously reading the evidence-in-chief contained in the affidavit and examining the annexed documents which have now been produced in evidence. The nature of actions which are usually before the Commercial High Court [as set out in section 2 read with the First Schedule to the High Court of the Provinces (Special Provisions) Act no. 10 of 1996] make the aforesaid procedure suitable for adoption in that Court. It also enables a speedier determination of actions instituted in the Commercial High Court, which is an important consideration in view of the significant role of that Court in the development of our economy. In these circumstances, the aforesaid practice was introduced in the Commercial High Court well over a decade ago, drawing on sections 179 and section 180 of the Civil Procedure Code.

In the present case, Journal Entry no. 19 states the parties agreed on 26th May 2011 that the evidence-in-chief of the plaintiff's principal witness would be presented to the Court by way of an affidavit.

Accordingly, the evidence-in-chief of that witness was set out in an affidavit dated 02nd September 2011 sworn to by the Senior Manager of the plaintiff company. This affidavit was filed in the Court Registry along with a motion dated 02nd September 2011 which states that a copy of the affidavit has been despatched to the defendant's attorney-at-law by registered post. Copies of the motion and affidavit have been filed with the petition of appeal marked "A" and "B". The defendants acknowledge that copies of both documents were received by the defendants prior to the trial.

A perusal of the affidavit dated 02nd September 2011 marked "B" shows that the Senior Manager of the plaintiff company who has sworn to the affidavit has averred, as his evidence-in-chief in the trial, an account of the plaintiff's cause of action against the defendants. That is set out in the averments of the witness in the thirteen paragraphs of the affidavit and the annexed documents marked "පැ 1" to "පැ 7 (අ)".

When the case was taken up for trial on 28th November 2011, the plaintiff's principal witness gave brief evidence-in-chief *viva voce* as set out below:

Q: *Witness on the 02nd of September 2011 tendered to this Court an affidavit swearing about the circumstances pertaining to the cause of action of this case ?"*

A: *Yes.*

Q: *An* [*sic*] *in that affidavit you have marked the documents "P1", "P2", "P3", "P4", "P4A", "P5", "P5A", "P6", "P6A" "P7" and "P7A" today you're tendering the originals of the said documents except for the document marked "P4A","P5A",*

"P6A", and "P7A". The originals of those documents have been tendered in case No. H.C. (Civil) 439/2008 which matter is also between the same parties of [*sic*] *who are parties to this action. I will undertake to tender the certified copies of those documents before the next date."*.

Court

"Until such time this documents [*sic*] *can be marked subject to proof."*.

As evident from the proceedings, the aforesaid witness has given oral evidence stating that he had sworn to an affidavit dated 02nd September 2011 setting out the plaintiff's cause of action and that he has tendered this affidavit to the court. Learned counsel appearing for the defendants did not object to the reception of that affidavit by the court. Immediately thereafter, learned counsel for the defendants commenced his cross examination of this witness.

Section 154 (1) in Chapter XIX of the Civil Procedure Code stipulates *"**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…."* and section 154 (3) requires *"The document or writing 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, shall cause it, or so much of it as the parties may desire, to be read aloud."*. Further, the Explanation to section 154 (3) states that *"If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it".* The Explanation to section 154 (3) also specifies that *"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 this account, it must, at least, be marked when the court decides upon admitting it."* [emphasis added]. On similar lines, section 114 (1) of the Civil Procedure Code states that *"No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force."*. Thereafter, section 114 (2) stipulates that *"**Every document so proved or admitted shall be endorsed with some number or letter sufficient to identity it**. The Judge shall then make an entry on the record to the effect that such document was proved against or admitted by (as the case may be) the person against whom it is used, and shall in such entry refer to such document by such number or letter in such a way as to identify it with the document so proved or admitted. The document shall then be filed as part of the record."*. [emphasis added].

These are important provisions setting out the manner in which documents should be produced and marked in evidence at a civil trial and should be followed in the original

civil courts. Neglecting to do so usually leads to mistakes, delay, and sometimes - as in this case - substantial prejudice to the parties. Counsel conducting civil trials would be well advised to ensure they carefully abide by the procedure set out in these provisions. It is also perhaps not out of place to mention here that the learned judges before whom civil trials are conducted should be vigilant to ensure that these provisions are complied with.

In the present case, although learned counsel who appeared for the plaintiff on 28th November 2011 has elicited evidence that the witness had *"tendered"* an affidavit dated 02nd September 2011 to Court, she failed to specifically elicit evidence that the witness was producing that affidavit in evidence and, further, she failed to give the affidavit a distinctive marking. As set out above, section 154 (1), section 154 (3), the Explanation to section 154 (3), section 114 (1) and section 114 (2) of the Civil Procedure Code required her to ensure that this was done.

Nevertheless, the proceedings establish that the intention of both counsel for the plaintiff and the plaintiff's principal witness was to produce the affidavit in evidence. More importantly, it appears that the learned High Court Judge who heard the case on 28th November 2011 has proceeded on the basis that the affidavit was in the case record and was produced in evidence. In passing, it should also be mentioned here with regard to the question of whether there was sufficient evidence to prove the affidavit, that the witness has expressly stated in his oral evidence that he had sworn to this affidavit dated 02nd September 2011 and *"tendered"* it to Court. These facts were not disputed when the witness was cross examined. Thus, there was evidence which would prove the affidavit if it had been duly produced.

Thereafter, as seen in the proceedings set out earlier, learned counsel has stated that the witness is *"tendering"* the documents annexed to the affidavit marked "පැ 1" to "පැ 7 (අ)". Some of these documents were originals and some were copies. Counsel has undertaken to furnish the certified copies of those copies. The learned High Court Judge has made Order that the aforesaid documents may be admitted subject to proof.

Here again, it is clear that the intention of counsel and the witness was to produce the aforesaid documents marked "පැ 1" to "පැ 7 (අ)" in evidence, with the same markings that they were given in the affidavit. More importantly, the fact that the learned judge considered the documents were produced in evidence is seen from his Order that some of these documents be admitted 'subject to proof'.

Further, it is clear from the contents of the cross examination which immediately followed the aforesaid evidence-in-chief of the witness, that learned counsel for the defendants proceeded on the basis that the affidavit dated 02nd September 2011 was in the case record and produced along with the documents marked "පැ 1" to "පැ 7 (අ)".

The witness was then re-examined by learned counsel for the plaintiff.

To sum up, the proceedings of 28th November 2011 establish that learned counsel for the plaintiff and learned counsel for the defendant both believed that the affidavit dated 02nd September 2011 setting out the substantive evidence-in-chief of that witness was filed in the case record. The proceedings make it clear that the learned judge before whom this evidence was led, was also under the same impression.

However, it appears that, unbeknownst to the parties and counsel and the learned judge, the affidavit was, in fact, not in the case record.

That was because the motion and affidavit marked “A” and “B” both bear the erroneous case number 440/2009/MR whereas the case number of the present action is 440/2008/MR. Thus, it would appear that, when the plaintiff’s Attorneys-at-Law submitted the motion and affidavit marked “A” and “B” to the Court Registry on 02nd September 2011, these documents would have been [in all probability] filed in the case record of the case bearing number 440/2009/MR and not in the record of the present case. However, as mentioned earlier, the parties and the learned judge were unaware of this error on 28th November 2011 and were unaware that the affidavit was not in the case record [of the present Case no. 440/2008/MR] when evidence was led on that day.

Thereafter, the case was next taken up on 03rd February 2012 before the same judge and the plaintiff led the evidence of another witness and then closed its case. The defendants chose not to give evidence. The parties tendered their written submissions and the case was reserved for judgment by the learned judge who had heard the case on 28th November 2011 and 03rd February 2012.

The fact that the affidavit was not in the case record was not noticed even at that time.

The judge before whom the case was taken up on 28th November 2011 and 03rd February 2012 was appointed a Judge of the Court of Appeal before he delivered the judgment. Another High Court Judge succeeded him in the Commercial High Court. That judge has proceeded to prepare and deliver the judgment, which is the subject matter of this appeal. It appears that the parties were unaware that the succeeding High Court Judge was proceeding to prepare and deliver the judgment.

The learned High Court Judge who delivered the judgment has stated in his judgment that the aforesaid affidavit was, in fact, not in the case record and that the case record does not bear a journal entry which records that the affidavit was filed. As mentioned at the outset, the learned judge then proceeded to dismiss the plaintiff’s action solely on the basis that the affidavit setting out the evidence-in-chief of the plaintiff’s principal witness was not in the case record and, therefore, the plaintiff had failed to prove its case.

When deciding this appeal, there is no gainsaying the fact that there have been errors on the part of the plaintiff's Attorneys-at-Law and learned counsel who appeared for the plaintiff on 28th November 2011.

In the first place, the wrong case number was negligently placed on the motion and affidavit by the plaintiff's Attorneys-at-Law. The result was that these documents were [in all probability] filed in the wrong case record. Thereafter, as observed earlier, learned counsel who appeared for the plaintiff on 28th November 2011 failed to specifically produce the affidavit in evidence and assign it a marking when the witness referred to the affidavit. If learned counsel had sought to do that, the fact that the affidavit was not in the case record would have immediately come to light and these events would not have come to pass.

However, the responsibility for failing to detect that the affidavit was not in the case record on 28th November 2011 cannot be left only at the door of the plaintiff's Attorneys-at-Law and counsel. The Court too must share a part of the responsibility for failing to detect the error.

In this regard, the officers of the Court Registry who accepted the motion and affidavit for filing on 02nd September 2011 have failed to notice that these documents did not relate to Case no. 440/2009/MR. Thereafter, the officer who would have made a related minute in the case record of Case No. 440/2009/MR, has also failed to notice that the documents did not relate to that case. In the event a judge of the Commercial High Court has signed such a minute in the case record of Case No. 440/2009/MR [as happens in the ordinary course of procedure in the Commercial High Court], there has been a failure to notice the error at that stage too.

More importantly, it has to be kept in mind that the provisions in Chapter XIX of the Civil Procedure Code which govern the procedure at a trial in a civil court, make it clear that the judge who is hearing the trial is the master of all that is done before him at the trial. In particular, he has the responsibility of ensuring that the presentation of evidence by the parties is in accordance with the procedure and provisions set out Chapter XIX of the Civil Procedure Code and Chapter XII of the Evidence Ordinance and other relevant provisions of these enactments. In fact, section 167 and section 169 of the Civil Procedure Code specify that the evidence of each witness is received under the trial judge's *"personal direction and superintendence"*. As Basnayake CJ said in MOHAMED FAUZ vs. SALHA UMMA [58 CLW 46 at p.48], *"….. the function of admitting evidence is vested in the Judge (Section 136, Evidence Ordinance)….."*.

In particular, there was a duty placed on the learned judge before whom the aforesaid evidence was led on 28th November 2011 to have directed the plaintiff's counsel to ensure that the affidavit be formally produced in evidence and be given a distinctive

marking - *vide:* section 154 (1), section 154 (3), the Explanation to section 154 (3) and section 114 (2) of the Civil Procedure Code, which were cited earlier.

With regard to the last sentence of section 114 (2) which calls for the documents produced in evidence to be filed as part of the record, there is a practice in many civil courts to read that requirement as permitting documents marked and produced in evidence and initialled by the trial judge in the course of a trial, to be returned to the party who has produced those documents and for the Court to call for all documents produced in evidence to be tendered to be filed in the record at the end of the trial. This is necessitated by limitations in the storage capacity of many Court Registries and other practical difficulties and has hardened into an established practice in several civil courts. In PODIRALAHAMY vs. RAN BANDA [1993 2 SLR 20 at p.21], Senanayake J commented on this practice and said *"There is a duty cast on the Court once the document is admitted and endorsed with a letter to identify it that the Court should have the custody of the documents so marked and identified, though the original Courts for convenience return the documents to Attorneys of the respective parties to tender the documents if necessary after being stamped with an accurate list of the documents.".* Subsequently, in PERERA vs. CALDERA [2007 1 SLR 165 at p.167], Gooneratne J, then in the Court of Appeal, recognised the existence of this practice when he stated *"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.".* It should be mentioned here that, since Gooneratne J noted that the documents had been returned to the defendant's Attorney-at-Law to be retained during the trial, His Lordships's mention of the duty cast on the trial judge to call for the documents, is a reference to calling for the marked documents to be tendered to the Court at the end of the trial. More recently, in PERERA vs. PERERA [SC Appeal No. 41/2008, decided on 03rd August 2018]. Eva Wanasundera J stated [at p.7] *"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."*.

To get back to the facts of the present case, it is well known and, as set out above, was specifically stated by Her Ladyship, Wanasundera J in PERERA vs. PERERA, that the

requirement in terms of section 154 (3) and section 114 (2) is for the judge who is hearing the trial to initial each document as it is produced and marked.

However, the proceedings of 28th November 2011 make it clear that the learned judge before whom the evidence was led, failed to ensure that these steps were taken and had not sought to initial the documents when they were produced and marked during the *viva voce* evidence of the plaintiff's principal witness. If the learned judge had acted in terms of the procedure stipulated in the aforesaid provisions of the Civil Procedure Code and, at the time the witness referred to the affidavit in his oral evidence-in-chief, directed that the affidavit be formally produced and marked in evidence and be handed to the judge to be initialled by him, the learned judge and the parties would have immediately discovered that the affidavit was not in the case record. Remedial steps would have then been taken immediately.

Thus, there was a manifest error on the part of the learned judge before whom evidence was led on 28th November 2011 when he failed to direct that the affidavit be formally produced and marked in evidence. Thus, the Court too must bear responsibility for the failure to detect the fact that the affidavit containing the evidence-in-chief of the plaintiff's principal witness was not in the case record when the trial was concluded and the case was reserved for judgment.

Somewhat similar circumstances arose in PERERA vs. AVISHAMY [12 NLR 26 at p.26-27] where the trial judge had, *inter alia*, omitted to ensure that the proceedings recorded that the documents referred to and relied on by the plaintiff were formally produced in evidence and identified with distinctive markings. Wood Renton J described this [and some other errors committed by the trial judge] as *"…worse than irregular. They are positively unjust to both sides. They directly tend to encourage appeals from the learned Judge's decisions, and make the task of the Appeal Court, in endeavouring to arrive at a sound conclusion, needlessly laborious."*.

To move on to the judgment of the High Court from which this appeal lies, it is evident that, despite the proceedings of 28th November 2011 making it very clear that the learned judge who heard the trial and counsel for both parties all proceeded on the basis that the affidavit dated 02nd September 2011 was in the case record, the learned judge who delivered the judgment has proceeded to dismiss the plaintiff's action without making the slightest effort to find out why this affidavit was not in the case record.

The aforesaid recent decision of PERERA vs. PERERA dealt with comparable circumstances. In that case, the judgment of the learned trial judge makes it clear that, when preparing the judgment, the trial judge found that several documents produced in evidence by the defendants were not in the case record. The trial judge has proceeded to deliver her judgment without taking any steps to obtain those documents and without considering those documents. The defendants appealed. Eva Wanasundera J held that

the failure by a trial judge to call for those documents from the defendants and consider them before preparing the judgment, resulted in a miscarriage of justice. Her Ladyship stated [at p. 8], *"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."* Her Ladyship goes on to state, *"…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."*.

On similar lines, in PERERA vs. CALDERA Gooneratne J held [at p.167] "*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.".*

The aforesaid decisions make it clear that, even where there has been a lapse on the part of a party to ensure that documents which have been led in evidence at the trial are before the Court when a case is reserved for judgment, there is an overarching duty placed on the Court to ensure that all such documents are before the judge and are given due consideration when writing the judgment.

It is a matter of regret that, in the present case, the learned judge who delivered the judgment did not think it fit to first have this case called in open Court in the presence of the parties and ascertain why the affidavit dated 02nd September 2011 was not in the case record. It appears the learned judge did not even make inquiries in the Court Registry to find out the reason why that affidavit was not in the case record. To my mind, these were elementary steps which common sense dictated should be taken by the learned judge when he discovered that an affidavit containing evidence [which his predecessor and the parties thought was in the case record], was not in the case record.

Had the learned judge taken either of those steps, he would have immediately ascertained that the reason the affidavit was not in the case record was that the motion and affidavit marked "A" and "B" both bore the erroneous case number 440/2009/MR when the case number of the present action is 440/2008/MR. Thus, if the learned judge had directed that the case first be called in open court in the presence of the parties, a glance at the copies of the motion and affidavit which were with the plaintiff and the

defendants, would have highlighted the erroneous case number and led to locating the affidavit dated 02nd September 2011. Similarly, if the learned judge had made inquiries in the Court Registry, a glance at the register maintained in the Court Registry to record the filing of documents, would have revealed that the affidavit was [in all probability] filed in the case record of Case No. 440/2009/MR and not in the case record of the present case bearing no. 440/2008/MR.

Thus, if the learned judge had taken either or both of these common sense steps and discovered the aforesaid error, he could have immediately taken appropriate steps to remedy the situation by directing that the affidavit be filed in the case record of the present case and giving the parties an opportunity to lead further evidence, if required. The learned judge had ample authority to do so under section 165 of the Civil Procedure Code which states *"The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in the course of the trial it thinks it necessary for the ends of justice to do so".* Further, section 165 of the Evidence Ordinance vested in the judge the power to order, at any time, the production of the affidavit and question the witnesses *"to discover or to obtain proper proof of relevant facts."*. While considering comparable provisions in India, the Delhi High Court in SURESH KUMAR vs. BALDEV [AIR 1984 439] stated that, a Court has the discretion to recall a witness at any stage before the judgment is pronounced. In MADUBHAI AMTHALAL vs. AMTHALAL NANALAL [AIR 1947 156], the Bombay High Court held that a Court which is considering its judgment may recall a witness to clear up an ambiguity or omission.

Further, ordering the production of the affidavit and recalling the witness would not have caused any irreparable prejudice to the defendants since they too believed and had proceeded on the basis that the affidavit was in the case record. Any monetary loss caused to the defendants by way of additional expenditure incurred by them, could have been compensated by the award of costs against the plaintiff.

To sum up, the learned judge who delivered the judgment erred gravely when he failed to take any steps to ascertain why the affidavit dated 02nd September 2011 was not in the case record and, instead, summarily dismissed the plaintiff's action for want of evidence. That was a hasty and ill-considered action which resulted in a denial of justice and grave prejudice to the plaintiff. Further, it resulted in this appeal with the attendant delay and unnecessary expenses which the parties would have been compelled to bear.

In the circumstances set out above, the time honoured maxim *actus curia neminem gravabit* - an act of the Court shall prejudice no man - applies, and made it incumbent on the High Court to rectify its own errors and ensure that the affidavit dated 02nd September 2011 was placed before the High Court when it determined the plaintiff's case. In this connection, in SIVAPATHALINGAM vs. SIVASUBRAMANIAM [1990 1 SLR

378 at p.388] Goonawardene AJ [as His Lordship then was] quoted with approval the following passage from Lord Cairns' decision in ROGER vs. THE COMPTOIR D' ESCOMPTE DE PARIS [1871 LR 3 PC 465]: *" Now their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression `the act of the Court' is used, it does not mean merely the act of the Primary Court, of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case. It is the duty of the aggregate of these tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court".* Goonewardene AJ cited several decisions which referred to the *"….. rule that the Court will not permit a suitor to suffer by reason of its wrongful act ….. and a Court of Justice is under a duty to repair the injury done to a party by its act"* [*vide:* SIRINIVASA THERO vs. SUDASSI THERO (63 NLR 31 at p.34)] and the *"….. rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act.* [*vide:* SALIM vs. SANTHIYA (69 NLR 490 at p. 492)]. His Lordship went on to state [at p. 392], *"The authorities undoubtedly make clear that a court whose act has caused injury to a suitor has an inherent power to make restitution. That power I am of the view is exercisable by a court of original jurisdiction as the cases show and in the case of a superior court such as the Court of Appeal there can be no doubt whatever that that power is exercisable in that way."*.

Since, in the present case, the High Court has failed to correct its own errors and, thereby, caused prejudice to the plaintiff, the maxim *actus curia neminem gravabit* requires this Court to step in and ensure that the plaintiff is not prejudiced by the errors of the High Court.

For these reasons, it is incumbent on this Court to set aside judgment of the Commercial High Court and return this case to that Court for trial *de novo*.

Before concluding, it is relevant to mention that, when the learned judge delivered the judgment, he, presumably, considered that the provisions of Section 48 of the Judicature Act No. 02 of 1978, as amended, entitled him to prepare and deliver the judgment since his predecessor had been appointed a Judge of the Court of Appeal.

Section 48 of the Judicature Act states:

"In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his

predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and re-heard. "

No doubt, section 48 of the Judicature Act gave the learned judge the discretion *"to act on the evidence already recorded by his predecessor"* and proceed to prepare and deliver the judgment.

Thus, in DHARMARATNE vs. DASSENAIKE [2006 3 SLR 130], the trial concluded and the District Judge who heard the trial reserved the case for judgment. However, before delivering judgment, he was promoted to the High Court and travelled abroad on leave. The succeeding District Judge had the case called in the presence of the parties. The defendants made an application for the trial [which was a civil trial] to be heard *de novo* for the reason that the succeeding judge had not heard the witnesses. The plaintiff objected to that application submitting that section 48 of the Judicature Act entitled the succeeding judge to proceed to deliver judgment on the basis of the evidence that was on record. After considering written submissions filed by the parties on the aforesaid question, the succeeding judge held that, although section 48 entitled him to direct that the trial be commenced *de novo,* doing so will cause great prejudice to the plaintiff. He made order that the judgment will be delivered by him on the basis of the evidence that had been recorded before his predecessor. The defendants appealed to the Court of Appeal, which set aside the aforesaid Order and directed that the trial be heard *de novo.* In appeal from that Order of the Court of Appeal [DASSENAIKE vs. DHARMARATNE [2008 2 SLR 184], the Supreme Court set aside the Order of the Court of Appeal and affirmed the Order of the District Court. Silva CJ observed [at p.185] "*It is necessary for a succeeding Judge to continue proceedings since there are changes of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving a discretion to a Judge to continue with the proceedings. Hence the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case. It is common ground that there are no such issues as to demeanour when evidence was adduced by the 1st defendant."*.

It is evident that section 48 vests a discretion in the succeeding judge in a civil trial to decide which of the three lines of action referred to in that provision of law should be followed when he takes over a case which has been heard by his predecessor. These three lines of action are: if the trial had concluded but his predecessor has not delivered

judgment, to act on the evidence that has been recorded before his predecessor and prepare and deliver judgment; (ii) if the trial is underway, to proceed with the trial by adopting the evidence that was recorded before his predecessor, hear the remaining evidence and give his judgment; or (iii) commence the trial proceedings afresh. Thus, in AG vs. SIRIWARDANE [2009 2 SLR 337 at p. 353] Salam J observed with regard to section 48 of the Judicature Act, *"On a proper analysis of the above section it would be seen the three courses available are*

1. To act on the evidence already recorded and deliver judgment.

2. To act on the evidence partly recorded by the predecessor and partly recorded by the successor and deliver judgment or

3. ***If the successor thinks fit,*** *to re-summon the witnesses and commence the proceedings afresh."*.

However, the discretion vested in the succeeding judge to follow one of the aforesaid three lines of action must be exercised reasonably since whenever the law vests a discretion in a Court, it is implicit that such discretion has to be exercised reasonably. When a succeeding judge is weighing how he should exercise the discretion vested in him by section 48 and which line of action envisaged in section 48 should be chosen by him, his decision will depend on the facts and circumstances of the case before him. These facts and circumstances will include: whether the nature of the issues before the Court make it essential for the succeeding judge to hear the witnesses and assess their demeanour and deportment in order to correctly determine the case or whether the correct decision of the case rests more on documents and it is unnecessary for the succeeding judge to rehear the oral evidence which has been led up to the point he took over the case; and whether one or both of the parties will be substantially prejudiced by hearing the trial *de novo* etc - *vide:* MV. OCEAN ENVOY vs. AL-LINSHRAH BULK CARRIERS LTD [2002 2 SLR 337]. In this regard, it is useful to cite the words of Salam J in AG vs. SIRIWARDANE [at p. 354-355] who observed, *"But the application of section 48 may vary depending on the facts and circumstances of each case. Since it is a discretion vested in court, it should have been exercised diligently for it is said that a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reasons direct. He must act reasonably (Roberts us. Hapwood[(8)] at 613).".*

In my view, in instances where a succeeding judge is called upon to deliver judgment in a case where the evidence has been concluded before his predecessor, the requirement that the discretion vested by section 48 of the Judicature Act in the succeeding judge must be exercised reasonably, places a duty on the succeeding judge to have the case called in open court and notify the parties that he [the succeeding

judge] is required to deliver judgment since his predecessor is unavailable. At that time, the succeeding judge should give the parties an opportunity to be heard with regard to which course of action outlined in section 48 should be followed. Having considered the submissions made by the parties on that question, the succeeding judge is entitled to make Order as to the manner in which he decides to exercise the discretion vested in him by section 48.

However, in the present case, as the plaintiff has submitted and as borne out by the relevant journal entries in the case record, the succeeding High Court judge has proceeded to prepare and deliver the judgment [based on evidence recorded before his predecessor] without informing the parties that he intended to do so and without giving the parties an opportunity to be heard on that issue. That was a grave error on his part.

For the reasons set out above, the appeal is allowed and the judgment dated 26th April 2013 of the Commercial High Court is set aside. The Commercial High Court is directed proceed to trial *de novo* based on the pleadings that have been filed. I wish to make it clear that this Court does not express any opinion on the merits of the cases of the plaintiff and defendants. The parties will bear their own costs.

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court

Murdu Fernando, PC, J.
I agree,

Judge of the Supreme Court