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

ATG Ceylon Pvt. Ltd.,
Spur Road, Phase 2,
Industrial Processing Zone (IPZ),
Katunayake.
Plaintiff-Appellant

SC/CHC/APPEAL/49/2019
HC/CIVIL/7/11/IP

Vs.

Attanayake Mudiyanselage Atulasiri Attanayake,
Weralugama,
Talahetimulla.
Defendant-Respondent

Before: Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena
Hon. Justice Sampath K.B. Wijeratne

Counsel: Ikram Mohamed, P.C., with Sa'adi Wadood and Harish Balakrishnam for the Plaintiff-Appellant.

Upul Kumarapperuma, P.C., with Shalini Weeraratne for the Defendant-Respondent.

Argued on: 21.07.2025

Written submissions:

by the Plaintiff-Appellant on 01.09.2025.
by the Defendant-Respondent on 04.09.2025.

Decided on: 27.07.2026

<u>Samayawardhena, J.</u>

Introduction

The plaintiff, which instituted this action in the Commercial High Court in 2011, is a company incorporated in 1992 with Board of Investment of Sri Lanka status and is engaged in the manufacture and distribution of latex and synthetic industrial gloves. It has acquired substantial goodwill and an international reputation in the industry. Through extensive research and development, the plaintiff developed a range of seamless gloves marketed under the names MaxiFlex, MaxiCut and MaxiDry ("the Maxi range"). The manufacture of those products involves confidential proprietary know-how, technology, processes and formulations developed in-house. The plaintiff holds local and international patents and registrations relating to the Maxi range.

The defendant joined the plaintiff in or about July 2000 as a trainee plant operator and, after serving in several departments including the compounding section and the process laboratory, last held the position of process control technician. The plaintiff maintains that the defendant was a hardworking and trusted employee who, by virtue of his duties and specialised training, acquired extensive knowledge of the manufacture of the Maxi range of products, including confidential processes, formulations, quality-control methods, proprietary technology, trade secrets and know-how developed by the plaintiff.

After serving the plaintiff for more than ten years, the defendant absented himself from work on or about 04.11.2010 without notice and was informed by letter dated 25.11.2010 that he had vacated his post and ceased to be an employee of the company.

The plaintiff alleged that, whilst in its employment and immediately thereafter, the defendant acted in concert with a Korean glove manufacturing company and transferred the plaintiff's confidential information, trade secrets, know-how and proprietary technology to that company for financial gain. The plaintiff characterises such conduct as industrial espionage and alleges that it violates section 160 and other provisions of the Intellectual Property Act.

In the prayer to the amended plaint, the plaintiff sought, *inter alia*, a permanent injunction restraining the defendant from disclosing, transferring or otherwise making use of the plaintiff's confidential information, trade secrets, proprietary technology, know-how and patented inventions relating to the manufacture of the Maxi range of products. The plaintiff also sought a declaration that the defendant remained under a continuing obligation to preserve the confidentiality of such information and was not entitled to disclose it to third parties. In addition, the plaintiff claimed damages in a sum of Rs. 200 million.

The plaintiff also sought an interim injunction, substantially similar to the permanent injunction claimed in the plaint, pending the final determination of the action. That interim injunction was subsequently granted by this Court with the consent of both parties.

In his answer, the defendant denied the material allegations in the plaint. He asserted that he neither possessed nor acquired any confidential information, trade secrets, proprietary technology or specialised know-how belonging to the plaintiff and maintained that, having regard to his educational qualifications and position, he lacked the capacity to understand or acquire such advanced technology and processes. He further maintained that he had never disclosed or transferred any such confidential information, trade secrets, proprietary technology or know-how to any third party.

At the trial, twelve admissions were recorded and twenty-six issues were raised. The plaintiff called five witnesses in support of its case and thereafter closed its case reading in evidence the documents marked P1 to P29. Although the defendant maintained that certain documents marked subject to proof had not been duly proved, he neither testified nor called any witnesses, nor did he produce any documentary evidence in support of his defence.

The trial proceeded before several Judges of the Commercial High Court and, ultimately, the judgment was delivered by a Judge before whom no evidence was led. By judgment dated 29.03.2019, the learned Commercial High Court Judge dismissed the plaintiff's action with costs. Aggrieved by that judgment, the plaintiff has preferred this appeal.

In the impugned judgment, the learned Commercial High Court Judge held that the plaintiff had failed to establish that it had imparted to the defendant the confidential information, trade secrets, know-how, technology, chemical formulations, and other proprietary information relating to the Maxi range of products to the extent alleged by the plaintiff. The learned Judge further held that, having regard to the defendant's educational background, he lacked the capacity to comprehend, acquire, or transfer such advanced technology, know-how, trade secrets, and chemical formulations. The learned Judge also held that the agreement marked P20 had not been proved, that the photographs marked P25 series and P26 series had not been proved in accordance with the Evidence (Special Provisions) Act, No. 14 of 1995, and that the document marked P27, said to be a judgment of a Korean court, was inadmissible in evidence. The learned Judge further found that a substantial number of documents had been marked subject to proof and, in the absence of such proof, were inadmissible in evidence.

Having carefully considered the impugned judgment as a whole, I am of the view that the learned Commercial High Court Judge concentrated largely on perceived deficiencies in the plaintiff's evidence without adequately considering whether the totality of the evidence, viewed cumulatively and in the absence of any evidence from the defendant, was sufficient to establish the plaintiff's case on a balance of probabilities. As will be discussed later in this judgment, this approach has materially affected several of the findings reached by the learned Judge.

Admissions recorded at the trial

Twelve admissions were recorded at the commencement of the trial with the consent of both parties. By the 4th admission, the defendant admitted paragraphs 4, 5(b), 5(e), 6, 10, 17, 28, 29, 32, and 33 of the amended plaint. While some of those admissions are of limited relevance and others overlap, several are of considerable importance to the determination of this appeal. I shall therefore refer only to those admissions that bear directly on the issues arising for decision.

By the 4th admission, the defendant admitted paragraph 28 of the amended plaint, namely that he joined the plaintiff company in or about July 2000 as a trainee plant operator and thereafter worked in the compounding section from 2000 to 2003 before being transferred to several departments, including the process laboratory, where he last served as a process control technician.

By the same admission, the defendant admitted paragraph 29 of the amended plaint, namely that he was a hardworking and dedicated employee who had earned the confidence of the senior management of the plaintiff company.

By the 8th admission, the defendant further admitted that he worked in the plaintiff's laboratory and learned the tasks assigned to him by observing the processes carried out by senior officers.

By the 4th admission, the defendant admitted paragraph 10 of the amended plaint, namely, that in the manufacture of the plaintiff's range of products, the plaintiff utilised carefully selected and purpose-built facilities comprising highly sophisticated computerised machinery, specially designed and built in-house using specialised experience and expertise acquired through hands-on experience, extensive research, and innovation developed over nearly 19 years of business operations at the relevant time.

By the 4th admission, the defendant also admitted paragraph 33 of the amended plaint, namely that from about 04.11.2010 he absented himself from work without prior notice or intimation and that, in those circumstances, he was informed by the plaintiff, by letter marked P19 dated 25.11.2010, that he had vacated his post and ceased to be an employee of the plaintiff.

By the 10th admission, the defendant admitted that, whilst in the employment of the plaintiff, he departed to South Korea in search of employment.

The defendant's access to confidential information

Against the backdrop of these admissions, it is necessary to examine the evidence of the plaintiff's 1st witness, who at the material time served as the Group Research and Development Manager of the plaintiff company. He tendered his evidence in chief by affidavit together with documents marked P1 to P27. Most of those documents were moved to be marked subject to proof.

The witness testified that the defendant was a hardworking and dedicated employee who had earned the confidence of the management. According to him, it was because of the trust reposed in the defendant that he was selected for specialised training and exposure in the process laboratory. He stated that the defendant was familiarised with all aspects of the manufacture of the Maxi range of products, including confidential processes relating to latex coating compounds, quality-control methods, proprietary technology, trade secrets, and other confidential aspects of the plaintiff's manufacturing operations. The witness further stated that the defendant received specialised training in troubleshooting production-line issues and that the information imparted to him constituted confidential information and trade secrets of the plaintiff company.

During cross-examination, the witness explained that he and Mr. John Taylor, the Chairman and a shareholder of the plaintiff company, had developed special features of the Maxi range of gloves, which were not available in competing products at the relevant time. He further testified that, because of the defendant's competence and reliability, he was entrusted with responsibilities of considerable importance and was personally trained by the witness in highly confidential and proprietary aspects of the plaintiff's products. According to the witness, the defendant was afforded extensive exposure to the plaintiff's operations and confidential processes because the production lines operated continuously and could not be personally supervised by the witness at all times. The witness further stated that, although the defendant joined the company as a junior employee, by the time he left he had assumed a position of significant responsibility.

With regard to educational qualifications, the witness explained that the plaintiff company placed greater emphasis on a candidate's aptitude, knowledge, and ability than on formal academic qualifications. He stated that candidates were personally interviewed by him and assessed on those criteria and, if satisfied as to their capability, were recruited and entrusted with greater responsibilities irrespective of their formal qualifications.

The admissions recorded at the trial, together with the evidence of the plaintiff's 1st witness, establish that the defendant worked for more than ten years in sensitive areas of the plaintiff's operations, including the compounding section and the process laboratory, received specialised training, earned the confidence of the management, and was exposed to confidential aspects of the plaintiff's manufacturing processes and technology. The admissions and evidence further demonstrate that, notwithstanding the absence of advanced formal educational qualifications, the defendant possessed the aptitude and ability required to understand and perform the specialised tasks entrusted to him.

As already stated, the learned Commercial High Court Judge dismissed the plaintiff's action, *inter alia*, on the basis that the defendant neither received training in, nor possessed the capacity to comprehend, the plaintiff's confidential information, trade secrets, know-how, technologies and manufacturing processes relating to the Maxi range of products. Both findings are difficult to reconcile with the admissions recorded at the trial and the oral and documentary evidence led therein.

The disclosure of confidential information to a Korean company

The learned Commercial High Court Judge concluded that the plaintiff had failed to establish that the defendant had divulged the plaintiff's confidential information, know-how, trade secrets, or proprietary technology to a Korean company. It is therefore necessary to examine the evidence led by the plaintiff on this issue.

The plaintiff's 2nd witness, who at the material time was the Director (Operations) of the plaintiff company, testified that he had received information from one Riyaz and other sources that the defendant, whilst in the employment of the plaintiff and immediately thereafter, had acted in concert with a Korean glove manufacturing company, with a view to transferring the plaintiff's confidential information, know-how, trade secrets, and proprietary technology for financial gain.

The witness testified that he received, *inter alia*, an email dated 22.02.2011 from Riyaz, marked P20(g). Following receipt of that email, he communicated directly with Riyaz, who was then residing in Korea. Through those communications, he learned that the defendant had travelled to Korea in November 2010, met representatives of the Korean company, and entered into the agreement dated 11.11.2010, marked P20(a) in English and P20(b) in Korean, under which the defendant agreed, for substantial financial consideration, to transfer technology and know-how relating to the plaintiff's "Maxi" range of products to the Korean company.

The witness further testified that, after returning to Sri Lanka, the defendant attempted to recruit employees of the plaintiff company to join the Korean venture. One such employee was Pradeep Laksiri, an engineer employed by the plaintiff company, who tendered his resignation by letter dated 13.12.2010 marked P21.

According to the witness, following receipt of the information from Riyaz, additional documents relating to the matter were forwarded to him by Riyaz through DHL. The relevant DHL airway bill was produced and marked P24(g).

This included a copy of the return air ticket of the defendant travelling to Korea in November 2010 marked P20(c), a copy of the invitation sent to the Korean embassy in Sri Lanka by the said Korean company marked P20(d), and a copy of the defendant's passport marked P20(e).

The agreement P20(a) and P20(b) does not stand in isolation. It is corroborated by the surrounding documentary evidence. The defendant's visa application and the related travel documents indicate that, whilst still employed by the plaintiff and without obtaining leave, he travelled to Korea at the invitation of the Korean company, a competitor engaged in the manufacture of industrial gloves, in a technical capacity connected with that business. The other documentary material produced by the plaintiff is likewise consistent with the collaborative arrangement between the defendant and the Korean company contemplated by the agreement.

The witness testified that he thereafter undertook his own investigations both in Sri Lanka and in Korea. In the course of those investigations, he met Riyaz, another person by the name of Rameez, and several other individuals connected with the events in question. According to the witness, Riyaz and Rameez confirmed the defendant's alleged activities and furnished him with photographs, video recordings, and other documents depicting the defendant training third parties and disclosing the plaintiff's confidential and undisclosed information to others, including the Korean competitor.

It is significant that this witness did not merely repeat information received from third parties. His evidence was that, upon receiving the initial information, he personally pursued the matter, communicated directly with the informant, travelled to Korea, met the persons concerned, obtained documents and other material relating to the alleged disclosure, and caused legal proceedings to be instituted in Korea. His testimony therefore describes not only the information that came to the attention of the plaintiff, but also the investigative steps taken by him to verify that information and the consequential action taken by the plaintiff. These matters are relevant in assessing the weight to be attached to his evidence and the reasonableness of the inferences sought to be drawn therefrom.

Admissibility and evidentiary value of the Korean Judgment

The plaintiff's 2nd witness testified that, following his investigations, the plaintiff consulted lawyers in Korea and instituted proceedings before the Seoul Central District Court against the recipients of the plaintiff's confidential information and the Court decided the case in favour of the plaintiff. The defendant was not a party to those proceedings. The judgment delivered by that Court was marked P27.

The learned Commercial High Court Judge rejected P27 on the basis that it did not fall within sections 40, 41 or 42 of the Evidence Ordinance. There is no dispute that P27 does not fall within sections 40, 41 and 42. However, that conclusion overlooks section 43 of the Evidence Ordinance, which serves a different purpose. Section 43 provides:

> *43. Judgments, orders, or decrees, other than those mentioned in sections 40, 41, 41A, 41B, 41C and 42,* ***are irrelevant, unless*** *the existence of such judgment, order, or decree is a fact in issue, or is relevant under some other provision of this Ordinance.*

According to section 5 of the Evidence Ordinance, evidence may be given only of facts in issue and relevant facts. In defining the term "relevant", section 3 of the Evidence Ordinance provides that "*One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Ordinance relating to the relevancy of facts*." Section 6 further provides that "*Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places*." The Korean judgment marked P27 is so connected with the facts in issue as to form part of the same transaction. Accordingly, on the proper construction of section 43, read with sections 3 and 6 of the Evidence Ordinance, P27 was admissible as evidence of those relevant facts.

The plaintiff did not rely on the Korean judgment as conclusively determining any issue before the Sri Lankan courts. The plaintiff relied on the judgment as a relevant circumstance corroborating its own oral and documentary evidence. The judgment expressly refers to the defendant, the agreements allegedly entered into by him, the transfer of technological information, and the activities carried out in Korea. It therefore possessed clear evidentiary relevance.

The learned Commercial High Court Judge was therefore not justified in excluding P27 from consideration. The weight to be attached to that judgment was a matter to be determined upon an evaluation of the totality of the evidence.

The execution of Agreement P20

The plaintiff's 3rd witness was Riyaz alias Ali. Unlike the plaintiff's previous witnesses, whose evidence was derived partly from investigations conducted after the events in question, this witness testified to matters which he had personally seen and experienced whilst residing in the Republic of Korea.

At the commencement of his evidence, the witness identified the defendant, who was present in court, as the person with whom he had become acquainted in Korea. According to the witness, he met the defendant on several occasions at a glove manufacturing company known as Shin Sung Major Glove Company, where a friend of his, namely Rameez, was employed.

The witness testified that, being proficient in Korean, Sinhala, Tamil, and English, he had been engaged by the Korean company to act as an interpreter and translator. In that capacity, he translated discussions between the defendant and the Korean representatives and was present during meetings and demonstrations conducted by the defendant over a period of approximately one to one and a half months.

According to the witness, the defendant represented to the Koreans that he had acquired extensive experience in a large glove manufacturing company in Sri Lanka, had worked in the laboratory, possessed complete know-how relating to the manufacture of gloves and the compounds used therein, and was capable of independently producing similar products. The witness further testified that the defendant brought with him moulds, chemical samples, documents, and gloves bearing the plaintiff company's logo and the name "MaxiFlex".

The witness stated that Korean laboratory assistants closely observed the demonstrations conducted by the defendant and recorded technical details such as temperatures, percentages, compounds, and production processes. According to the witness, the purpose of those exercises was to enable the Koreans to reproduce gloves comparable to those manufactured by the plaintiff company, whose products were regarded by them as superior to those of their competitors.

The crucial document relied upon by the plaintiff in support of its case is the agreement dated 11.11.2010, marked P20(a) in English and P20(b) in Korean.

According to P20(a), the agreement was entered into between the defendant, described as the "Advisor", and GYC Co. Ltd. of Korea. The agreement expressly states that the defendant was engaged to advise on "ATG technology including MaxiFlex, MaxiCool, MaxiDry and production lines". The plaintiff is ATG Ceylon (Private) Limited. Clause 1 describes the object of the agreement as advising on "all the technologies of ATG including MaxiFlex, MaxiCool, MaxiDry and production lines", whilst Clause 2 identifies the subject matter simply as "All the ATG technologies". Clause 3 provides that the duration of the agreement was from 08.11.2010 until the completion of the transfer of technologies. Clause 4 provides for payments amounting in total to approximately USD 180,000, linked to the successful completion of samples, the transfer of technology relating to MaxiFlex, MaxiCool and MaxiDry, the ability of Korean personnel to manufacture samples and obtain certification, consultation regarding production lines, and the stage at which the Korean factory could independently manufacture the products.

Objectively viewed, the agreement is directed not towards ordinary employment or consultancy services but towards the transfer and implementation of technical know-how relating to the plaintiff's products and manufacturing processes.

Riyaz gave direct evidence that he personally knew the defendant in Korea, acted as interpreter between the defendant and the Korean company, explained the contents of the agreement to the defendant, and was present when the agreement was signed. He consistently maintained, both in examination-in-chief and under cross-examination, that he witnessed its execution. According to him, the defendant entered into the agreement in the presence of the witness, his friend Rameez, and several representatives of the Korean company.

The witness also stated that he became concerned that confidential information belonging to a Sri Lankan company was being disclosed for the defendant's personal financial gain. He therefore sent emails to the plaintiff company warning it of the defendant's activities, forwarded relevant documents through courier services, and subsequently cooperated with the plaintiff company and its Korean lawyers in the legal proceedings instituted in Korea. According to the witness, he supplied documents, photographs and video recordings relating to the defendant's dealings with the Korean company.

The learned Commercial High Court Judge described P20(a) and P20(b) merely as "alleged agreements" and held that the plaintiff had failed to prove them because they were photocopies and because there was no proof that those copies had been made from the original documents. On that basis, the learned Judge further held that no importance could be attached to the related correspondence and emails.

In my view, that approach overlooks the provisions of the Evidence Ordinance governing primary and secondary evidence. Section 64 requires documents to be proved by primary evidence, namely the original document itself, except in the cases provided for by the Ordinance. Section 65 permits secondary evidence to be given in the circumstances specified therein, including where the original is in the possession or power of the adverse party or of a person not subject to the process of Court. Section 66 lays down the general rule that notice to produce the original document must first be given to the person in whose possession or power it is. That requirement has no application where the adverse party has denied the existence or execution of the document. In the present case, the defendant's position in the answer was that the agreement was fabricated and forged and that he had never executed it. In those circumstances, the plaintiff was entitled to lead secondary evidence of the agreement without first calling upon the defendant to produce the original.

Furthermore, the plaintiff did not seek to prove the agreements merely by tendering photocopies. They were produced through Riyaz, who gave direct evidence that he personally witnessed their execution and later furnished copies of the documents to the plaintiff. His evidence therefore extended not merely to the contents of the documents but also to their execution.

More importantly, the matters relied upon by the learned Judge, namely whether the copies were made from the original documents and how the witness came into possession of them, were never put to Riyaz in cross-examination.

It is also significant that Riyaz did not tender only the agreements marked P20(a) and P20(b). He produced a series of related documents, including the defendant's return air ticket evidencing his travel to Korea in November 2010 marked P20(c), the invitation issued by GYC Co. Ltd. to the Korean Embassy in Sri Lanka marked P20(d), and a copy of the defendant's passport marked P20(e). These documents formed part of the same body of evidence and were consistent with the plaintiff's version of events.

In these circumstances, the evidence of this witness cannot be disregarded on the basis that he is an unreliable witness or his evidence as hearsay.

Accordingly, I am unable to agree with the learned Commercial High Court Judge's conclusion that P20(a) and P20(b) were not proved. Both the legal basis upon which the documents were rejected and the factual reasons relied upon by the learned Judge are unsustainable. The agreements, together with the accompanying documents and the direct evidence of Riyaz regarding their execution, ought to have been evaluated as part of the totality of the evidence instead of being excluded from meaningful consideration.

The Effect of the defendant's failure to testify

The plaintiff led direct evidence from its 3rd witness, Riyaz, who testified that he personally witnessed the execution of the agreement marked

P20(a) in English and P20(b) in Korean, explained its contents to the defendant, and thereafter furnished the relevant documents to the plaintiff. The plaintiff also produced documentary evidence relating to the surrounding circumstances, including the defendant's return air ticket, his passport, and the invitation issued by the Korean company. In addition, the plaintiff relied upon the photographs marked P25 series and P26 series which, according to the evidence, depicted the defendant training personnel of the Korean company and disclosing the plaintiff's confidential manufacturing processes and proprietary technology. The record further shows (Vol. I of the Appeal Brief, pages 773–775) that the CD relating to those photographs was tendered to Court on 06.12.2013, together with notice to the defendant's registered Attorney-at-Law sent by registered post in terms of the Evidence (Special Provisions) Act, No. 14 of 1995. Viewed cumulatively, this body of evidence established a *prima facie* case against the defendant requiring an answer.

The defendant, however, elected neither to testify nor to call any witness or produce any documentary evidence. He therefore declined to subject himself to cross-examination on the serious allegations made against him.

This is a civil action in which the plaintiff bears the burden of establishing its case on a balance of probabilities. In relation to proof on a balance of probabilities, Lord Denning stated in *Miller v. Minister of Pensions* [1947] 2 All ER 372 at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not.*

Ratanlal and Thakore, *The Law of Evidence (The Indian Evidence Act)*, 13th Edition (1958), at page 10 observe that "*In a civil case, a Judge of* *fact must find for the party in whose favour there is a preponderance of proof, though the evidence is not entirely free from doubt."*

Against this backdrop, it must be emphasised that where a plaintiff adduces evidence which, if accepted, establishes a *prima facie* case, the defendant cannot simply remain silent and expect the Court to dismiss the plaintiff's claim for want of proof without offering any evidence in answer.

As explained in *Murphy on Evidence*, 9th Edition (2005), at page 68:

> *A prima facie case is established when there is enough evidence to entitle, though not compel, the tribunal of fact to find in favour of the claimant, if there were to be no further evidence given.*

The learned author further explains, at page 75:

> *In a case in which the defendant merely denies the claim and therefore has no legal burden to prove, if the claimant succeeds in establishing a prima facie case as to each element of his claim, the defendant acquires an evidential burden of adducing some evidence to contradict the claim.*

Although the defendant bears no legal burden of disproving the plaintiff's claim, the establishment of a *prima facie* case gives rise to an evidential burden requiring him to adduce some evidence in answer. A failure to do so is a circumstance to which the Court is entitled to attach due weight.

Under the well-known Ellenborough dictum, a court may, in an appropriate criminal case, draw an adverse inference from an accused person's failure to explain highly incriminating evidence led by the prosecution; *a fortiori*, there is even greater justification for doing so in a civil action where the plaintiff has established a *prima facie* case on a balance of probabilities and the opposing party nevertheless elects to remain silent.

In *Edrick De Silva v. Chandradasa De Silva* (1967) 70 NLR 169 at 174, H.N.G. Fernando C.J. observed:

> *But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional 'matter before the Court', which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted.*

These principles are entirely consistent with the presumption embodied in section 114(f) of the Evidence Ordinance, namely that the Court may presume "*that evidence which could be and not produced would if produced, be unfavourable to the person who withholds it*".

Those principles apply with greater force in the present case. The plaintiff adduced evidence which, if accepted, established the essential elements of its case. The defendant, despite alleging in his answer that the agreements were fabricated and forged and despite being the person best placed to explain those allegations, elected not to enter the witness box.

Accordingly, I am unable to agree with the approach adopted by the learned Commercial High Court Judge in assessing the crucial evidence led against the defendant.

Evidence of the plaintiff's 4th and 5th witnesses

The plaintiff's 4th witness was the Chief Financial Officer of the plaintiff company. His evidence was directed primarily towards the issue of damages. He testified that the plaintiff was a large-scale enterprise employing approximately 2,500 persons and operating several manufacturing facilities, and that its most valuable assets consisted of its intellectual property, proprietary technology, know-how and trade secrets. According to this witness, the disclosure of such information to competitors would inevitably result in substantial financial loss to the plaintiff, although the precise quantum of such loss would be difficult to ascertain. He further stated that the plaintiff had invested substantial sums over many years in research and development and that, notwithstanding losses allegedly exceeding the amount claimed, the plaintiff sought damages only in the sum of Rs. 200 million. In cross-examination, he maintained that damages resulting from the disclosure of intellectual property and confidential information are inherently difficult to quantify with precision.

The plaintiff's 5th witness was Mohamed Ashroff Fareek, the Group Human Resources Manager of the plaintiff company. His evidence related principally to the defendant's conduct following the termination of his employment. He stated that the defendant had absented himself from work without notice from 04.11.2010 and that, on 07.02.2011, the defendant visited the plaintiff company to obtain documents relating to his EPF and ETF entitlements. According to this witness, during that meeting the defendant stated that he had been working in Korea, had returned to Sri Lanka to meet certain friends and take them back to Korea, and that the remuneration available in Korea was attractive. The witness further stated that the defendant indicated that he intended to return to Korea shortly thereafter.

Importantly, the evidence of both witnesses remained substantially unchallenged, and neither witness was re-examined.

Section 160 of the Intellectual Property Act and undisclosed information

Section 160 of the Intellectual Property Act, No. 36 of 2003, affords statutory protection to undisclosed information and prohibits its unauthorised disclosure, acquisition or use in a manner contrary to honest commercial practices. The section provides both civil and criminal remedies against the unlawful disclosure, acquisition or use of such information.

Sections 160(6)(a) and 160(6)(b) provide that any act or practice carried out in the course of industrial or commercial activities resulting in the disclosure, acquisition or use of undisclosed information without the consent of the rightful holder, and in a manner contrary to honest commercial practices, constitutes an act of unfair competition. Such disclosure, acquisition or use may result, inter alia, from industrial or commercial espionage, breach of contract, breach of confidence, inducement to commit any such act, or acquisition by a third party who knew, or was grossly negligent in failing to know, that the information had been improperly obtained.

Section 160(6)(c) defines "undisclosed information" as information which is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question, possesses actual or potential commercial value because it is secret, and has been subjected by the rightful holder to reasonable steps under the circumstances to preserve its secrecy.

Section 160(6)(e) further provides that undisclosed information includes technical information relating to the manufacture of goods or the provision of services, as well as business information, including internal information developed by an enterprise for use within that enterprise.

Section 160(7) confers a civil remedy upon any person, enterprise or association of producers, manufacturers or traders aggrieved by any act or practice referred to in the section by enabling such party to institute proceedings to prohibit the continuance of the unlawful act or practice and to recover damages suffered as a result thereof.

Section 160(8)(a) makes it a criminal offence for any person, wilfully and without lawful authority, to disclose any undisclosed information.

In addition, section 170 confers broad remedial powers upon the Court in respect of infringements of rights recognised under the Act. Section 170(1) empowers the Court to grant injunctive relief where a recognised intellectual property right is threatened with infringement or has been infringed, and to award damages and such other relief as may be just and equitable. Section 170(3) further empowers the Court, inter alia, to award damages adequate to compensate the right holder for the loss suffered by reason of the infringement and, subject to the protection of confidential information, to order the production of evidence relevant to the substantiation of the claim where such evidence is within the control of the opposing party.

These provisions establish a comprehensive statutory framework for the protection of undisclosed information by prohibiting its unlawful disclosure, acquisition and use in the course of industrial or commercial activities, providing civil remedies to restrain continuing violations and recover damages, and, in appropriate cases, imposing criminal liability for the wilful disclosure of such information without lawful authority. The rights conferred by section 160(6) are, moreover, expressly stated to be in addition to, and not in derogation of, any common law rights.

Burden of proof and evaluation of the evidence

The principal error in the impugned judgment lies in the manner in which the evidence was evaluated. In a civil case, the Court must evaluate the evidence as a whole and determine whether, considered cumulatively, it establishes on a balance of probabilities that the plaintiff's version is more probable than not. The learned Commercial High Court Judge instead examined individual items of evidence in isolation, without considering their cumulative effect, and on that basis concluded that the plaintiff had failed to prove its case.

The proper approach to the evaluation of evidence is reflected in the statutory definition of the expression "proved" in section 3 of the Evidence Ordinance, which provides:

> *A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so*

probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The statutory definition is significant for several reasons.

Firstly, the Court is required to consider all the "matters before it", an expression deliberately wider than the term "evidence".

In explaining the expression "matters before it", Ratanlal and Thakore observe in *The Law of Evidence (The Indian Evidence Act)*, 13th Edition (1958) at page 10:

The expression 'matters before it' includes matters which do not fall within the definition of 'evidence' in section 3. Therefore, in determining what is evidence other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'. It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it'. For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not. Similarly the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not 'evidence' within the definition given by the Act.

Secondly, the statutory standard is one of probability rather than certainty. The law does not require the Court to attain absolute certainty before holding a fact to be proved. At the same time, a mere possibility is insufficient. The Court must be satisfied that the existence of the fact is sufficiently probable that a prudent person would, in the circumstances of the particular case, act upon the supposition that it exists.

The same authors further explain, at page 9, that the concept of proof embodied in section 3 is founded on probability rather than mathematical certainty:

> *The word 'proof' seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. 'Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion.' The degree of certainty which must be arrived at before a fact is said to be proved is that described in this section. In human affairs everything cannot be proved with mathematical certainty and the law does not require it. The definition of 'proof' centres round probability. The accused in establishing his plea of private defence may discharge his burden by evidence satisfying the jury of the probability of his defence.*

Woodroffe and Amir Ali, in *Law of Evidence*, 16th Edition (1996), emphasise that the judicial inquiry should be directed towards determining whether the evidence establishes the probability of truth, rather than searching for possible grounds on which it might be rejected. They state, at page 189:

> *The true question, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence. When there is sufficient evidence of a fact it is no objection to the proof of it that more evidence might have been adduced.*

Thirdly, section 3 does not make the proof of a fact depend upon the personal conviction of the individual judge. The question is not whether the judge thinks the fact is probable or improbable. The question is whether, after considering all the matters before the Court, the existence of the fact is so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists. The standard prescribed by the Ordinance is therefore objective, not subjective. The Court must evaluate the evidence by applying the prudent man's test rather than by reference to the judge's personal assessment of the probabilities.

These principles underscore that the judicial task is neither to search for isolated deficiencies in individual items of evidence nor to demand proof with mathematical certainty. Rather, the Court must consider all the matters before it and determine whether the plaintiff's version is sufficiently probable to satisfy the statutory standard.

As pointed out in *The King v. James Chandrasekera* (1942) 44 NLR 97, section 3 does not itself prescribe the degree of proof required in every case. The applicable standard of proof is to be gathered from other provisions of the Evidence Ordinance, including those contained in Chapter IX.

Applying those principles to the present case, I am satisfied that the plaintiff has established, on a balance of probabilities, that the defendant entered into arrangements with the Korean company for the purpose of transferring the plaintiff's technological knowledge, confidential information and know-how relating to its products and manufacturing processes. The admissions recorded at the trial, the oral testimony of the plaintiff's witnesses, the agreement marked P20(a) in English and P20(b) in Korean, the Korean judgment, the accompanying documentary evidence, the surrounding circumstances, and the defendant's failure to testify, when evaluated cumulatively, point certainly in that direction.

The learned Commercial High Court Judge failed to evaluate the cumulative effect of the evidence led by the plaintiff, as required by section 3 of the Evidence Ordinance. The findings reached are therefore against the weight of the evidence and cannot be sustained. Upon a proper evaluation of the evidence as a whole, I am satisfied that the plaintiff has established its case on a balance of probabilities.

Reliefs to which the plaintiff is entitled

Having concluded that the plaintiff has established its case on a balance of probabilities, it remains to determine the reliefs to which it is entitled.

The evidence establishes that, during the course of his employment, the defendant acquired confidential information, trade secrets, know-how, manufacturing processes, proprietary technology and other commercially sensitive information relating to the plaintiff's "Maxi" range of products. It further establishes that the defendant thereafter entered into arrangements with third parties in the Republic of Korea for the disclosure and transfer of such information for substantial financial gain.

In those circumstances, the plaintiff is entitled to the permanent injunctive relief sought in paragraph (a) of the prayer to the plaint. Accordingly, a permanent injunction shall be issued restraining the defendant, his servants, agents and all persons claiming through or under him from:

(i) disclosing, communicating, transferring or otherwise making available to any third party any confidential information, trade secrets, know-how, proprietary technology, manufacturing processes or other confidential information belonging to the plaintiff relating to the manufacture of the plaintiff's "Maxi" range of products; and

(ii) making, using, offering for sale, selling or otherwise exploiting any patented invention, proprietary technology or manufacturing process belonging to the plaintiff and used in the manufacture of the plaintiff's "Maxi" range of products.

The plaintiff is also entitled to the declaratory relief sought in paragraph (b) of the prayer to the plaint. I accordingly declare that the defendant remains under a continuing legal obligation to preserve the confidentiality of, and is not entitled to disclose, communicate, transfer, utilise or otherwise exploit, any confidential information, trade secrets, know-how, proprietary technology, manufacturing processes or other proprietary information belonging to the plaintiff relating to the "Maxi" range of products.

The plaintiff has further claimed damages in the sum of Rs. 200 million. The evidence of the plaintiff's 4th witness establishes the substantial commercial value of the plaintiff's intellectual property, trade secrets, know-how and proprietary technology developed through many years of research, innovation and investment. The evidence further establishes that the unauthorised disclosure of such confidential information to a competitor is capable of causing substantial commercial loss, although the precise quantification of that loss is inherently difficult.

The defendant's conduct was neither inadvertent nor accidental. The evidence establishes a deliberate course of conduct directed towards transferring the plaintiff's confidential information and proprietary technology to a competitor for substantial financial consideration. Such conduct strikes at the very foundation of commercial confidence and the protection afforded to confidential information and trade secrets.

The unauthorised disclosure of confidential information, trade secrets and proprietary technology is ordinarily carried out in secrecy, making direct proof inherently difficult. In the present case, however, the plaintiff undertook extensive investigations both in Sri Lanka and in the Republic of Korea, painstakingly gathered and presented cogent circumstantial evidence, and succeeded in establishing, on a balance of probabilities, the defendant's unlawful conduct.

Nevertheless, I am not satisfied that the entirety of the damages claimed by the plaintiff has been strictly established. It is also material that the plaintiff acted promptly to restrain the defendant's activities, thereby preventing the intended disclosure and exploitation of its confidential information from being carried through to the extent contemplated by the defendant. That timely intervention necessarily mitigated the loss likely to have been suffered by the plaintiff.

Doing the best I can on the available evidence, and taking into account the nature and commercial value of the confidential information involved, the deliberate nature of the defendant's conduct, the substantial financial benefit expected to be derived therefrom, the difficulty of quantifying the plaintiff's actual loss with precision, the plaintiff's timely intervention, and all the circumstances of the case, I assess the plaintiff's damages in a sum of Rs. Five Million.

Accordingly, judgment is entered for the plaintiff against the defendant in a sum of Rs. Five Million as damages, together with the declaratory and permanent injunctive reliefs set out above.

For all the foregoing reasons, I set aside the judgment of the Commercial High Court dated 29.03.2019 and direct the Commercial High Court to enter judgment for the plaintiff in the above terms. The plaintiff-appellant is entitled to costs in the Commercial High Court and this Court.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court

Sampath K.B. Wijeratne, J.
I agree.

Judge of the Supreme Court