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

In the matter of an Appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

Attorney General,
Attorney General's Department,
Colombo 12.
Complainant

S.C. Appeal No.220/2012
SC (SPL) LA No. .49/2012
C. A. No. C.A.97/2004
H.C. Kalutara No.38/2000

Vs.

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused

And

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused-Appellant

Vs.

Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

Attorney General,
Attorney General's Department,

Colombo 12.
Complainant-Respondent-Appellant

Vs.

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused-Appellant-Respondent

****

BEFORE : **MURDU N.B. FERNANDO, PC, J.**
KUMUDINI WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Rohantha Abeysuriya, PC, ASG, for the Complainant-Respondent-Appellant
Anil Silva, PC, for the Accused-Appellant-Respondent.

ARGUED ON : 07th March, 2022

ORDER ON : 10th March, 2023

****

ACHALA WENGAPPULI, J.

The Complainant-Respondent-Appellant (hereinafter referred to as the Appellant), sought special leave to appeal from this Court over several questions of law arising out of a Judgment pronounced by the Court of Appeal on 02.02.2012 in relation to the criminal appeal No. CA 97/2004.

Perusal of the proceedings before the appellate Court indicate that one *Dekum Ambakotuwa Prageeth Nishantha Bandara* was indicted by the Hon. Attorney General on 19.10.1997, alleging that he committed rape, an offence punishable under Section 364(2) of the Penal Code, as amended by Act No. 22 of 1995. The trial against said *Dekum Ambakotuwa Prageeth Nishantha Bandara* proceeded before a Judge without a Jury and, at the conclusion of which, the Court found him guilty as charged. The High Court thereupon imposed a 10-year term of imprisonment and a fine of Rs. 5000.00 on him, coupled with a default sentence. In addition, he was to compensate the victim with a payment of Rs. 15,000.00. Being aggrieved by the said conviction and sentence, said *Dekum Ambakotuwa Prageeth Nishantha Bandara* had preferred an appeal to the Court of Appeal under CA Appeal No. 97/2004. In the caption to his petition of appeal, he had described himself as the Accused-Appellant. The Court of Appeal, by its Judgment dated 26.10.2004, pronounced after hearing of the said appeal, had set aside the conviction entered against the Accused-Appellant by the *Kalutara* High Court in case No. 38/2000 HC, along with the sentences of imprisonment and compensation. It is against the said Judgment of the Court of Appeal that the Appellant had sought special leave to appeal from this Court.

However, in the operative part of the caption to the said application, i.e., the part demarcated by the section titled " AND NOW BETWEEN", which indicates the names of the parties to the application before this Court, the Appellant had named one *Imbulana Liyanage Dharmawardhana* of No. 145/53, *Walaw-watta, Weliweriya*, (hereinafter referred to as the original Respondent) as the Accused-Appellant-Respondent and not the actual Accused-Appellant before the Court of

Appeal, namely *Dekum Ambakotuwa Prageeth Nishantha Bandara* of *Godella Watta, Andawela, Meegama,* (hereinafter referred to as the present Respondent) in whose favour the impugned Judgment of the Court of Appeal was pronounced.

Application of the Appellant listed to be supported on 28.05.2012 and notice on the said original Respondent was dispatched by the Registry on 21.03.2012. When the application was taken up on 28.05.2012 for support, the original Respondent was absent and unrepresented. Thereupon, Court made order that the matter is re-fixed for support once again on 05.07.2012, "*with notice to the Respondent*". The notice issued on the original Respondent was returned to the Registry on 31.05.2012 with the endorsement that its intended recipient had "*rejected the notice*". This fact was brought to the notice of the Appellant on 11.06.2012 by the Registry. Consequent to the said intimation, a motion was tendered to Court by the Appellant on 25.06.2012. The Appellant thereby sought to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent*" but did not indicate as to the status of the already named *Imbulana Liyanage Dharmawardhana* of No. 145/53, *Walaw-watta, Weliweriya* upon the said "*substitution*". This motion was supported by the Appellant on 05.07.2012 and the Court allowed his application to amend the caption.

Consequent to the said order of Court, the Appellant had, in order to reflect the present Respondent, *Dekum Ambakotuwa Prageeth Nishantha Bandara* of *Godella Watta, Andawela, Meegama* is named as the "Accused-Appellant-Respondent", tendered an amended caption. Only then the present Respondent was noticed to appear before Court on 11.09.2012, being the next date of support. Notice of the said application was dispatched on the present Respondent only on 31.07.2012, who had

then tendered his proxy and caveat along with a motion dated 08.08.2012.

When the application of the Appellant for special leave to appeal was eventually supported before this Court on 07.12.2012, learned President's Counsel, who represented the present Respondent, moved Court to consider the question whether the application of the Appellant is time-barred inasmuch as a wrong party had been originally named and the present Respondent was brought in as a party to that application by substituting his name at a subsequent stage and that too after a period of over ten months. This Court, however, after hearing parties granted special leave to appeal to several questions of law, as set out in sub paragraphs (a) to (d) of paragraph 14 of the petition of the Appellant dated 14.03.2012 and the appeal was fixed for hearing.

When the instant appeal was taken up for hearing on 07.03.2022, learned President's Counsel for the present Respondent reagitated his contention already presented before this Court on 07.12.2012 and raised it formally as a preliminary objection. It was also his contention that the rules of procedure that had been laid down in the Supreme Court Rules of 1990, which sets out the manner in which a party could invoke the final appellate jurisdiction of this Court, are mandatory in nature and therefore, in view of the failure of the Appellant to comply with same, his appeal should be rejected *in limine.*

Since the objection of the present Respondent concerns a threshold issue as to the proper invocation of jurisdiction, the Court decided to hear parties on the said preliminary objection.

The preliminary objection raised by the present Respondent, in the manner in which the Appellant had invoked the jurisdiction of this Court, is founded upon his alleged failure to adhere to a procedural requirement, which he contends as mandatory in nature. In support of his objection, learned President's Counsel had strongly relied on the applicable rules of procedure contained in the Rules of the Supreme Court 1990, which specifically lay down the manner of lodging applications seeking special leave to appeal from a Judgment of the Court of Appeal. In the circumstances, it is very relevant to consider at the very outset of the applicable procedural requirements which must be fulfilled by an applicant, in seeking special leave to appeal, as laid down by the Supreme Court Rules 1990, along with the judicial precedents which had indicated the degree of importance this Court had attached to adherence to these procedural requirements and the consequences that may follow upon non-compliance of these Rules.

Article 118(c) of the Constitution states that subject to the provisions of the Constitution, the Supreme Court shall exercise "*final appellate jurisdiction*". Article 127(1) and 127(2) defines the scope of the said jurisdiction conferred on this Court while Article 128(1) provides that an appeal shall lie to the Supreme Court from any final order, Judgment, decree or sentence of the Court of Appeal, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal granted leave to appeal to the Supreme Court. Article 128(2) states that the Supreme Court may, in its discretion, grant special leave to appeal from any final or interlocutory order, Judgment, decree or sentence of the Court of Appeal, whether civil or criminal. Special leave to appeal could also be granted by this Court, where the Court of

Appeal has refused to grant leave to appeal or in the instances where this Court is of the opinion that the case or matter is fit for review.

The boundaries within which the right to invoke an appellate jurisdiction were considered in ***Martin v Wijewardena*** (1989) 2 Sri L.R. 409, where this Court held (at p. 419) that "*an Appeal is a Statutory Right and must be expressly created and granted by Statute. It cannot be implied*" and therefore "… *the right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular Courts, in the Judicature Act, and the Procedural Laws pertaining to those Courts*". Hence, the preliminary objection of the present Respondent, founded on the premise of non-compliance of a mandatory procedural requirement.

In the Judgment of ***Nestle Lanka PLC v Gamini Rajapakshe*** (SC Appeal No. SC HC LA/54/18 – decided on 30.09.2020) *Jayasuriya* CJ, having observed that the "… *Constitution that establishes the Supreme Court and makes provision relating to its jurisdiction have not made provisions relating to the practice and procedure of the Court and had left it to the Supreme Court to make provision on such matters by way of Rules under Article 136 subject to the provisions of the Constitution and any law*". His Lordship further observed that the "… *Constitution empowers to make such Rules regulating the practice and procedure including matters pertaining to appeals such as the terms under which appeals to the Supreme Court to be entertained and for provision for the dismissal of such appeals for non-compliance with such Rules.*" In this context, it is pertinent to refer to another observation on the same lines, made by *Bandaranayake* CJ, in the Judgment of ***Sudath Rohana and Another v Mohamed Zeena and Another*** (2011) 2 Sri L.R. 134 (at p. 144) where it is stated that "*whilst the*

substantive law lays down the rights, duties, powers and liberties; the procedural law refers to the enforcement of such rights and duties. In other words, the procedural law breathes life into substantive law, sets it in motion, and functions side by side with the substantive law."

Thereupon, her Ladyship added that the "*Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the Courts of civil jurisdiction, the Supreme Court Rules thus regulates the practice and procedure of the Supreme Court*".

Turning to the question at hand; it is to be noted that the caption to the application of the Appellant describes its nature as an application for special leave to appeal from an "order" of the Court of Appeal, in terms of Article 128 of the Constitution. Since the Appellant had sought special leave to appeal from this Court over a final Judgment of the Court of Appeal, it is clear that, in doing so, he had moved this Court by invoking its jurisdiction conferred under Article 128(2).

Learned President's Counsel strongly contended that for all purposes the application by which the Appellant sought special leave to appeal against the present Respondent was made only on 07.12.2012 and that too with the insertion of his name and thereby substituting him in the place of the original Respondent, whereas the impugned Judgment of the Court of Appeal had been delivered in favour of the present Respondent on 02.02.2012. Since the Appellant had moved this Court seeking special leave to appeal against the said Judgment after a period of well over ten months, the Appellant had acted in violation of the specific time period, as laid down by Rule 7, which restricted the

time within which such an application should be made to six weeks reckoned from the date of the order, Judgment decree or sentence of the Court of Appeal. Therefore, the present Respondent contended that the appeal of the Appellant is clearly time barred and should be rejected.

There is no dispute to the factual position of naming the present Respondent was made, as the sole respondent in the special leave to appeal application of the Appellant, only after the applicable six-weeks' time period reckoned from the date of the Judgment of the Court of Appeal had lapsed. The Appellant, by a motion dated 25.06.2012, moved this Court to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent as Dekum Ambakotuwa Prageeth Nishantha Bandara, Godella Watta, Andawela, Meegama for the name and address Imbulana Liyanage Dharmawardana, No. 145/53, Walawatta, Weliweriya in the caption thereof*". This motion was supported by a Deputy Solicitor General on 05.07.2012 and, in the absence of the present Respondent, this Court allowed the amendment of the caption and made order to notify the present Respondent.

Thus, the present Respondent was named as a respondent to the application of the Appellant only on the 05.07.2012 and that too was made without serving notice on him. The Judgment of the Court of Appeal, against which the application to seek special leave to appeal was lodged, was pronounced on 02.02.2012. Obviously, the time interval between these two points well exceeds the six-weeks limitation as per Rule 7.

Defending his motion to "*substitute*" the present Respondent, in place of the original respondent, the Appellant had contended that the application for special leave to appeal against the impugned Judgment

of the Court of Appeal had in fact been lodged within the stipulated time period as prescribed by Rule 7 and therefore the jurisdiction of this Court had properly been invoked as far as this appeal is concerned.

In view of the conflicting positions presented by the learned Counsel as to the validity of the application, the pivotal question that should be decided by this Court in respect of the preliminary objection raised on behalf of the Respondent could be identified as whether, in terms of the Supreme Court Rules 1990, the Appellant could validly invoke the final appellate jurisdiction of this Court by "*substituting*" the present Respondent, after the expiration of the time period of six weeks reckoned from the date of the pronouncement of the Judgment of the Court of Appeal, to an application that had already been lodged within time but naming a wrong party?

In this regard, I must therefore consider the procedure that had been laid down in the said Rules, in setting out the manner in which a party could make an application for special leave to appeal against a Judgment or an order of the Court of Appeal and thereby properly invoke the final appellate jurisdiction of this Court.

Sub part A of Part I of the Supreme Court Rules 1990, which consists of a total number of 17 Rules (from Rule 2 to 18), sets out the procedure an applicant must follow and should comply with, when making an application for special leave to appeal. Rules 2 and 3 deals primarily with the content and the format of such an application should be drafted and presented with and, in addition, also impose the requirements of setting out the questions of law on which special leave to appeal is sought. The Rules further require such an applicant to set

out in that application as to the circumstances which renders the case or matter fit for review by the Supreme Court.

The provisions that are directly applicable to find an answer to the question referred to in the preceding segment could be found in Rule 4. Hence, for the convenience of treatment, it is important to reproduce the said Rule below in its original form;

Rule 4, in reference to an application under Rule 2, states as follows;

> *"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether the plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter) in whose favour the judgment or order complaint against was delivered, or adversely to who whom such application is preferred, or whose interest may be adversely affected by the success of the appeal, and the names and the present addresses of all such respondents shall be set out in full."*

The instant matter before this Court, the impugned Judgment is a final Judgment of the Court of Appeal, which determined an appeal preferred to that Court upon a conviction entered against the present Respondent following a criminal prosecution conducted before a High Court. In the circumstances, I once again reproduce the said Rule 4 below, but after leaving out the irrelevant parts. Thus, the edited-out Rule 4 now reads thus;

In every such application, there shall be named as respondent,

i. the accused in whose favour the judgment complaint against was delivered, or

ii. adversely to who whom such application is preferred, or

iii. whose interest may be adversely affected by the success of the appeal,

and the names and the present addresses of all such respondents shall be set out in full.

The indictment presented before the High Court of *Kalutara* contained only one name as the person against whom the accusation of rape was made and it is the name of the present Respondent that appears therein as the accused. The caption to the petition of appeal that had been preferred to the Court of Appeal by the present Respondent after his conviction described him as the only Accused-Appellant named therein. The present Respondent succeeded in his appeal. In these circumstances, the present Respondent should have been named as the Accused-Appellant-Respondent at the time of lodgment of the application seeking special leave to appeal. This is because only he is qualified to be treated as either "*the accused in whose favour the Judgment complaint against was delivered"* or "*whose interest may be adversely affected by the success of the appeal*". The original Respondent, who had been named by the Appellant would only fit into the category of a person "*adversely to who whom such application is preferred*." Obviously, the original Respondent had nothing to do with the application of the Appellant seeking special leave to appeal against a Judgment of the Court of Appeal to which he is not a party and perhaps that could be the reason as to why he had refused to accept the notice sent by the Registry of this Court. The identity of the present Respondent is already known to the Appellant as the indictment and the petition of appeal of the present Respondent clearly indicate the

names of the relevant parties to the prosecution as well as to the appeal preferred to the Court of Appeal.

But what is important to note here is when the Appellant had only named a person *"adversely to who whom such application is preferred"*, and thereby leaving out "*the accused in whose favour the Judgment complaint against was delivered"* and "*whose interest may be adversely affected by the success of the appeal*", whether this Court could accept the contention of the Appellant that he had complied with the procedure as set out in Rule.

In view of the nature of the preliminary objection, the only way the Appellant could negate the contention of the present Respondent is that he must satisfy this Court there was a valid application pending before this Court to which the present Respondent was subsequently named as the Accused-Appellant-Respondent.

If the Appellant had named either "*the accused in whose favour the Judgment complaint against was delivered"* or "*whose interest may be adversely affected by the success of the appeal*", at the time of the lodgement of his application that would automatically satisfy the requirement of naming the person *"adversely to who whom such application is preferred"*. But the Appellant did not name either "*the accused in whose favour the Judgment complaint against was delivered"* or the person "*whose interest may be adversely affected by the success of the appeal*". Instead only the person *"adversely to who whom such application is preferred"* was named as the Accused- Appellant-Respondent. In such an instance, the course of action adopted by the Appellant would lead to the question, whether there was a valid application for special leave to appeal for the Appellant to "*substitute*" the present Respondent with.

The requirement of correctly identifying and naming the parties in an application invoking appellate jurisdiction of this Court was raised before this Court and considered in the appeal of ***Ibrahim v Nadarajah*** (1991) 1 Sri L.R. 131. This was an instance where the appellant had failed to name a particular party to the proceedings before the original Court as a respondent in the appellate proceedings before this Court, despite naming several others. Court had then considered the question whether there was non-compliance of Rule 4 and 28(5) and if so, the consequences that would follow upon such non-compliance. Delivering the Judgment of Court, *Amarasinghe* J stated that the consideration of Rule 28(5) in relation to Rule 4 was necessary due to the reason that "*although ordinarily in terms of Rule 27 all appeals to the Supreme Court must be upon a petition in that behalf lodged by the appellant, where leave to appeal is granted, Rule 12 makes it unnecessary for the appellant to file a fresh petition of appeal. The application for leave to appeal is deemed to be the petition of appeal. A petition of appeal, whether actual or deemed, however, must in terms of Rule 28 name as respondents all parties in whose favour the judgment appealed against has been delivered and all parties whose interests may be adversely affected by the success of the appeal together with their full addresses*".

His Lordship then determined the consequences of such a failure would follow by holding that "*It has always, therefore, been the law 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 principle of law enunciated by the said pronouncement of *Amerasinghe* J was re-affirmed in ***Senanayake v Attorney General &***

Another (2010) 1 Sri L.R. 149, as it was stated by *Bandaranayake J* (as she then was) 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.*" In stating thus, this Court had considered the preliminary objection of the learned Senior State Counsel, who contended that since the Director-General of the Commission to Investigate Allegations of Bribery or Corruption, a necessary party to that application, had not been named a respondent, the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules 1990. On that premise, he moved for the dismissal of the said appeal *in limine*. Having referred to Rules 4, 28(1) and 28(5), her Ladyship held that "*The totality of the aforementioned Rules indicates 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*". This Court thereupon proceeded to dismiss the appeal for non-compliance of the Supreme Court Rules.

In view of the above, it is clear that this Court had consistently held that naming "*all parties who may be adversely affected by the result of the appeal should be made parties*" as a mandatory requirement that an applicant must comply in seeking special leave to appeal against a Judgement or an order of the Court of Appeal and also for proper invocation of its appellate jurisdiction. In the circumstances, such an applicant must, in addition to naming "*… all parties, who may be adversely affected by the result of the appeal*" must also name the parties "*adversely to who whom such application is preferred*" if the circumstances so demand.

In addition to laying emphasis on the aspect of naming the proper parties who may be adversely affected by the success of appeal in view of the applicable rules of procedure, there is yet another aspect that had been emphasised by this Court, which needs to be referred to in this context. In the Judgment of ***The Ceylon Electricity Board & 9 others V. Ranjith Fonseka*** (2008) 1 SLR 337 this Court dealt with a situation where the petitioner, in filing a Special Leave to Appeal Application in the Supreme Court regarding an Order made by the Court of Appeal, included an incorrect title and a statement in the caption where the jurisdiction of this Court was pleaded incorrectly.

In pronouncing the Judgment, this Court was of the view that "*… the application for Special leave to Appeal filed by the Petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objections may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990.*"

This particular aspect had become relevant in relation to the instant appeal as well. Perusal of the caption to the application seeking special leave to appeal lodged by the Appellant reveals that the name of the present Respondent is already mentioned in the part of the caption which describes the parties to the proceedings before the High Court and also before the Court of Appeal. However, in the operative part of

the caption in which the parties to the proceedings before this Court are named, the Appellant had inserted the name of the original Respondent, instead of the present Respondent, who would undoubtedly be adversely affected by the success of the appeal.

In view of the pronouncements of this Court quoted above, there arises the question as to why this Court insisted on strict compliance of Rule as a mandatory requirement and therefore held its non-compliance is fatal to the maintenance of an application seeking special leave to appeal. The answer to this question could be found in ***Ibrahim v Nadarajah*** (supra) as it had been held that (at p.133) "*… 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 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 Court arrived at the said conclusion after considering the principles of law that had been laid down and followed in the Judgments of ***Ibrahim v. Beebee et al*** (1916) 19 NLR 289, ***Ammal et al v. Mohideen et al*** (1933) 34 NLR 442, ***Wickremasooriya v. Rajalias de Silva*** (1937) 8 CLW 29, ***Seelananda v. Rajapakse*** (1938) 11 CLW 36, ***Sinnan Chettiar and Others v. Mohideen*** and ***Swarishamy v. Thelenis et al*** (1916) 19 NLR 289.

It was also decided in ***Ibrahim v Nadarajah*** (supra, at p. 132) that the mere act of granting leave by this Court, as in the case of the instant appeal, would not confer any validity to a defective application for the

reason that granting of leave would only determines the question of access to Court and it does not confer any advantages or exemptions on the appellant other than to make it unnecessary for the appellant to file a fresh petition of appeal.

It is already noted that by the motion dated 25.06.2012, the Appellant moved Court to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent as Dekum Ambakotuwa Prageeth Nishantha Bandara, Godella Watta, Andawela, Meegama for the name and address Imbulana Liyanage Dharmawardana, No. 145/53, Walawvatta, Weliweriya in the caption thereof*". The purpose of the motion, according to the Appellant, is to "*substitute*" the name of the original Respondent by the present Respondents, cited in the operative part of the caption to the said application.

In these circumstances, it is pertinent at this juncture to consider to the question whether such a step is even provided for in the Supreme Court Rules 1990.

Rule 38 of Part II of the Supreme Court Rules, which lay down general provisions regarding appeals and applications, indicate the circumstances under which the Court would allow a substitution of a party already named in an application or an appeal. The Rule 38 states that where at any time after lodging of an application for special lave to appeal "… *the record becomes defective by reason of death or change of status of a party to the proceedings*" this Court may make order substituting or adding a person "*who appears to the Court to be the proper person*" upon consideration of the material to establish that fact. Hence, the word '*substitute*', irrespective of the purpose in which it was used in the said motion of the Appellant, should only be considered in the context of the

scope, as envisaged in Rule 38. Therefore, the proposed "*substitution*" of one respondent in the place and room of another created by the act of mere deletion of his name from the amended caption and making the insertion of the name of another cannot be considered as a situation where the record had become defective owing to the reason of the death of a party or to a change of status of a party to the proceedings as provided for in Rule 38. In view of the above considerations, it is my view that, in terms of Rule 38 there cannot be a '*substitution*' of a party who had wrongly been named at the time of lodgement of the application seeking special leave to appeal with the insertion of the name of the correct party at a subsequent stage. If that error is detected within the stipulated time period of six weeks, during which an applicant could lodge an application seeking special leave to appeal, such an applicant could lodge a fresh application naming the correct party.

An application for special leave to appeal, after its lodgement, could not be corrected subsequently to cure any defects in naming of parties, perhaps except to any obvious typographical errors. This is because, unlike in section 332 of the Code of Criminal Procedure Act No. 15 of 1979 as amended, Rules of the Supreme Court does not contain any similar provisions that provide for making such amendments to an application for special leave to appeal after its lodgement, in order to facilitate an applicant to rectify a defect in naming parties by moving to "*substitute*" the correct party later. If an applicant had named a wrong party at the time of lodgement of his application, instead of a party who is adversely affected if the appeal succeeds, that party could not thereafter be "*substituted*" to that application at a later point of time and thereby enabling such an

applicant to bring his application in conformity with the procedure of invoking the final appellate jurisdiction of this Court under Article 128(2), as laid down in Rules 1 to 7.

Section 332 of the Code of Criminal Procedure Act specifically provide for an amendment of an appeal after its lodgement on the basis that is not in conformity with the manner prescribed therein, particularly by section 331 of that Code. The section 332 had empowered the original Court either to return the petition of appeal to the appellant to make the necessary amendment or to permit such amendment to be made then and there in satisfying the provisions of section 331. The failure of an appellant to comply with a direction of Court on such an amendment that should be made under section 332, would make such a petition liable to be rejected by that Court. In relation to civil litigation, Civil Procedure Code too, in section 759 also, provide for amendment of the petition of appeal that had already been lodged.

However, no comparable provision could be found in the Supreme Court Rules to these statutory provisions contained in section 332 of the Code of Criminal Procedure Code and section 759 of the Civil Procedure Code. In fact, said Rules indicate a contrary provision to sections 332 and 759. Rule 10(1) provided several reasons enabling a single Judge of this Court, sitting in chambers, to refuse to entertain an application for special leave to appeal. One such reason is if "*such application does not comply with these rules*". Thus, the defect of the application of the Appellant owing to the failure to name the party adversely affected if the appeal succeeds to the application at the time of its lodgement cannot subsequently be cured merely by '*substituting*'

that party after the mandatory six weeks period had elapsed. If there was compliance of Rule 8(4) by the Appellant, that initial defect in the application could have been easily detected for that particular Rule expected an applicant to attend the registry in the third week since the lodgement of the application for special leave to appeal and to verify whether the notices of the respondents were returned undelivered. If this was done by the Appellant, there would have been a window of opportunity to rectify the defect in the application, provided the remedial action is taken within the stipulated six-weeks period, as provided for by Rule 7.

This is not a situation where the often-quoted reasoning of *Fernando* J in ***Kiriwantha and Another v Navaratne and Another*** (1990) 2 Sri L.R. 393 could be applied. In that instance his Lordship had considered the nature of the consequences that would follow upon the failure to comply with Rule 46 of the Supreme Court Rules 1978. Setting aside the order of the Court of Appeal, in which such a failure had been considered as a ground for an automatic rejection, his Lordship preferred to adopt a " *a more liberal view*" as in the Judgment of ***Rasheed Ali v Mohammed Ali*** (1981) 1 Sri L.R. 262 and stated that " … *the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction ; dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter*". In arriving at this conclusion, his Lordship cited and relied on the following quotation from Maxwell (Interpretation of Statutes, 12th ed. pp. 314-5);

> *"When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases, the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. 'An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially".*

Unlike the Rule 46 of the Supreme Court Rules 1978, Rule 10(1) of the Supreme Court Rules 1990, in fact had spelt out the consequences that would follow upon any failure to comply with the procedure that had been laid down for moving this Court seeking special leave to appeal, as set out in the Rules 1 to 7. That particular Rule made specific provision that such an application is liable to be refused or to be entertained.

In this context, it must be noted that this Court only allowed the Appellant to "*amend the caption*" on 05.07.2012, and clearly desisted itself in making a positive order of substitution, despite the motion requesting the Court to do so and thereby to accept the proposed "*substitution*" of the present Respondent as a party whose interest may be adversely affected by the success of the appeal. The Appellant only deleted the

name of the original respondent from the amended caption and replaced him with the insertion of the present Respondent's name, under the nomenclature "Accused-Appellant-Respondent". The amended caption that was filed by the Appellant had no indication to the "substitution" of original Respondent, who was named and described in the original caption as the Accused-Appellant-Respondent, with the name of the present Respondent. The Court, at any point of time, neither made any order either discharging the original Respondent from these proceedings nor made order to "*substitute*" the present Respondent in the former's place, as already noted. However, with the replacement of the name of the present Respondent as the Accused-Appellant-Respondent, the original Respondent had totally disappeared from the caption. The amendment made to the caption by the Appellant replacing the already named original respondent with the present Respondent, after a period of six weeks from the pronouncement of the final Judgment, cannot cure the fundamental defect created by the failure to name the proper party at the time of Judgment of that application for special leave to appeal against the Judgment of the Court of Appeal in Appeal No. 97/2004.

In view of the above considerations, the appeal of the Appellant should firstly be rejected due the failure of the Appellant to name the present Respondent a party at the time of the lodgement of the instant application, as it was imperative on the Appellant to name him due to the reason that only he is qualified to be considered as "*the accused in whose favour the Judgment complaint against was delivered*" or "*whose interest may be adversely affected by the success of the appeal*" and not the original Respondent. Secondly, the appeal of the Appellant should be rejected for the reason that he cannot confer validity to a defective

application by tacking on to the same with naming of the present Respondent and that too after the expiration of the mandatory period of six weeks.

The appeal of the Appellant is accordingly rejected. Parties will bear their costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT