1959
May 21.
Oct. 27

CHARALAMBOS PETROU HADJI LOIZOU AND ANOTHER v. ANTHONY DE BONO

[ZEKIA, J. and ZANNETIDES, J.]

CHARALAMBOS PETROU HADJI LOIZOU AND ANOTHER,

*Appellants (Defendants to the Counterclaim),*

*v.*

ANTHONY DE BONO,

*Respondent (Defendant in the action — and Plaintiff by way of counterclaim).*

*(Civil Appeal No. 4275).*

*Practice—Counterclaim—Against person not already a party to the action—Summons to appear—Service—Civil Procedure Rules, 0.21, r. 8 (1) and (2), Form 13—Omission to serve—Not mere irregularity that can be cured—Civil Procedure Rules, 0.64, r.r. 1 and 2 have no application—Fatal defect—Entailing nullity—Consequently, a judgment obtained against such person is null and void—Although counsel acting for him had previously accepted copy of defence and counterclaim, and delivered a defence to the counterclaim.*

*Appeal—Interlocutory order—Failure to appeal therefrom—Does not operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just—Civil Procedure Rules, 0.35, r. 16.*

*Appeal—Costs.*

The respondent was one of the defendants in the action, brought against them by a certain E.C. He counterclaimed against the appellants not being already parties to that action. The respondent failed to serve on the appellants the process required by the Civil Procedure Rules, 0.21, r. 8 (2) being content to deliver to counsel for the appellants a copy of his defence and counterclaim. Counsel for the appellants accepted the said documents. At an early stage of the trial before the lower Court, counsel for the appellants objected to the proceedings on the ground that the provisions of 0.21, r. 8 (2) had not been complied with. The trial Judge overruled the objection, went on with the hearing of the case and gave judgment against the appellants for £90.100 mils with costs payable to the defendant No. 1 (the respondent). It appears that originally the defendant-respondent had resorted to third party proceedings against the appellants, but those proceedings were by consent set aside.

The defendants to the counterclaim appealed against that judgment.

*Held:* (1), reversing the judgment of the lower Court:

This is a clear case of nullity and any conduct or negligence on the part of counsel for the appellants cannot cure it. Order 64, r.r. 1 and 2 of the Civil Procedure Rules have no application to this case. After the order setting aside the third party proceedings the appellant was, to all intents and purposes, a person *not already a party* and the way to join him ought to have been by summoning him to appear by serving him with a copy of the defence endorsed in the way prescribed. This is analogous to the issue and service of a writ of summons on a defendant. Without the issue and service of such summons it cannot be said that a person can be made a party to an action in one way or the other. The omission is tantamount to suing a person without a writ of summons, or with a writ of summons service of which has not been effected on defendant. Judgment obtained against him in this way is null and void as far as he is concerned.
*Craig v. Kanseen* (1943) 1 All E.R. 108 at p. 113, *per* Lord Greene, *M.R.*, *followed.*

(2) A preliminary objection was taken as to the time of appeal. The learned counsel for the respondent argued that the objection by counsel for the appellant at the early stages of the hearing was overruled and the appellant had to make his appeal within time after the said ruling; but even if we accept his argument that a litigant has got to make his appeal against an interlocutory order (if the ruling in question is considered as such), whether the appellant in this case is bound is highly doubtful since he was not already a party to the proceedings at the time such a ruling was made. Moreover under Order 35, rule 16 of the Civil Procedure Rules any failure to appeal from an interlocutory order cannot operate so as to bar or prejudice the Court of Appeal from giving a decision as may be just.

(3) Owing to the course this case had taken the respondent should not be burdened with costs.

*Appeal allowed. The judgment of the lower Court set aside to the extent the appellants are concerned. No order as to costs.*

Cases referred to:
*Craig v. Kanseen* (1943) 1 All E.R. 108.

**Appeal.**

Appeal by the defendants to the counterclaim against the judgment of the District Court of Nicosia (Pierides D.J.) dated December, 24, 1958, (Action No. 1923/56) whereby the def. to the counterclaim were adjudged to pay to defendant No.1 the sum of £90.100, mils plus £29.300 mils costs as damages for negligence.

*Glafcos Clerides* for the appellants.
*Chr. Mitsides* with
*G.I. Pelagias* for the respondent.

*Cur. adv. vult.*

The facts sufficiently appear in the judgment of the Court' read by:

ZEKIA, J. : In this case there is only one issue, namely whether non-compliance with Order 21, rule 8 (2) of the Civil Procedure Rules constitutes a mere irregularity, or such an omission as to amount to nullity. If the omission on the part of the respondent to serve the new party, the appellants, with a copy of defence endorsed in Form 13 in the Rules nullified all proceedings taken as far as the appellants are concerned, fresh steps taken by his counsel after a copy of the defence was left with the office of the said counsel, and a statement of defence given by him at a later date will have no consequence. In other words, whatever part counsel for the appellant had taken in the proceedings would not remedy the omission mentioned as in a case of nullity the question of waiver does not arise.

The facts in this case are rather peculiar. Appellant was, at some stage of the proceedings between the original plaintiff and defendant 1, joined as a third party. The subject in dispute was damages due to car collision. Defendant 1's car allegedly hit the plaintiff's car. The former in turn alleged negligence on the part of the present appellant whose driver had left his car stationary on a public road without sufficient lights on. Defendant 1 wanted to counterclaim against the appellant. It appears that at one stage of the proceedings it was contended that the third party procedure was not properly resorted to and by consent the following order was made:-

"1. Third party proceedings set aside without costs.

2. Defendant 1 to be at liberty within 14 days to file and deliver a fresh defence and counterclaim versus the plaintiff along with the previous third parties and if he makes use of this liberty, plaintiff to be at liberty to file and deliver a fresh reply to the counterclaim within 14 days of delivery of fresh defence and counterclaim. In either case the fresh pleadings to supersede those already filed and delivered by the parties concerned. When pleadings closed the action to be fixed for mention with a view to settlement some time in September next. No costs.".

The effect of this order was to wipe out the appellant as a party in the action while allowing defendant 1 to bring him in by having recourse to Order 21, rule 8. Respondent wished to do so but he failed to summon him to appear in the way prescribed in rule 8 (2). Counsel for the appellant, on the other hand, accepted a copy of the defence as provided under the said rule dated the 21st day of September, 1957. On the other hand, it appears that due to an oversight a statement of defence bearing title describing appellant a third party was delivered by the counsel of the appellant on the 18th Septem-

ber, 1957, i.e. before a copy of the defence was left with their office on the 21st September. This shows clearly the mistake committed by the office of counsel for the appellant. Counsel acted obviously without authority. Later the hearing started and at an early stage of the trial, counsel for the appellants appeared and objected to the proceedings on behalf of his client as rule 8 (2) was not complied with. The Judge overruled the objection and went on hearing the case and gave judgment against the appellants in their absence for £90.100 mils plus £29.300 mils costs payable to defendant 1 in the action.

After the order setting aside the third party proceedings the appellant was, to all intents and purposes, a person *not already a party* and the way to join him ought to have been by summoning him to appear by serving him with a copy of the defence endorsed in the way prescribed. This is analogous to the issue and service of a writ of summons on a defendant. Without the issue and service of such summons it cannot be said that a person can be made a party to an action in one way or the other. The omission is tantamount to suing a person without a writ of summons, or with a writ of summons service of which has not been effected on defendant. Judgment obtained against him in this way is null and void as far as he is concerned. In *Craig v. Kanseen* (1943) 1 All E.R. 108 - at page 113, Lord Greene, M.R. on a similar point said:—

> "The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper exparte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained".

This is a clear case of nullity and any conduct or negligence on the part of counsel cannot cure it. Order 64, rules 1 and 2 of the Civil Procedure Rules therefore have no application in this case.

A preliminary objection was taken as to the time of appeal. The learned counsel for the respondent argued that the objection by counsel for the appellant at the early stages

of the hearing was overruled and the appellant had to make his appeal within time after the said ruling ; but even if we accept his argument that a litigant has got to make his appeal against an interlocutory order (if the ruling in question is considered as such), whether the appellant in this case is bound is highly doubtful since he was not already a party to the proceedings at the time such a ruling was made. Moreover under Order 35, rule 16 of the Civil Procedure Rules any failure to appeal from an interlocutory order cannot operate so as to bar or prejudice the Court of Appeal from giving a decision as may be just. We think, therefore, that the appeal was not made out of time.

Appeal allowed without costs. It is only fair that owing to the course this case has taken the respondent should not be burdened with costs. The judgment of the trial Court is, therefore, set aside to the extent the appellants are concerned.

*Appeal allowed.*