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

In the matter of an Application for Leave to Appeal in terms of Article 127,128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5 (c) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006.

MUNASIGHE LEELA NANDA SILVA
Welpansala Road,
Kudawaskaduwa,
Waskaduwa.

17th DEFENDANT-APPELLANT-PETITIONER

S.C. H.C. C.A. L.A.
Application No.449 /2014 **VS.**
WP/HCCA/KAL/128/2007(F)
D.C. Kalutara Case No.6040/P

T.G.CHANDRAWATHIE WIJESEKERA
Waskadu Methsevena,
Waskaduwa.

PLAINTIF-RESPONDENT-RESPONDENT

1. **JAYALATHGE DON SARATH GUNASEKERA**
   No. 14, 23rd Lane,
   Colombo 03.

2. **WIMALAWATHIE DE SILVA**
   No.51/1, Borupana Road,Ratmalana.

3. **R.N.ZOYSA** C/O Munasinghe Leelawathie Silva, Kuleegoda, Ambalangoda

3A. ANIL GUNARATNA DE ZOYSA
Welibadda,Kuleegoda,Ambalangoda.

4. **MUNASINHGE SYRIL PIYARATNA SILVA**
   No.51/1, Borupana Road,Ratmalana.

4A.WALIMUNI DEWAGE LEELAWATHIE
No. 75/20, Kanatta Road, Mirihanan,
Nugegoda.

5. **MUNASINGHE ANULA DE SILVA**
   Pririvana Rathna Sri Road,
   Pinwatta,Panadura.

6. **PERCY KUMARA SILVA**
   Pririvana Road,Rathna Sri,
   Pinawatta, Panadura.

7. **MUNASINGHE SARATHCHANDRA,**
   Rathna Sri, Pririvana Road,
   Pinawatta, Panadura.

8. **M.D.MALALASEKERA**
   No. 513/1, Nalluruwa,Panadura.

9. **MUNASINGHE BOID KULASENA**
   Wellawatta, Kuleegoda, Ambalangoda.

10. **SRIYANANDA MUNASUNGHE**
    Madawela, Ulpotha, Matale,

11. **MUNASINGHE TICKMEN DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.
    .

12. **MUNASINGHE NANCY DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

13. **RANANALINA WICGKRAMATILLAKE**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

14. **MUNASINGHE DAYANANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

15. **MUNASINGHE CHITHRA NANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

16. **MUNASINGHE VIJITHA NANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

18. **S. HARISON SILVA**
    “Shanthi, Peter Place, Leegamuwa.

19. **S. WILSON SILVA**
"Shanthi, Peter Place, Leegamuwa.

20. **F. EUGENE SILVA**
"Shanthi, Peter Place, Leegamuwa.

21. **VITHANAGE SUMANADASA**
Wellamawala, Uduwara,
Anuguruwathota.

22. **MESSIRI SEEDIN SILVA**
Welpansala Road,Kudawaskaduwa,
Waskaduwa.

23. **MASILIN SILVA**
Welpansala Road,Kudawaskaduwa,
Waskaduwa.

24. **MESSIRI ALJIN SILVA**
Bogasa Asala Nainaduwa,
Kudawaskaduwa,Waskaduwa.

25. **MESSIRI WEWLIN SILVA**
Sri Subuthi Mawatha, Kudawaskaduwa.

26. **CHANDRA PATHMINI DE SILVA**
Sri Subuthi Mawatha, Kudawaskaduwa.

27. **GUNEDRAWATHIE**
Sri Subuthi Mawatha, Kudawaskaduwa.

28. **RANASINGHE ARACHCHIGE ALPI NONA**
Sri Rahula Mawatha,Maho.

29. **GUNENDRA PRIYAWADA**
Sri Rahula Mawatha,Maho.

30. **GUNENTHTHI GAMINI**
Sri Rahula Mawatha,Maho.

31. **GUNENTHTHI SUSANTHA**
Sri Rahula Mawatha,Maho.

DEFENDANTS-RESPONDENTS-RESPONDENTS

SUPREME COURT
Sisira J. De Abrew J.
Nalin Perera J.
Prasanna Jayawardena, PC. J.

COUNSEL: Jagath Halpandeniya with Udara Suwandarachchi for the 17th Defendant-Appellant-Petitioner.
Sanjeewa Ranaweera for the Plaintiff-Respondent-Respondent. Charith Galhena for the 24th – 26th Defendants-Respondents-Respondents.

ARGUED ON:	12th July 2016
WRITTEN SUBMISSIONS:	17th Defendant-Appellant-Petitioner"s Written Submissions tendered on 26th July 2016. Plaintiff-Respondent-Respondent"s Written Submissions tendered on 26th July 2016.
DECIDED ON:	30th September 2016

Prasanna Jayawardena, PC, J

This Order is on a preliminary objection raised by learned Counsel for the Plaintiff-Respondent-Respondent ["Plaintiff"] who submits that, the present Application made by the 17th Defendant-Appellant-Petitioner ["17th Defendant"] violates Rule 28 (5) of the Supreme Court Rules, 1990 and that, therefore, the Application should be rejected.

The preliminary objection is on the ground that, 17th Defendant's Petition filed in this Court seeking Leave to Appeal from the Judgment of the High Court of Civil Appeal (Holden in Kalutara) does not name as a Respondent, the 1st Defendant in the original Action in the District Court of Kalutara who was also the 1st Defendant-Respondent in the Appeal made to the High Court.

Before examining whether this preliminary objection ought to be sustained, I should state the relevant facts.

The Plaintiff instituted this Action against the 1st Defendant named *"Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"* and 24 other Defendants seeking to partition an allotment of land situated in Waskaduwa. After the institution of the Action, 6 more Defendants were added. Thus, there were 31 Defendants when this Case went to Trial in the District Court.

The 1st Defendant filed a Statement of Claim stating that, the 1st Defendant is entitled to a 5130/17280th share of the land. The 1st Defendant also made claims in respect of the buildings and crops on the land. The Record of the Case in the District Court shows that, the 1st Defendant participated in and gave evidence at the Trial and that she was represented by Counsel who appeared for her throughout the Trial.

Several of the other Defendants including the 17th Defendant contested the Case claiming shares in the land. Some of these Defendants, including the 17th Defendant, gave evidence at the Trial and were represented by their Counsel.

The learned District Judge entered Judgment partitioning the land in the following manner: an undivided 7/12th share jointly to the Plaintiff and the 1st Defendant and the remaining undivided 5/12th share to the 22nd to 25th and 29th Defendants. It was also decreed that, the buildings and crops upon the land be allotted to the aforesaid parties according to their respective shares – *ie:* to the Plaintiff, 1st Defendant and 22nd to 25th and 29th Defendants.

The other Defendants, including the 17th Defendant, received no shares in the land.

Being dissatisfied with this Judgment, the 17th Defendant filed an Appeal in the High Court praying that, the Judgment of the District Court be set aside, that the Case be sent back to the District Court for Trial *de novo* and that, the 17th Defendant be awarded the rights she claimed in respect of the land.

The Caption of the 17th Defendant's Petition of Appeal to the High Court named only the Plaintiff and the 1st Defendant as Respondents and omitted to name the 2nd to 31st Defendants as Respondents.

When the Appeal was taken up for Argument before the High Court, learned Counsel appearing on that day for both the Plaintiff and the 1st Defendant raised a preliminary objection that, the Appeal could not be maintained and should be dismissed since the 17th Defendant had failed to name the 2nd to 31st Defendants as Respondents in the Petition of Appeal. This preliminary objection was upheld by the learned High Court Judge who dismissed the Appeal on that ground, by his Judgment dated 28th July 2014.

Thereupon, the 17th Defendant filed a Petition dated 05th September 2014 in this Court, seeking Leave to Appeal from the aforesaid Judgment of the High Court.

However, the 1st Defendant in the District Court - namely *"Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"* - who was also the 1st Defendant-Respondent in the Petition of Appeal filed in the High Court, was *not* named as the 1st Defendant-Respondent-Respondent in the 17th Defendant's aforesaid Petition filed in this Court.

Instead, the Caption to the 17th Defendant's Petition in this Court named one *"Jayalathge Don Sarath Gunasekera, No. 14, 23rd Land, Colombo 3."* as the 1st Defendant (in the District Court), the 1st Defendant-Respondent (in the High Court of Appeal) and the 1st Defendant-Respondent-Respondent (in this Court)- – *ie:* an entirely different person was named and an entirely different address was stated in all three places in the Caption where the 1st Defendant's name *should* have appeared.

This Application was first taken up for support in this Court on 24th November 2014. On that day, the 17th Defendant, the Plaintiff and the 23rd to 26th Defendants-Respondents-Respondents were represented by Counsel. However, the Application for Leave to Appeal was not supported on that day since the 23rd to 26th Defendants-Respondents-Respondents moved to have this matter re-fixed for Support as their Counsel was not able to be present in Court ion that day.

The Journal Entry of 24th November 2014 also records *"Counsel for the petitioner moves that he be granted leave to amend the caption. Application to amend the*

caption is allowed. Any amendments to the caption should be made within one month of today".

Thereafter, the 17th Defendant has filed an amended Caption on 22nd December 2014. This amended Caption cites the correct name of *: "Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"*, as the 1st Defendant (in the District Court), the 1st Defendant-Respondent (in the High Court of Appeal) and the 1st Defendant-Respondent-Respondent (in this Court).

However, there is no subsequent Order made by this Court accepting the amended Caption. The record also does not indicate that any of the Respondents were given Notice of the amended Caption which was filed on 22nd December 2014.

It is also evident from the record that, Notice to Munasingha Nilmini Renuka Wijesekera ["Nilmini Renuka"] was not tendered by the 17th Defendant after the amended Caption was filed on 22nd December 2014. Further, the 17th Defendant did not make an application for Notice to be sent to her. Thus, up to this date, Nilmini Renuka has not been given any Notice of this Application for Leave to Appeal.

When this Application for Leave to Appeal was taken up for Support on 30th September 2015, learned Counsel for the Plaintiff-Respondent raised the aforesaid preliminary objection that, the 17th Defendant-Petitioner's failure to cite the 1st Defendant as a Respondent in the Petition, constitutes a violation of Rule 28 (5) of the Supreme Court Rules, 1990.

Learned Counsel for the 17th Defendant replied submitting that, an application had been made to amend the Caption on 24th November 2014 and submitted that, the said application was allowed by the Court.

In these circumstances, the Inquiry into the aforesaid preliminary objection was fixed for 19th January 2016 and was, thereafter, taken up by us on 12th July 2016 and was reserved for Order on the preliminary objection. I will now make that Order.

Firstly, it is clear that, a need to examine whether the preliminary objection ought to be sustained will *not* arise if this Court is of the view that, prior to the preliminary objection being raised on 30th September 2015, Nilmini Renuka has been duly named and included as the 1st Defendant-Respondent-Respondent by reason of the amended Caption filed on 22nd December 2014 (which correctly names her).

In this regard, the simple fact of the matter is that, Nilmini Renuka was not named in the Petition dated 05th September 2014 and, therefore, she was *not* a party to this Application at the time it was filed in this Court. Needless to say, it is only the parties who are named in a Petition, who can be regarded as parties to the Application.

Notice of the Application was despatched to the Plaintiff on 02nd October 2014 who filed her Proxy and a Caveat on 16th October 2014 stating that she intended to object to the 17th Defendant's Application. Nilmini Renuka was not a party to this Application, at that time either.

Next, it is to be noted that, any Application seeking Leave to Appeal from a Judgment of the High Court in favour of Nilmini Renuka, would usually be time barred unless it is filed within 42 days of 28th July 2014, which is the date on which the Judgment of the High Court was delivered. This is established Law which does not need to be recounted here – *vide:* JINADASA vs. HEMAMALI [2011 1 SLR 337].

In the aforesaid circumstances, the subsequent insertion of the name of Nilmini Renuka as a Respondent to this Application will amount to an amendment of the Petition by the addition of a Party, which can be done only by an Order of Court specifically permitting the amendment of the Petition by the addition of Nilmini Renuka as a Respondent.

It is established law that, an Order of that nature can be made only after the opposing parties were given notice of the proposed amendment and were heard in opposition if they wished to oppose the amendment. This is particularly so, since the opposing parties may be entitled to object to the proposed amendment on the grounds of time bar if the amendment was sought after the expiry of 42 days from 28th July 2014.

In the aforesaid circumstances, the best and, in my view, proper course of action which the 17th Defendant should have followed, was to make an application, by way of a motion and affidavit, with due notice to the Respondents and Nilmini Renuka who was sought to be added, stating the nature of the amendment which the 17th Defendant wished to make and seeking the permission of Court to make the amendment.

However, the 17th Defendant did not do so.

Instead, the Journal Entry of 24th November 2014 is the only record we have as to what the 17th Defendant chose to do, which was to make an oral application when the Case came up in Court for support on that day.

At this point, it should be noted that, 24th November 2014 is long after the expiry of 42 days from the date on which the Judgment of the High Court was delivered. Therefore, any application to amend the Petition by *adding* Nilmini Renuka as a Respondent, was *prima facie* time barred by that time.

The Journal Entry of 24th November 2014 indicates that, when this Case came up for Support on that day, Counsel appearing for the 17th Defendant only stated that he moved that *"he be granted leave to amend the caption".* There is an absence of any detail and a lack of any explanation in this application, which does not help the 17th Defendant. The manner in which the application was couched could well suggest a need to correct only a minor and obvious typographical mistake.

I am of the considered view that, if the 17th Defendant wished to amend the Petition by the addition of Nilmini Renuka as a Respondent in the Caption and chose to leave this to be made by way of an oral application on 24th November 2014, then the very least that should have been done was for Counsel to clearly and frankly spell out the exact nature of the amendment which was sought to be made. The opposing parties would then have been advised of the proposed amendment and would have had an opportunity to respond by either agreeing to the amendment or opposing it. The permission of the Court for the proposed amendment should have been sought thereafter.

However, the Journal Entry indicates that, the nature of the proposed amendment was not disclosed to Court or to the opposing parties on 24th November 2014. The Journal Entry does not record any response by the opposing parties. The Journal Entry also establishes that, the consent of the opposing parties was not obtained.

I should mention that, the Journal Entry of 24th November 2014 is the only record we have of what transpired on that day and, therefore, I am obliged to go by what is contained in that Journal Entry.

In my view, the events as recorded in the Journal Entry of 24th November 2014 do not establish that, the 17th Defendant made a due and proper application to amend the Petition by the addition of Nilmini Renuka as a Respondent. Further, as I will explain in the next paragraph of this Order, I do not think the Journal Entry can be construed to mean that, on that day, the Court permitted the addition of Nilmini Renuka as a Respondent.

I am of the view that, in the aforesaid circumstances, the part of the Journal Entry which states *"Application to amend the caption is allowed. Any amendments to the caption should be made within one month of today"* can only mean that, the Court gave the 17th Defendant an opportunity to tender an amended Caption subject to the right of the opposing parties to object to any amendment which was sought to be made and for the Court to, thereafter, make an Order on whether or not the proposed amendment should be permitted.

The above interpretation of the Journal Entry is reinforced by my certainty that, if the Court had, on 24th November 2014, intended to permit the amending of the Petition by the addition of Nilmini Renuka as a Respondent, the Court would have immediately directed that she be given due Notice of the Leave to Appeal Application. The fact that no Order was made for Notice to issue to Nilmini Renuka indicates that, the Court only permitted the 17th Defendant to tender an amended Caption subject to the right of the opposing parties to object and for the Court to, thereafter, make an Order on the proposed amendment. The validity of this conclusion is further strengthened by the fact that, where a party seeks to amend a Petition, it is the usual practice to direct that party to tender the proposed

amendment so that it can considered after the opposing parties are given the opportunity of examining the proposed amendment and being heard in opposition if they wish to object and for the Court to, only thereafter, make an appropriate Order.

Finally, it seems to me that, the above interpretation is that which can be rightly and fairly accorded to the Journal Entry since the maxim *Actus Curiae Neminen Gravabit* - an act of the Court shall prejudice no man – will apply to prevent this Journal Entry being interpreted in a manner which will cause prejudice to the Respondents.

In these circumstances, I hold that, the amended Caption filed on 22nd December 2014 must be treated as having being tendered subject to the objections of the Respondents and that, since there has not been a subsequent Order of Court accepting the amended Caption, the 17th Defendant's Petition has not, up to now, been amended by the addition of Nilmini Renuka as a Respondent.

Accordingly, I hold that, at present, Nilmini Renuka is not named as a Respondent to the 17th Defendant's Application for Leave to Appeal.

It is evident from the position taken by learned Counsel for the Plaintiff that, the Plaintiff objects to the amendment of the Petition by the *addition* of Nilmini Renuka, as a Respondent. However, before this Court is required to consider whether or not the addition of a party should be permitted, the preliminary objection raised by the Plaintiff has to be decided since it may go to the very maintainability of this Petition.

Therefore, I will now proceed to consider whether the Plaintiff's preliminary objection should be sustained.

I wish to clarify at the outset that, the merits of the Judgment of the High Court do not come up for consideration when this Court is examining the aforesaid preliminary objection which is solely confined to and based upon the submission that, the 17th Defendant's Petition to this Court should be rejected on the ground that it violates Rule 28 (5) of the Supreme Court Rules, 1990.

The present Application is one praying for Leave to Appeal from the Judgment of a High Court of the Provinces established under Article 154P of the Constitution.

It is settled Law that, the Supreme Court Rules, 1990 apply to such Applications. As explained by Dr.Bandaranayake J (as she then was) in SUDATH ROHANA vs. MOHAMED ZEENA [2011 2 SLR 134], such Applications fall within the category of *"OTHER APPEALS"* referred to in Section C of Part I of the Supreme Court Rules, 1990.This has been also stated in JINADASA vs. HEMAMALI (*supra*) and several other Cases.

Rule 28 which is in Section C of Part I of the Supreme Court Rules, 1990 sets out the requirements and procedural steps that must be complied with when a Petition of Appeal which falls into the category of *"OTHER APPEALS"* in terms of the said Rules, is filed in the Supreme Court. It is to be noted that, in the case of a Petition seeking Leave to Appeal from a Judgment or Order of a High Court of the Provinces established under Article 154P of the Constitution, that Petition will be deemed to be the `Petition of Appeal' in the event this Court grants Leave to Appeal – *vide:* IBRAHIM vs. NADARAJAH [1999 1 SLR 131 at p.132] where Dr. Amerasinghe J explained that, in corresponding circumstances relating to Applications for Special Leave to Appeal, "*The application for leave to appeal is deemed to be the petition of appeal."*.

Rule 28 (5) the Supreme Court Rules, 1990 mandatorily requires that, in the 17th Defendant's Petition *"….. there **shall** be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full"*. (emphasis added). It is clear from the wording of Rule 28 (5) that, its requirements are mandatory.

Undoubtedly, the 1st Defendant was a party who had to be named as a Respondent by operation of Rule 28 (5) since the Judgments of both lower Courts were in favour of the 1st Defendant and the 1st Defendant would have been adversely affected if the 17th Defendant succeeded in this Court. The 1st Defendant was a `necessary party'.

Thus, the inescapable conclusion is that, the 17th Defendant has violated the mandatory requirements of Rule 28 (5) of the Supreme Court Rules, 1990 by the failure to name the 1st Defendant as a Respondent to the Petition. This fact is not disputed by learned Counsel for the 17th Defendant.

The next question then is, what the consequence of that violation are ?

The general principle which will apply under the provisions of Chapter LVIII of the Civil Procedure Code when there is a failure to name a Necessary Party as a Respondent to a Petition of Appeal, is set out in the leading Case of IBRAHIM vs. BEEBEE [19 NLR 289], which was a Full Bench decision.

In that Case, Wood Renton CJ held (at p.291) *"I have no doubt as to the power of the Supreme Court to dismiss an appeal, on the ground that it has not been properly constituted by the necessary parties being made respondents to it, and I am equally clear that that power should be exercised, unless the defect is not one of an obvious character, which could not reasonably have been foreseen and avoided."* Shaw J held (at p. 293) that, ….. *"it is necessary for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected."*

In SEELANANDA THERO vs. RAJAPAKSE [39 NLR 361] and in SUWARISHAMY vs. THELENIS [54 NLR 282] which were both Cases which considered the position under the provisions of Chapter LVIII of the Civil Procedure Code, the Supreme Court held that, where a necessary party had not been named as a Respondent to the Petition of Appeal, the Appeal should be rejected unless it was not clear from the Record that the said party would be affected by the Appeal or the necessity of naming him as a Respondent could not be reasonably foreseen.

Similarly, in GUNASEKERA vs. PERERA [74 NLR 163], which was a Partition Case, the District Court had held that, the Plaintiff and the 1st to 5th Defendants are entitled to shares in the land which was being partitioned and had rejected the claim of the 6th Defendant. The 6th Defendant appealed but named only the Plaintiff as a

Respondent to the Petition of Appeal. The Plaintiff raised a preliminary objection on the grounds of non-joinder of the 1st to 5th Defendants who were necessary parties since their interests would be adversely affected in the 6th Defendant's Appeal succeeded. Thus, the facts in GUNASEKERA vs. PERERA are similar to the facts in the present Case.

H.N.G.Fernando C.J. upheld the preliminary objection and rejected the Appeal stating (at p.164), *" In the present appeal the 6th defendant has joined only the plaintiff as a respondent, although it is manifest that if the appeal were to succeed the interests of the 1st to the 5th defendants would be completely affected. The failure to join the 1st to the 5th defendants as respondents is a defect of an obvious character which should have been foreseen."*.

The above Cases were all decided under the provisions of Chapter LVIII of the Civil Procedure Code.

On 01st November 1978, this Court made the Supreme Court Rules, 1978 in the exercise of the power conferred upon this Court by Article 136 of the Constitution which was promulgated on 31st August 1978. Thenceforth, it is the Supreme Court Rules, 1978 which applied in respect of the procedure which had to be followed in Applications for Special Leave to Appeal, Applications for Leave to Appeal and the several other areas which are set out in therein.

In the often cited Case of IBRAHIM vs. NADARAJAH (*supra*) which was decided under the Supreme Court Rules, 1978, the Substituted Defendant-Respondent-Appellant filed a Petition in the Supreme Court seeking Leave to Appeal from an Order of the Court of Appeal. Special Leave to Appeal was granted by the Supreme Court. When the Appeal was taken up for argument, President's Counsel appearing for the 1st Substituted Plaintiff-Appellant-Respondent submitted that, the Appeal should be dismissed since the Substituted Defendant-Respondent-Appellant had violated Rules 4 and 28 of the Supreme Court Rules, 1978 by the failure to make the 2nd Substituted Plaintiff-Appellant in the Court of Appeal, a Respondent in the Petition filed in the Supreme Court. It should be mentioned that, Rules 4 and 28 required that Applications of Special Leave to Appeal and Petitions of Appeal *"shall*"

name as Respondents all parties in whose favour the Judgment appealed against has been delivered or whose interests may be adversely affected by the success of the Appeal. This preliminary objection was upheld by the Supreme Court and the Appeal was rejected.

Dr.Amerasinghe J, with whom Dheeraratne J and Goonewardene J agreed, stated (at p. 133) that, *"…… a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal. Those Rules are meant to ensure that all parties who may be prejudicially affected by the result of an appeal should be made parties. How else could justice between the parties be ensured ? It has always, therefore, been the law that that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected."*.

The aforesaid Supreme Court Rules, 1978 governing Applications for `Special Leave to Appeal', Applications for `Leave to Appeal' and some other specified areas were revoked when, on 25th September 1990, this Court made the Supreme Court Rules, 1990 also in the exercise of the power conferred upon it by Article 136 of the Constitution. Therefore, from 25th September 1990 onwards, it is the Supreme Court Rules, 1990 which specify the procedure which has to be followed in Applications for 'Special Leave to Appeal', Applications for 'Leave to Appeal' and `Other Appeals' and the several other areas which are set out in therein.

The wording of Rule 28 (5) of the Supreme Court Rules, 1990 is similar to the wording of the corresponding Rule in the Supreme Court Rules, 1978 in terms of which the Supreme Court decided IBRAHIM vs. NADARAJAH (*supra*).

In SENANAYAKE vs. AG [2010 1 SLR 149] which was decided under the Supreme Court Rules, 1990, Dr. Bandaranayake J (as she then was) held that both Rule 4 of the Supreme Court Rules, 1990 which applied to Applications for `Special Leave to Appeal' and Rule 28 (5) of the Supreme Court Rules, 1990 which applies to `Other Appeals' require that all persons who may be adversely affected by the Appeal should be made parties. Her Ladyship went on to refer to Dr.Amerasinghe J's

aforesaid statement in IBRAHIM vs. NADARAJAH and held (at p.161) that, *"The totality of the aforementioned Rules indicate the necessity for all parties who may be adversely affected by the success or failure of the appeal to be made parties to the appeal"* and that, *"In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties who may be adversely affected by the result of the appeal should be made parties"*.

Subsequently, in ILLANGAKOON vs. LENAWELA [SC HCCA LA 277/2011 (S.C. Minutes of 05th April 2013) Sripavan J (as His Lordship, the Chief Justice then was) referred to IBRAHIM vs. NADARAJAH (*supra)* and dismissed an Application for Leave to Appeal on the ground of non-compliance with Rule 28 (2) and Rule 28 (5) of the Supreme Court Rules, 1990.

His Lordship cited with approval, the words of Dr. Bandaranayake J (as she then was) in ATTANAYAKE vs. COMMISSIONER GENERAL OF ELECTIONS [2011 1 SLR 220] where Her Ladyship had explained (at p.233-234) ,*"Through a long line of cases decided by this Court, a clear principle has been enumerated that where there is non-compliance with a mandatory Rule, serious consideration should be given for such non-compliance as such non-compliance would lead to a serious erosion of well established Court procedure followed by our Courts throughout several decades."*.

In ATTANAYAKE vs. COMMISSIONER GENERAL OF ELECTIONS, Dr. Bandaranayake J (as she then was) has also stated (at p. 234), *"The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections. As correctly referred to by Dr. Amerasinghe,J., in Fernando v Sybil Fernando and others, `Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly'. If*

a party so decides to act recklessly it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions".

SUDATH ROHANA vs. MOHAMED ZEENA (*supra)* is another recent decision where this Court reiterated the principle that, non-compliance with the mandatory requirements of the Supreme Court Rules, 1990 will usually render an Appeal liable to rejection. In that Case, Dr.Bandaranayake J (as she then was) rejected an Application on the grounds that, the Petitioner had violated Rule 28 (3) of the Supreme Court Rules which requires a Petitioner to tender Notices to the Registry of the Supreme Court with his Application for Leave to Appeal. Her Ladyship stated (at p.147) *"…… the failure to comply with Rule 28(3) of the Supreme Court Rules would necessarily be fatal".*

I have cited the above decisions, at some length, to illustrate the established rule that, all parties who may be adversely affected by an Appeal must be named as Respondents in the Petition of Appeal and be given due Notice in accordance with the Rules and that, a failure to do so, renders the Appeal liable to rejection.

To move to the present Case, it is clear from the above cited line of authority that, the 17th Defendant's violation of the mandatory requirements of Rule 28 (5) of the Supreme Court Rules, 1990 by the failure to name the 1st Defendant as a Respondent to the Petition, makes the 17th Defendant's Petition liable to rejection.

Learned Counsel for the 17th Defendant has urged that, this Court should grant its indulgence to the 17th Defendant and excuse the aforesaid violation of Rule 28 (5) of the Supreme Court Rules, since, learned Counsel submits, the 1st Defendant was not named as a Respondent due to an *"oversight"* and the *"the mistake was not deliberate"*. While that may well be the cause of the violation of the rule, I do not think it can take away the operation of Rule 28 (5) against the 17th Defendant. Due compliance with the Supreme Court Rules, 1990 cannot be excused on the grounds that the failure to comply was unintentional.

Learned Counsel for the 17th Defendant also cites Section 759 (2) of the Civil Procedure Code which confers a discretion on Court to grant relief in the case of any

mistake, omission or defect on the part of the appellant in complying with the requirements of the Civil Procedure Code with regard to the Petition of Appeal and Section 770 of the Civil Procedure Code which confers a discretion on Court to issue notice and add a party to the Action in the lower Court who has not been made a party to the Appeal. Counsel's submission is that, notwithstanding the failure to comply with Rule 28 (5) of the Supreme Court Rules, 1990, Sections 759 (2) and Section 770 of the Civil Procedure Code vest this Court with the discretion to now issue Notice to the 1st Defendant and add her as a Party.

While such a submission regarding the exercise of the discretion vested in an Appellate Court by Sections 759 (2) and Section 770 of the Civil Procedure Code may have been made in the High Court of Civil Appeal in the original Appeal which was heard under and in terms of the provisions of Chapter LVIII of the Civil Procedure Code, it is not relevant in the present matter in this Court, since the preliminary objection is centered upon non-compliance with Rule 28 (5) of the Supreme Court Rules, 1990, to which Section 759 (2) and Section 770 in Chapter LVIII of the Civil Procedure Code do not apply.

In this regard, I would also add that, the decisions of JAYASEKERA vs. LAKMINI [2010 1 SLR 41] and WILSON vs. KUSUMAWATHIE [2015 B.A.L.J. Vol. XXI p.49] cited by learned Counsel for the 17th Defendant in support of the aforesaid submission, deal with situations where the High Court of Civil Appeal applied Section 770 and Section 759 (2) of the Civil Procedure Code and not with situations where there was non-compliance, in this Court, with Rule 28 (5) of the Supreme Court Rules, 1990.

The decision of this Court in EDIRIWICKREMA vs. RATNASIRI [2013 B.A.L.J. Vol. XX p.4] which has also been cited by learned Counsel for the 17th Defendant, deals with the question of whether objections based on non-compliance with Supreme Court Rules, 1990 can be sustained where the objections are raised very belatedly – in that case eight years after Special Leave to Appeal had been granted. The issue of belatedness does not arise for consideration in the present Case and, therefore, EDIRIWICKREMA vs.RATNASIRI does not assist the 17th Defendant.

Learned Counsel for the 17th Defendant also submits that, since the 17th Defendant's Application for Leave to Appeal has not been supported as yet, there is *"sufficient time to rectify the mistake by sending notices"* to the 1st Defendant. Counsel's submission is, in effect, that, the non-compliance with the requirements of Rule 28 (5) should be overlooked and notice should be issued since there is sufficient time to do so.

In support of this contention, Counsel has cited the recent decisions of LEELAWATHIE MENIKE vs. BANDARA [2015 BLR 97] and ELIAS vs. CADER [2011 2 BLR 375] which took the view that, the raising of technical objections should be discouraged in the cause of the proper dispensation of justice and that, wherever possible, it is preferable to decide a Case on its merits rather than upon technicalities. The facts in these two decisions are entirely different to the facts in the present Case and no parallels can be drawn with the present Case.

In any event, I do not think that, in the light of the facts of the present Case, the preliminary objection raised by the Plaintiff can be properly regarded as being a mere `technical objection'.

In this regard, it has to be remembered that, the 1st Defendant was awarded substantial entitlements by the Judgments of the District Court and High Court which the 17th Defendant now seeks to set aside in her Application to this Court. If the 17th Defendant succeeds, the 1st Defendant will be substantially and irrevocably prejudiced. In these circumstances, it was necessary that, the 17th Defendant named the 1st Defendant as a Respondent to her Petition filed in this Court so that, the 1st Defendant will be given the opportunity to be heard in opposition to the 17th Defendant's Application.

This is what is mandatorily required by Rule 28 (5) of the Supreme Court Rules, 1990. This Rule places an imperative burden and responsibility upon an Appellant or Petitioner to ensure that his Petition is presented in a manner which will ensure that, all those parties in the lower Courts who may be prejudiced if he succeeds in this Court, are named as Respondents and, thereby, are given an opportunity to be heard in opposition to his Appeal or Application to this Court.

Thus, it is evident that, Rule 28 (5) of the Supreme Court Rules, 1990 is an important provision of procedural law designed to ensure the due and proper dispensation of justice by this Court.

It should be kept in mind that, as Dr. Amerasinghe J explained in FERNANDO vs. SYBIL FERNANDO [1997 3 SLR 1 at p. 13] *"There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim ubi jus, ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (ibid.) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being.".* More recently, in SUDATH ROHANA vs. MOHAMED ZEENA (*supra*) Dr, Bandaranayake J (as she then was) stated (at p.145) *"….. the procedural law breathes life into substantive law, sets it in motion, and functions side by side with substantive law".*

Rule 28 (5) of the Supreme Court Rules, 1990 is simply a crystallization into procedural law of the inviolable *audi alteram partem* requirement of the substantive law. Therefore, this rule must be complied with, must be enforced and violations of this rule will be liable to rigorous penalties.

It is for the above reasons that, our Courts have, for good reason as referred to above, regarded strict compliance with Rule 28 (5) and its equivalent in the Supreme Court Rules, 1978, as being mandatory and have rejected Appeals which do not comply with the Rule.

Thus, I am not inclined to accept the submission that, the preliminary objection raised by the Plaintiff is a mere `technical objection' which should be overlooked.

Before concluding, it is appropriate to briefly consider whether a failure to name a necessary party as a Respondent to a Petition of Appeal will always and invariably

result in the rejection of the Appeal due to non-compliance with Rule 28 (5) of the Supreme Court Rules, 1990.

In IBRAHIM vs. NADARAJAH (*supra)*, Dr.Amerasinghe J expressed his view (at p. 133) that, *"…… a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal"* and later (at p.133-134) referred to the submission made by Counsel for the Petitioner that the Court should exercise its discretion and grant relief to the Petitioner under the provisions of Chapter LVIII of the Civil Procedure Code and set out the submission, in reply, of President's Counsel for the Respondent as: *"Mr. Samarasekera, P.C., however, submits that the Court no longer has that discretion under the prevailing laws and rules and that in any event there are no circumstances in this case warranting the granting of any indulgence."*. Dr. Amerasinghe J stated that, the Court agreed with aforesaid submission of President's Counsel for the Respondent. However, the Judgment does not state that, Dr. Amerasinghe J was of the view that this Court was bereft of jurisdiction to exercise discretion and grant relief even in an instance where it was established that, the non-compliance with the Rule was caused by exceptional circumstances and without any fault on the part of the Appellant.

It is evident that, in IBRAHIM vs. NADARAJAH, there were no exceptional circumstances which could have been considered by the Court as, in the words of Dr. Amerasinghe J, *"warranting the granting of any indulgence"* by the Court. Thus, Dr. Amerasinghe J does not appear to have considered the specific question of whether indulgence could be granted where the non-compliance with the Supreme Court Rules, 1978 was due to exceptional circumstances where no fault, negligence or lack of diligence could be attributed to the Petitioner or Appellant. The more recent decisions of this Court in SENANAYAKE vs. AG and ILLANGAKOON vs. LENAWELA cited above which deal with Rule 28 (5) of the Supreme Court Rules, 1990 also do not appear to consider this specific question.

I am of the view that, while Rule 28 (5) of the Supreme Court Rules, 1990 places a mandatory duty on a Petitioner or Appellant to name all necessary parties as Respondents to his Petition and the failure to duly comply with this requirement will ordinarily result in the rejection of the Application or Appeal, there could be

exceptional circumstances where this Court may consider it to be just and equitable to grant indulgence where it has been established that, the non-compliance was unavoidable or was caused by exceptional circumstances *and provided* there had been no fault, negligence or lack of diligence on the part of the Petitioner or Appellant or his Attorney-at-Law.

However, there is no need to further consider this aspect in the present Case since the 17th Defendant has adduced no excuse for the failure to name the 1st Defendant as a Respondent to the Petition other than to describe it as a mistake or oversight.

For the aforesaid reasons, I hold that, the 17th Defendant's Petition should be rejected for non-compliance with the requirements of Rule 28 (5) of the Supreme Court Rules due to the failure to name the 1st Defendant as a Respondent to the Petition.

The Application of the 17th Defendant-Appellant-Petitioner is rejected. In the circumstances of the Case, I do not make an Order for Costs.

Judge of the Supreme Court

Sisira J. De Abrew J.
I agree

Judge of the Supreme Court

Nalin Perera J.
I agree

Judge of the Supreme Court