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

In matter of an application for Leave to Appeal from the Order of the High Court of the Western Province holden in Colombo.

In the matter of

Green Lanka Shipping Limited
Green Lanka Tower,
46/46, Nawam Mawatha,
Colombo 02.

S.C Leave to Appeal No: SC/HC/LA/40/2018
High Court No: HC (Civil) 49/2016(CO)

Evergreen Marine Corporation (Taiwan) Limited
No.166, Sec 2,
Mingsheng East Road,
Taipei 104, Taiwan,
Republic of China.

Petitioner

AND NOW

Green Lanka Shipping Limited
Green Lanka Tower,
46/46, Nawam Mawatha,
Colombo 02.

Company Ordered to be Wound Up - Petitioner

VS

1. **Evergreen Marine Corporation (Taiwan) Limited**
No.166, Sec 2,
Mingsheng East Road,
Taipei 104, Taiwan,
Republic of China.

Petitioner- Respondent

2. **Mercantile Investments & Finance PLC**
No. 236, Galle Road,
Colombo 03.

Creditor- Respondent

3. **G.J David**
SJMS Associates,
Chartered Accountants,
Level 03,
No.11, Castle Lane,
Colombo 04.

Liquidator- Respondent

Before: Jayantha Jayasuriya PC CJ.,
Vijith K. Malalgoda, PC J. and
Murdu N.B. Fernando, PC J.

Counsel: S.A. Parathalingam PC with Nishkan Parathalingam, Ms. Olivia Thomas instructed by Anoma Goonethilake for the Company Ordered to be Wound up - Petitioner.

Suren de Silva instructed by D.L and F de Saram for the Petitioner- Respondent.

Harsha Amarasekara P.C. with Kanchana Peiris instructed by Paul Ratnayake Associates for the Creditor – Respondent.

Nihal Fernando P.C. with Rohan Dunuwille and Anushka Weerakon instructed by Thivanka Pussewela for the Liquidator – Respondent.

Argued on: 12.06.2019, 22.11.2019 and 18.12.2019.

Decided on: 21.10.2021

Murdu N.B. Fernando, PC. J.

This Leave to Appeal Application arises from an Order of the High Court of the Western Province, exercising Civil (Commercial) jurisdiction, holden in Colombo ("the High Court") dated 29th March, 2018.

By the said Order, the learned judge of the High Court, revoked its earlier Order dated 22nd February, 2018 and re-issued notice on the liquidator in terms of the relevant rules, in a winding-up application filed in the High Court under the Companies Act No 07 of 2007 ("Companies Act").

Being aggrieved by the said High Court Order, *Green Lanka Shipping Limited,* **the Company Ordered to be Wound up- Petitioner,** came before this Court on 17th April, 2018 in a Leave to Appeal Application and moved for Leave to Appeal and to set aside the Order dated 29th March, 2018 and also to grant and issue interim relief to stay and suspend the said Order pending the determination of this application.

In the Leave to Appeal Application filed before this Court, the Company Ordered to be wound up - Petitioner, Green Lanka Shipping Limited ("Green Lanka Ltd"), named three parties as Respondents. They are;

(i) *Evergreen Marine Corporation (Taiwan) Limited*, the **Petitioner – Respondent;**

(ii) *Mercantile Investments and Finance Limited,* the **Creditor- Respondent;** and

(iii) *G. J. David of SJMS Associates, the* **Liquidator- Respondent.**

When this Application for Leave to Appeal was taken up before this Court on 12th June, 2019 the learned Counsel for the Petitioner- Respondent and the learned Presidents' Counsel appearing for the Creditor- Respondent and Liquidator- Respondent (collectively referred to as the "Respondents") raised a number of preliminary objections and moved that the Leave to Appeal Application be dismissed *in limine.*

The said preliminary objections are as follows: -

(i) there is no valid proxy granted on behalf of the Petitioner (Green Lanka Limited) filed of record;

(ii) the affidavit filed in support of the petition filed of record cannot be acted upon, since the deponent is not a director of the Petitioner Company, Green Lanka Ltd.; and

(iii) the Leave to Appeal Application filed is defective, since all parties who were represented at the High Court, have not been made parties to the application filed in this Court.

Having heard all the parties before this Court with regard to the above preliminary objections and also having considered the written submissions filed of record, I wish to advert to certain facts, *albeit* brief, relevant to this application prior to considering the said preliminary objections.

01. In the year 2002, Evergreen Marine Corporation (Taiwan) Limited ("Evergreen Ltd") the Petitioner–Respondent before this Court, appointed the Petitioner, Green Lanka Ltd as its local shipping agent to provide shipping services to its vessels sailing under the name of "Evergreen Lines" by way of an agency agreement.

02. This agency relationship continued between the parties for a number of years and Green Lanka Ltd owed a substantial sum of money to the principal, Evergreen Ltd. In the year 2016, there were discussions between the parties with regard to the

outstanding sum and a mechanism was arrived at for settlement of the monies due. However, Green Lanka Ltd failed to adhere to the said terms.

03. On 21st September 2016, Evergreen Ltd moved the High Court by virtue of Section 270 (e) of the Companies Act for an Order of winding-up of Green Lanka Ltd.

04. The High Court, in terms of the Companies Winding-up Rules of 1939 ("winding-up rules") made order and appointed a "provisional liquidator" and issued notice on the party sought to be wound-up.

05. The company sought to be wound- up, Green Lanka Ltd filed papers opposing the winding-up application. Certain other parties too, intervened in this application.

06. The Court inquired into this matter and on 29th January, 2018 the learned High Court judge, made Order permitting the winding-up of Green Lanka Ltd. The Court also appointed the provisional liquidator as the liquidator of the Company Ordered to be wound-up, Green Lanka Ltd and the case was re-fixed for 13th March, 2018.

07. On 08th February, 2018 consequent to the aforesaid Order of the High Court, Evergreen Ltd tendered notices to be served on the liquidator in terms of Rule 17 and 19 of the winding-up rules and the Court issued the said notices on the liquidator on 19th February, 2018.

08. On 21st February, 2018 Green Lanka Ltd being aggrieved by the winding- up Order, tendered a notice of appeal to the High Court.

09. **Upon tender of the notice of appeal, the learned High Court judge re-called the notices issued on the liquidator** SJMS Associates. This Order dated 22nd February 2018 minuted in the journal entry was made three days after the initial direction to issue notice on the liquidator.

10. When the case was called before the High Court on the next date, 13th March, 2018

- It was submitted on behalf of Evergreen Ltd that lodging of an appeal does not automatically stay the proceedings before the High Court and the process of winding-up should go on, unless it is stayed by an Order of a Superior Court;

- The submission of Green Lanka Ltd was that the Order made by the learned High Court judge to re-call the notices issued on the liquidator cannot be challenged before the High Court itself;

- In response Evergreen Ltd contended that if an order has been made *per incuriam,* then that order can be challenged before the very same court.

11. Intervening parties also made submissions and the learned judge called for written submissions and fixed the matter for Order on 29th March, 2018.

12. On the said date the High Court **made Order to re-issue notice on the liquidator** in terms of Rule 17 and 19 and called for the liquidator's report.

13. The learned High Court judge in his Order stated as follows:

"60. Taking into consideration all those matters, I am of the view that the ***Order made in journal entry on 22.02.2018 was made due to an inadvertence*** *without affording the parties to present their arguments and without considering the subsequent Divisional Bench decision of the Court of Appeal and Winding- up Rules, the rationale of which would have made the Order made on 22.02.2018 different from what it was.*

61. For those reasons, I hold that this Court ***has inherent power to revoke the Order made inadvertently on 22.02.2018*** *in the said journal entry, and I am now correcting the said Order made, by re-issuing the notices submitted by the Petitioner in terms of Rule 17 and 19 of the Companies Winding- up Rules." (emphasis added)*

14. Being aggrieved by the aforesaid Order dated 29th March, 2018, Green Lanka Ltd came before this Court in a Leave to Appeal Application and that is the matter that is now before us for determination.

15. Independent to this application, the final appeal lodged by Green Lanka Ltd against the Order of winding-up dated 29th January, 2018 too, is before this Court for determination.

If I may summarize;

- Evergreen Ltd, moved the High Court to obtain an order to wind-up Green Lanka Ltd, its local shipping agent;

- The High Court on 29th January, 2018 allowed the application, made the winding-up Order and directed notices be issued on the liquidator;

- Evergreen Ltd tendered the requisite notices to be served on the liquidator and the High Court issued the notices on the liquidator;

- Green Lanka Ltd filed notice of appeal against the Order of winding up and the learned High Court judge *ex-mere motu* re-called the notices served on the liquidator;

- Upon representations made and hearing all parties, the learned High Court judge, by its Order dated 29th March, 2018 revoked its earlier Order and re-issued notice on the liquidator.

Having referred to the factual matrix of the instant matter, let me now move onto consider the Leave to Appeal Application before this Court for determination.

The Respondents raised three preliminary objections and moved that this Application be rejected at the threshold itself.

The grounds urged by the Respondents are;

i. validity of the proxy filed in the Supreme Court;

ii. validity of the affidavit filed in support of the Leave to Appeal application; and

iii. necessary parties not being named in the Leave to Appeal application.

Thus, this Court would now examine the said preliminary objections.

(i) There is no valid proxy filed on behalf of Green Lanka Ltd in the Supreme Court.

The contention of the learned Counsel for Evergreen Ltd, the parent shipping company with regard to the objection on proxy, was twofold.

Firstly;

-that the proxy filed in the Supreme Court with a motion by the Company Ordered to be wound up - Green Lanka Ltd together with the petition and affidavit seeking Leave to Appeal, is not the proxy of the Petitioner, Green Lanka Ltd but of an individual by the name of Don Kushani Nanyakkara and issued by her in her personal capacity;

- this proxy is the only proxy filed of record and it indicates that Don Kushani Nanayakkara being a director of Green Lanka Ltd has nominated D. Shanika Samarawickrama Attorney-at-Law, *to be her registered Attorney- at- Law and to appear for her and in her name and behalf*, before the Supreme Court;

- that the Petitioner Company Ordered to be wound up - Green Lanka Ltd has not granted a proxy to Shanika Samarawickrama Attorney-at-Law or to any other Attorney-at-Law to appear on its behalf and or to sign and file petition or any other documents on behalf of the Petitioner;

- that although Kushani Nanayakkara in the proxy filed, calls herself a director of Green Lanka Ltd and a frank of Green Lanka Ltd is placed on the proxy, that itself does not make the proxy, a proxy of Green Lanka Ltd; and

- the petition filed of record subscribed by Shanika Samarawickrama Attorney-at-Law, thus, cannot be construed as a petition of the Company Ordered to be wound-up, Green Lanka Ltd.

Secondly,

Since the petition filed before this Court has not been duly subscribed by the party aggrieved Green Lanka Ltd or its registered attorney, that in terms of Section 757 (1) of the Civil Procedure Code, there is no valid petition before this Court.

The learned Presidents' Counsel for the Creditor- Respondent and the Liquidator-Respondent associated themselves with the submissions made on behalf of Evergreen Ltd. The Respondents relied on the case of **Gordon Frazer and Co. Ltd. v Jean Marie Losio and Martin Wenzel [1984] 2 SLR 85,** to substantiate that the proxy was defective.

The Court of Appeal in the said case observed as follows:

> *"…**in the absence of the corporate seal, the proxy granted to […] does not authorize […] to appear for the defendants, but only for Losio and Wenzel in their personal capacities.** But Losio and Wenzel are no parties to the action filed against the three defendant companies and have no status in law to participate in the proceedings. It was therefore not open to them to have appeared in the action and have had the interim injunction against the defendants, suspended, or to have taken steps for the issue of the Order Nisi on the plaintiff. The orders made by the learned judge in this respect are consequently made per incuriam and are null and void."* (page 90) (emphasis added)

Responding to the aforesaid submissions, the learned President's Counsel for Green Lanka Ltd put forward many contentions.

Firstly, the Respondents intention in raising the preliminary objections were primarily to delay the determination of the Leave to Appeal Application and the objection pertaining to the validity of proxy is misconceived as at the date the preliminary objection was raised, the impugned proxy had been revoked and replaced by the proxy of Anoma Goonetilleke Attorney-at-Law.

It was also contended that the arguments of the Respondents are substantially stretched and strained and had been made ignoring facts of this Application and that by the impugned proxy, it is the *Petitioner Green Lanka Ltd, through its director Kushani Nanayakkara* that authorized Shanika Samarawickrama Attorney-at-Law to act on behalf of the company and not Kushani Nanayakkara in her personal capacity as submitted by the Respondents.

With regard to the **Gordon Frazer** case, the learned Counsel for Green Lanka Ltd contended, it has no bearing to the facts of this case and moreover that defects and obscurities in proxies are curable. Thus it was argued, that in view of the proxy granted to Anoma Goonetilleke Attorney-at-Law, even if there was a defect in the proxy granted to Shanika Samarawickrama Attorney-at-Law, it is now cured by the new proxy.

The learned Counsel also contended that non-filling of a proxy would have no effect on the validity of proceedings and to substantiate this argument, relied on the case **S.P. Gunatilake v S.P. Sunil Ekanayake [2010] 2 SLR 191,** where Chief Justice J.A.N de Silva observed:

> *"the aforementioned facts…. provides a sufficiently strong indication that the substituted plaintiff had at all material times granted…. the authority to appear and make applications on behalf of him,* ***despite the substituted plaintiff not filing a proxy*** *as an overt manifestation of the granting of such authority……"*
> *(page 204)* (emphasis added)

Prior to considering the aforesaid arguments put forward by the parties with regard to the validity of the proxy, I wish to examine the revocation papers and the new proxy filed in these proceedings. The contention of the learned Counsel for Evergreen Ltd was that Green Lanka Ltd willfully suppressed matters from Court, being very well aware that at the time the *jurisdiction of this Court was invoked, there was no proxy filed of record on behalf of Green Lanka Ltd.* He drew the attention of Court to the following facts, as reflected in the record before Court.

Revocation of Proxy

On 23.05.2019, a motion was tendered together with two revocation papers, one by Kushani Nanayakkara and the other on behalf of Green Lanka Shipping Ltd dated 25.04.2019 and 30.04.2019 respectively. Both were signed by Kushani Nanayakkara one in her personal capacity and the other as a director of Green Lanka Ltd.

In the revocation paper where Kushani Nanyakkara revokes proxy in her personal capacity, Shanika Samarawickrama Attorney-at-Law has signed agreeing to the cancellation of the proxy. The other revocation paper filed on behalf of Green Lanka Ltd does not bear the signature of Shanika Samarawickrama Attorney-at-Law consenting to the cancellation of the proxy.

Thus, the contention put forward was that this clearly indicates that Shanika Samarawickrama Attorney- at- Law was not appointed as the registered attorney of Green Lanka Ltd by Green Lanka Ltd and there was no reason or necessity for Shanika Samarawickrama Attorney-at-Law to consent for the cancellation of the said proxy.

New Proxy

On 23-05-2019 together with the two revocation papers, a new proxy was tendered to Court. It was dated 30.04.2019. By the said proxy Green Lanka Ltd appointed Anoma Goonetilleke Attorney-at-Law as its registered attorney. It does not bear a corporate seal nor

was it notarially executed or executed in the presence of two witnesses. It bears only one signature i.e. of Kushani Nanayakkara and a rubber frank 'director of Green Lanka Ltd'.

It also does not bear the signature of Anoma Goonetilleke Attorney-at-Law nor an endorsement of acceptance of the appointment by the registered attorney.

Hence it was contended, that Green Lanka Ltd did not authorize this appointment and also that Kushani Nanayakkara as a director did not have the capacity to authorize or grant a proxy to Anoma Goonetilleke Attorney-at-Law and thus, the said proxy too was defective. It was also contended that in any event, Green Lanka Ltd, did not seek permission of Court either to cure the defective proxy granted to Shanika Samarawickrama Attorney-at-Law or to file a new proxy, prior to filing the revocation papers and the new proxy.

This Court has carefully examined the record before Court, the proxy filed in April 2018, i.e. at the time of invocation of jurisdiction, the two revocation papers and the new proxy filed in May 2019.

The Court observes that the impugned proxy, by which Shanika Samarawickrama Attorney-at-Law was authorized to appear and to take necessary steps in the Supreme Court is dated 16th February, 2018. It was tendered to Court together with the Leave to Appeal Application dated 17th April, 2018. Thus, it is pertinent to note that this proxy has been authorized by the person therein, forty one days prior to the impugned Order of the High Court dated 29th March, 2018 when there was no grievance or a reason to be canvassed before the Supreme Court.

The impugned proxy, does not refer to a case number nor the parties to the application. It only bears the signature of Kushani Nanayakkara. The wording of the proxy which is in the first person clearly indicates, it is filed in the personal capacity of Kushani Nanayakkara and not on behalf of Green Lanka Ltd, the Petitioner before this Court.

The Court also observes the stark difference and the disparity in the impugned proxy filed by the Petitioner before this Court and the proxy filed in the High Court on 28th October, 2016 and briefed to this Court. The proxy filed in the High Court specifically refers to the case number and clearly and precisely state that it is the proxy of Green Lanka Ltd. It has the

company seal affixed therein witnessed by two directors, namely, Brahakmanalage Genevieve Norma Nanayakkara and Don Kushani Nanayakkara as required by the Articles of Association.

The learned Counsel for Green Lanka Ltd did not offer any explanation with regard to the antedating of the impugned proxy filed in this Court. No reasons were given as to why permission of Court was not obtained to cure the defect of the proxy if there was any, or to file a new proxy. The journal entries indicate, that when this matter was mentioned before this Court on 30.08.2018, 04.12.2018 and 01.03.2019, the learned Counsel appearing for Green Lanka Ltd was instructed by Shanika Samarawickrama Attorney-at-Law whom it is alleged, was not duly appointed as a registered attorney by the Petitioner, Green Lanka Ltd.

Hence, having regard to the aforesaid facts and circumstances, especially the semantics of the impugned proxy and the absence of a company seal, whilst appreciating that in the interim of the proxies filed in the High Court and this Court, there was an Order of winding-up made by the High Court, I am inclined to accept that the proxy filed in the Supreme Court by Kushani Nanayakkara, only authorizes Shanika Samarawickrama Attorney-at-Law, to appear for Kushani Nanayakara in her personal capacity. Admittedly, Kushani Nanayakkara is not a party to these proceedings and has no status in law to participate in these proceedings.

Though Kushani Nanayakkara's signature appears in the proxy and there is a rubber frank placed in the proxy with the wording 'Green Lanka Ltd.' and 'director', that itself in my view, will not authorize or empower Kushani Nanayakkara to act for and on behalf of the Company Ordered to be wound-up Green Lanka Ltd or Green Lanka Ltd to act through Kushani Nanayakkara. Hence, my considered view is that Kushani Nanayakkara acts in her personal capacity and cannot authorize Shanika Samarawickrama Attorney-at- Law to represent Green Lanka Ltd. before the Supreme Court. In any event, the impugned proxy is antedated. It does not refer to a specific case by its number or by the names of the parties and thus is defective.

The rules and procedures governing Company Law lays down intricate details, pertaining to rights and duties of companies and its directors. Winding-up rules envisage the mechanism to be followed with regard to a company sought to be and or ordered to be wound-

up. It also lays down the steps a liquidator should follow in the event of a winding-up of a company. I do not wish to go into details pertaining to these issues.

Suffice is to state, in the absence of any cogent reason, document or material before this Court in terms of the law to establish that Green Lanka Ltd authorized or is represented by Kushani Nanayakkara, that Kushani Nanayakkara cannot authorize Shanika Samarawikrama Attorney-at-Law or any other Attorney-at-Law to represent Green Lanka Ltd before the Supreme Court. Thus, it is evident that by the impugned proxy Shanika Samarawickrama Attorney-at-Law was authorized only to represent Kushani Nanayakkara in her personal capacity.

The case of **Gordon Frazer** referred to earlier, in my view is of a similar context. The Court of Appeal in the said case held, when an action is instituted against a company and proxy is filled without a corporate seal, the proxy does not authorize the Attorney-at-Law to represent the company but only to represent the signatories in their personal capacity and the said persons have no right on behalf of the company to participate or move for orders of court.

In the instant case, the Leave to Appeal Application has been subscribed by Shanika Samarawickrama Attorney-at-Law, who as discussed earlier was not authorized by Green Lanka Ltd to act for and on its behalf. The only proxy filed together with the petition and affidavit, at the time of invocation of the jurisdiction of this Court by Green Lanka Ltd was the proxy given by Kushani Nanayakkara who is not a party to this application. Thus, when Green Lanka Ltd filed the Leave to Appeal Application before this Court, there appears to be no valid proxy filed on behalf of Green Lanka Ltd.

The alternate position taken up by the Petitioner before this Court was that presently, there is a new proxy filed of record on behalf of Green Lanka Ltd. As discussed earlier, that too, bears no corporate seal and has only one signature and has not been executed in terms of the governing rules.

We note that filing of the new proxy had been done without obtaining permission of Court. Similarly, two revocation papers have also been filed by Kushani Nanayakkara, in her

personal capacity and on behalf of Green Lanka Ltd., and the reason for filling two revocation papers have not been explained to this Court.

In my view, the alternate contention of the Petitioner that the semantics of the proxy granted to Shanika Samarawickrama Attorney-at-Law is immaterial since there is a new proxy filed of record cannot be accepted. It is not justifiable either, for the reason that documentation filed should be in accordance with the law and the rules of court, at the time of invocation of the jurisdiction of court, which is clearly not the position in the instant matter.

The next issue, I wish to examine is the contention that non-filling of a proxy would not affect the validity of proceedings. The learned Counsel relied on the observations made by this Court in the case of **Gunetilleke v Ekanayake** (supra) to submit, that even when there was a total failure to file proxy, this Court accepted the validity of the proceedings.

The observations made by this Court in the aforementioned case in my view, can be clearly distinguished from the instant application. In the said case, the Attorney-at-Law who initially appeared for the plaintiff, upon the plaintiff's death moved for substitution and obtained an order of substitution and continued to appear for the substituted plaintiff, but failed to file a proxy on his behalf. The case continued and judgement was entered for the substituted plaintiff. The aggrieved party filed an appeal on the ground that the judgement was null and void as there was no valid proxy filed of record and it was upheld by the Civil Appellate High Court. The said decision was set aside in appeal by this Court, upon the basis that the circumstances of the said case clearly provided a strong indication that the substituted plaintiff had granted the Attorney-at-Law authority to appear on his behalf and filing of proxy though belated, ratified the appearance and validated all proceedings. In the said case, the emphasis was on the fact that the party concerned i.e. the substituted plaintiff, impliedly granted authority to the Attorney-at-Law to appear on its behalf by its conduct. Hence, in my view the said case too, has no bearing to the matter before us and can be distinguished.

The Petitioner's next point of argument was that a defective proxy can be cured. It is not in dispute that in a series of cases, this Court has held that a defective proxy can be cured. In the case of **Tea Small Factories Ltd v Weragoda and another (1994) 3 SLR 353** the word

'Ltd' was left out from the name of the company. In the case of **Distilleries Company Ltd v Kariyawasam and others [2001] 3 SLR 119** the appellation 'consultant', was used together with the name of the registered attorney in the proxy. In both instances, the Court held the proxy to be defective but permitted the defect to be cured and corrected.

The facts in the aforesaid cases, vastly differ from the instant application and no parallel can be drawn. Thus, in my view the proposition that a defective proxy can be cured, *ipso facto* cannot be applied to the instant application.

In the matter before us, the validity of the proxy filed was raised at the threshold when the application was taken up for granting of Leave to Appeal and the challenge pertained to the commencement or the invocation of the jurisdiction of this Court itself. Thus, by mere correction of a defect in the proxy, the Petitioner cannot cure the fundamental flaw in the invocation of jurisdiction.

In the instant case, the flaw or the omission goes to the root of the issue. Did Green Lanka Ltd authorize Kushani Nanayakkara to act on behalf of Green Lanka Ltd? Or was she acting in her personal capacity? If so, was the proxy a legally valid document to be filed with the Leave to Appeal Application? If not, was the consent and authority of the Petitioner obtained to subscribe to the Leave to Appeal Application filed? If not, was there a valid application before this Court?

In my view, the defect *perse* is not a superficial flaw or an error or omission that can be corrected by filing a new proxy. The main issue before Court is whether the Attorney-at-Law referred to in the impugned proxy had the authority to perform what was done on behalf of the client therein, on the strength of the proxy filed. In my view, the Petitioner has failed to establish this fundamental issue.

In the said circumstances, for reasons more fully adumbrated herein, I see merit in the submissions made by the Respondents to sustain the objection, that there is no valid proxy filed before Court pertaining to the Leave to Appeal Application of Green Lanka Ltd, the Petitioner before this Court.

Hence, the preliminary objection raised before this Court pertaining to the validity of proxy is upheld.

(ii) There is no valid affidavit filed in support of the Leave to Appeal Application.

The contention of the learned Counsel for Evergreen Ltd was that the affidavit filed before this Court dated 17th April, 2018 together with the Leave to Appeal Application cannot be considered a valid affidavit, since the deponent therein Kushani Nanayakkara was not a director of the Petitioner Company, Green Lanka Ltd at the material time.

The position of the Petitioner Company, Green Lanka Ltd was that Kushani Nanayakkara, was a director of Green Lanka Ltd on 17th April, 2018.

Both parties relied on the below mentioned documents in the record [tendered to the High Court] to substantiate their positions.

(i) an extract from the books of the Registrar General of Companies (page 277 of the record) which indicate that Kushani Nanayakkara resigned as a director of Green Lanka Ltd on 08-07-2016. Thus, the contention of the Respondents was that she was not a director at the relevant time.

The above extract from the Registrar's Books also indicate that three other directors (i.e. a total of four) resigned on the same day and two others were appointed. [The relevant form pertaining to the new appointment is also available in the record].

(ii) a preliminary report of the provisional liquidator (page 422 of the record) where it states that Kushani Nanayakkara is a director among six others. Thus, the contention of the Petitioner was that she was a director at the relevant time.

The Court considered the said documents. It is observed that the provisional liquidator has prepared the preliminary report based upon the material tendered by the company secretary of Green Lanka Ltd itself. It is also noted that by the said report, the provisional liquidator has

sought a direction of Court for assistance and co-operation of directors, on the basis that such assistance and co-operation is lacking and in the absence of same it makes it difficult to investigate the matters of the Company Ordered to be wound-up Green Lanka Ltd.

It is also observed that the Petitioner did not counter the position of the Respondents that at the relevant time Kushani Nanayakkara was not a director of Green Lanka Ltd by presenting independent evidence or contemporaneous documents maintained by Green Lanka Ltd and merely relied upon the preliminary report of the provisional liquidator filed in the High Court.

In the aforesaid circumstances and in view of paucity of material with regard to the composition of the board of directors of Green Lanka Ltd, I am of the view that the preliminary objection pertaining to Kushani Nanayakkara being a director of Green Lanka Ltd at the material time, is a disputed fact.

Hence, I refrain from answering the said preliminary objection raised before this Court.

(iii) The Leave to Appeal Application is defective, since the necessary parties are not before Court.

This is the third and final preliminary objection raised before this Court. The contention of the Respondents was that a number of parties entered an appearance and participated at the inquiry before the High Court and such parties are necessary parties to this application. Therefore, the Respondents pleaded that leaving out such parties from these proceedings would amount to a violation of Rule 28(5) of the Supreme Court Rules, 1990 and upon the said basis moved that this application be rejected *in limine.*

The Respondents also contended that the Petitioner only named three parties, i.e. Ever Green Ltd the company which sought the winding-up of Green Lanka Ltd, SJM Associates the liquidator appointed by Court and *one of the creditors* namely, Mercantile Investment and Finance Ltd as Respondents and brought to the attention of this Court, that subsequent to the High Court re-calling the notices issued on the liquidator [and impliedly staying the process of liquidation], written submissions were called from all parties and even parties who filed

written submissions before the High Court [including Aitken Spence Group of Companies and Sri Lanka Port Authority] were not made parties to the instant application.

The Respondents strenuously argued that the requirement for necessary parties is mandated by the Supreme Court Rules and the failure to comply with these Rules would prove fatal to the application and relied on the ratio decidendi of this Court in **Illangakoon v Anula Kumarihamy SC/HCCA/LA 277/2011 - S.C.Minutes 05-04-2013** and **Leelananda Silva v Chandrawathi Wijesekera SC/HCCA/LA 449/2014 - S.C.Minutes 30-09-2016** to substantiate its position.

Countering the said submissions, the Learned President's Counsel for the Petitioner contended, the scope of the present application does not require all participating parties to be included as party-respondents and drew a distinction between a party and a creditor. It was also contended that this application is a winding-up application and not a regular action and hence it is not necessary to name all creditors as it would be a cumbersome process and would cause immense injustice to a petitioner and would negate the intention of the drafters of the Companies Act in so far as winding-up is concerned. It was also submitted that in any event, no action or application should be dismissed for failure to add a defendant or a respondent and such a failure is merely a procedural irregularity which can be cured. The learned Counsel relied upon the judgments of this Court in **Chandrani v De Fonseka and Others (2011) B.L.R 153** and **Wilson v Kusumawathie and Others (2015) B.L.R 49** to substantiate its argument.

In the said backdrop, this Court would now examine the applicability of Rule 28(5) of the Supreme Court Rules, 1990. It reads as follows:

> "In every such petition of appeal and notice of appeal, there shall be named as defendants, all parties in whose favour the judgement or order complaint 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 defendant shall be set out in full" (emphasis added)

At this stage, it is relevant to note that the applicability of Supreme Court Rules, 1990 were examined by this Court exhaustively in the landmark case, **Sudath Rohana and another v Mohamed Zeena and another [2011] 2 SLR 134** and this Court held, that the Rules pertaining to appeals from the High Courts of the Provinces were governed by Section C of Part I of the Supreme Court Rules, 1990.

In **Jinadasa v Hemamalie and others [2011] 1 SLR 337**, this Court held that the Supreme Court Rules, 1990 is also applicable to Leave to Appeal Applications stemming from the Orders of the High Courts of the Provinces.

Thus, undisputedly Rule 28(5) which falls within Section C of Part I of the Supreme Court Rules, is applicable to the instant Leave to Appeal Application.

Rule 28(5) of the Supreme Court Rules, 1990 makes provision pertaining to naming of parties as defendants. It refers to three instances of naming defendants or respondents in an Appeal or Leave to Appeal Application. The first instance being all parties in whose favour an Order is delivered. The second instance is all the parties, adversely to whom such appeal is preferred and thirdly **all the parties whose interests may be adversely affected by the success of the appeal.** The Rule spells out **all such parties should be made parties before this Court.** Hence, it is clearly seen that any party whose interests may be affected by the success of the appeal, should be made parties before this Court and they are deemed to be the necessary parties.

Winding-up applications are unique in its nature and character and are filed in terms of the Companies Act and are governed by winding-up rules. The principal parties to a winding-up application are, the party who initiates the application and the company whose winding-up is sought. In the instant matter, it will be Evergreen Ltd and Green Lanka Ltd.

However, in this application, the *Petitioner Green Lanka Ltd* in addition to Evergreen Ltd *named the liquidator and one of the creditors as Respondents*. The rest of the creditors

were not brought before this Court. The only explanation tendered by Green Lanka Ltd for such selective naming of Respondents was that the impugned Order referred to only the said parties. Upon perusal of the record before Court, it amply demonstrates there were many intervening parties who were represented before the High Court. An Order of this Court would adversely affect the interests of the said parties. Moreover, some of the intervening parties have even filed written submissions with regard to the matter in issue i.e. re-calling of notices issued on the liquidator by the High Court which impliedly stayed the winding up process begun and thus had an impact and effect on the interests of such parties.

Hence, I am inclined to accept, that the Petitioner selectively named the Respondents before this Court and intentionally left out certain other parties from these proceedings upon the wrongful premise that the said parties did not fully take part at the inquiry.

The alternate contention put forward by the Petitioner was that not naming certain parties as Respondents is an omission or procedural irregularity which can be cured. In my view, selective naming of Respondents cannot be construed as an omission or a procedural irregularity, which can be subsequently cured.

This brings me to the next matter to be determined. Were the parties not brought before this Court, necessary parties to this application?

It is not in doubt that the High Court permitted the winding-up of Green Lanka Ltd and appointed a liquidator to get into the shoes of the company. The duty of the liquidator is to receive all dues, make calls on all monies due, collate and distribute funds in accordance with the law.

However, with the re-calling of notices issued on the liquidator, the process of liquidation was impliedly stayed and it affected the interests of all creditors and contributories. By re-issuing of the notices on the liquidator [which is the impugned order] the status of the liquidator was re-instated and the liquidator was free to perform its duties.

By this Leave to Appeal application, the Petitioner is challenging the said re-issue of notice on the liquidator and re-instating the status-quo of the liquidator to perform its duties.

In my view, if the Petitioner succeeds before this Court, it would adversely affect the interests of all the intervening parties. Hence, I see, merit in the submissions of the Respondents that the intervening parties are necessary parties and should have been made parties to this application.

Furthermore, Rule 28(5) as discussed earlier, clearly states that **all parties whose interests may be adversely affected** by the success of the appeal, should be made parties before this Court. Thus, naming only one creditor as a Respondent to this application, for the reason it was the said creditor who *fully took part at the inquiry*, in my view will not suffice. In any event, the record bears out that other creditors too, have *fully participated* at the inquiry and the Petitioner has failed to give a cogent reason for exclusion of such parties from these proceedings. Hence, it is apparent that the Petitioner has failed to bring all necessary parties before this Court and thus, violated Rule 28(5) of the Supreme Court Rules.

I would pause at this juncture to refer to a few cases, where Supreme Court Rules and specifically Rule 28(5) was examined by this Court.

In the case of **Ibrahim v Nadarajah [1991] 1 SLR 131** this Court considered Rule 4 and 28 of the Supreme Court Rules, 1978 which is identical to Rule 28(5) of the present Supreme Court Rules, 1990 and held that failure to comply with the requirements of Rule 4 is necessarily fatal.

In **Senanayake v Attorney General and another [2010] 1 SLR 149**, a case which considered Supreme Court Rules, 1990 this Court held that Rule 4 and 28(5) require that all parties who may be adversely affected by the appeal should be made parties to such appeal and the failure to do so was fatal.

In **Attanayake v Commissioner General of Elections [2011] 1 SLR 220**, this Court held, that where there in non-compliance with a mandatory rule of the Supreme Court Rules, serious consideration should be given for such non-compliance, since non-compliance would lead to erosion of well-established court procedure followed by our Courts through several decades.

In a recent case **Leelananda Silva v Chandrawathie Wijesekera** (supra), this Court after a critical examination of cases pertaining to Supreme Court Rules held, that all parties who may be 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 the failure to do so, renders the appeal liable for rejection.

Prasanna Jayawardena J., in the above referred judgement, went onto observe as follows;

> "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." (at page 20)

Thus, it is observed, that this Court has time and time again, unreservedly held that Rule 28(5) is mandatory in nature and is designed to ensure due and proper dispensation of justice by this Court. This rationale, in my view equally applies to all appeals and applications filed before this Court, irrespective of it stemming from a regular action or a special procedure.

Hence, my considered opinion is that, the instant application which is pivoted on an Order made to re-issue notice on a liquidator in terms of the winding-up rules, falls fairly and squarely within the said ambit and must imperatively be governed by the Supreme Court Rules, 1990 and especially Rule 28(5).

Moreover, in the instant application, it is noted that parties were named consciously and left out also by design. Thus, in my view, the Petitioner cannot now avail of the defense of error or omission nor can the Petitioner at this stage seek the indulgence of Court to permit the Petitioner to cure the *procedural irregularity* as was contended by the Petitioner before this Court.

Admittedly, the Petitioner did not name all the creditors as party-respondents to this application. In my view, such process offends and violates Rule 28(5) of the Supreme Court

Rules,1990 which require all parties whose interests may be adversely affected by the success of the appeal to be made parties before this Court.

In the said aforesaid circumstances, I uphold the third preliminary objection raised before this Court, that necessary parties have not been named in the instant Leave to Appeal Application filed before the Supreme Court and the said failure renders the Leave to Appeal Application defective and liable for rejection.

In concluding, for reasons morefully adumbrated in this Order, I sustain the 1st and 3rd preliminary objections raised before this Court by the Respondents. The Leave to Appeal Application filed by the Company Ordered to be Wound Up- Petitioner, Green Lanka Shipping Limited dated 17th April, 2018 is thus rejected and dismissed *in limine*.

I make no order as to costs.

The Leave to Appeal Application is dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya PC, CJ.

I agree

Chief Justice

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court