1988 July 18

(A. LOIZOU, P., SAVVIDES, KOURRIS, JJ.)

MUNICIPALITY OF NICOSIA,

Appellant,

v.

CHARALAMBOS CLEOVOULOU,

Respondent.

(Criminal Appeal No. 4936).

Municipal Corporations — The Municipal Corporations Law 111/85, as amended, sections 92, 93 and 94 — Nuisance — The proceedings under subsection 93(1)(b) — Nature of — Not criminal — Rules governing such proceedings — The Municipal Corporation (Nuisances) Rules — Continued to be in force in virtue of section 11 of the Interpretation Law, Cap. 1.

Civil procedure — Contravention of rules — If defect fundamental, proceedings are a nullity, whilst if contravention a mere irregularity, the matter can be remedied under 0.64 R.1 of the Civil Procedure Rules — The Municipal Corporations (Nuisances) Rules — Contravention of Rule 4 in that summons was not sealed by the seal of the Court or signed by the Judge — Summons a nullity, but the application itself and the interim order granted are not affected.

Municipal Corporations — The Municipal Corporations (Nuisances) Rules — See Municipal Corporations, ante; and Civil Procedure, ante.

The appellants served in accordance with section 92 of Law 111/85 on the respondent a notice calling upon him to abate a public nuisance.

As the respondent failed to comply the appellants began legal proceedings by filing an application under Rule 3 of the Municipal Corporations (Nuisances) Rules. As a result a summons was issued calling the respondent to appear before the Court on a specified day. However, in contravention of Rule 4, the summons was not sealed by the seal of the Court or signed by a Judge.

On the same day with the filing of the aforesaid application, the appellants obtained upon ex parte application an interim order, restraining the respondent from continuing the alleged nuisance. This order was made returnable on the same day as the summons.

The trial Judge found that the word «charge» (κατηγορία) in s.93(2) indicates that the proceedings are criminal proceedings. As a result, he concluded that, notwithstanding s.11 of the Interpretation Law, Cap.1, the said rules are inconsistent with the new law and, therefore, are not applicable. He considered the proceedigs a nullity and, consequently, dismissed the application and discharged the interim order.

Hence this appeal.

Held: (1) Sub-section 93(2) should be read in conjunction with subsections 93(1)(b) and 93(4).

The use of the word «charge» in sub-section (2) cannot be interpreted as meaning that such proceedings are proceedings of a criminal nature. No criminal offence is created under section 93 entailing punishment. What the Court is empowered to do is to issue an order directing a person, who has failed to comply with a notice served on him under s.92, to abate the nuisance and if he fails to comply with such order then an offence is committed under sub-section (4) of s.93 subjecting the offender to the sentence contemplated thereunder and also under section 96.

(2) The object of Rules 3 and 4 of the Municipal Corporations (Nuisances) Rules is to give effect to the provisions of s.93(1) and (2) for presenting a person causing nuisance before the Court with the object of securing an abatement of the nuisance. Then such proceedings come to an end with the issue of an order.

(3) There is no doubt that under the provisions of the law any violation of the provisions of the law renders also a person liable to pure criminal proceedings. This is however an alternative procedure to that contemplated by sections 92 and 93 of the Law and Rules 3 and 4 of the Municipal Corporations (Nuisances) Rules.

(4) The question now is whether in this case the particular contravention of Rule 4 amounts to a fundamental defect or to mere irregularity remediable under 0.64 R.1 of the Civil Procedure Rules.

(5) In the light of the authorities, and of the mandatory language of the Rule, the defect is a fundamental one.

(6) However, such defect affects only the summons. It does not affect the application; moreover, it does not affect the interim order

Appeal allowed to the above extent. Directions accordingly.

Cases referred to

Re Pritchard (deceased) [1963] 1 All E.R. 873;

Spyropoulos v. Transavia (1979) 1 C.L.R. 421;

Demetriou and Others v. Prodromou (1983) 1 C.L.R. 300;

Attorney-General v. Kouppi, 1 R.S.C.C. 115;

Demetriou v The Republic, 1 R.S.C.C. 99;

President of the Republic v. House of Representatives (1985) 3 C.L.R. 872.

Appeal.

Appeal by the Municipality of Nicosia against the decision of the District Court of Nicosia (Photiou, Ag. D.J.) given on the 20th October, 1987 dismissing an application on behalf of the appellants calling upon the respondents to show cause for having failed to abate the nuisance caused as a result of the operation of his business premises at Nicosia and also discharging an interim order restraining the respondent from continuing the alleged nuisance.

E. Odysseos with L. Georghiadou (Mrs.), for the appellants.

M. Constantinides, for the respondents.

Cur. adv. vult.

A. LOIZOU P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the decision of a Judge of the District Court of Nicosia whereby he dismissed an application on behalf of the appellants against the respondent calling upon him to show cause for having failed to abate the nuisance caused as a result of the operation on his business premises at Nicosia and also discharged an Interim Order restraining the respondent from continuing the alleged nuisance.

The proceedings in the case which led to the present appeal were instituted under the provisions of the Municipal Corporations Law No. 111/85 and the Municipal Corporations

(Nuisances) Rules, published in vol II of the Subsidiary Legislation of Cyprus, at p. 519.

The facts of the case are briefly as follows:

The respondent operates a workshop at Florinis street, Nicosia for the repair of motorcycles. The operation of the said workshop caused complaints against the respondent for excessive noise and for causing the accumulation of filth in Promitheas street. As a result the appellants upon receipt of information to the above effect and having been satisfied that the above complaints were well founded served upon the respondent a notice in accordance with the provisions of s.92 of Law 111/85 asking him to stop:

(a) causing noise by the repair and operation of motorcycles.

(b) accumulating filth on the public pavement at Promitheas street.

(c) operating a workshop for the repair of motorcycles; and

(d) To remove such factory and clean the area from any filth as the above acts of the respondent were the cause of a public nuisance.

The respondent failed to comply and as a result appellants filed an application under Rule 3 of the Municipal Corporations (Nuisances) Rules to the District Court of Nicosia for the issue of a summons to the respondent ordering him to abate the nuisance, specifying therein the nature of the nuisance sought to be abated. A summons was issued in accordance with the terms of the application which was drafted by counsel for appellants calling on the respondent to appear before the Court on a specified date for the purpose of the proceedings to be had. Such summons however instead of being sealed with the seal of the Court or signed by a Judge as provided by rule 4 it was signed by counsel for appellants.

At the same time counsel for appellants applied for an interim Order restraining the respondent from causing the alleged nuisance which was granted by the Court and was made returnable on 29th June, 1987, on which date the summons was also fixed. On such date counsel appearing for the respondent raised a preliminary objection that the summons served upon him was wrongly issued as it was not in compliance with the provisions of the rules, in that it was neither sealed by the Registrar nor signed

by a Judge and that it should be dismissed and the interim order discharged. Counsel further submitted that the proceedings were wrongly commenced by a civil action describing the parties as plaintiffs and defendant respectively. The creation of a public nuisance, counsel submitted, is a criminal offence punishable as provided by law and such proceedings could not have been instituted in any other way than by filing a criminal charge. Though under the Municipal Corporations Law provision is made that «Legal proceedings may be instituted» the law clearly speaks about an offence, and the prosecution of an offence can only commence by the filing of a criminal charge.

The learned trial Judge came to the conclusion that though in the Municipal Corporations Law, 1985, (Law 111/85), there is no provision that the rules which existed prior to its enactment should continue to be in force nevertheless by virtue of the Interpretation Law such rules continue to remain in force till repealed but he went further and found that there was conflict between the rules and the provisions of the law and, therefore, to such extent the law prevails. He found that s.93(2) expressly provides for proceedings to be taken for the abatement of a nuisance, which bearing in mind the mention of the word «charge» in sub-section (3) of s.93 and also in s.94 and the fact that the sentence provided has been increased and in addition to a fine, imprisonment has also been provided, the procedure contemplated by the Municipal Corporations (Nuisances) Rules cannot be utilized as being contrary to the provisions of the law. He went further and found that even assuming that the rules continue to be applicable the application should be dismissed on the ground that there was no compliance with the relevant rules in that the summons issued and served on the defendant was not in compliance with rule 3 as it was signed by counsel for appellants and not sealed by the Court or signed by a Judge thereof, a mandatory provision under the rules. He considered the said irregularity as a material one rendering the proceedings a nullity. As a result he dismissed the application on the basis of his findings and he also discharged the interim order issued.

Counsel for the appellants raised the following grounds of appeal:

(a) That the trial Judge was wrong in finding that the Municipal Corporations (Nuisances) Rules are inconsistent with the provisions of the Municipal Corporations Law, 111/85, as

amended by Laws 1/86 - 165/87 and that they have no application in the case

(b) He wrongly concluded that s 11 of the Interpretation Law, Cap 1 cannot save the said rules

(c) He wrongly found that s 143 of the aforesaid law, No 111/85, does not save the said rules

(d) He wrongly concluded that s 93 of the aforesaid law, No 111/85, introduced a new procedure regulating matters of nuisance provided by the law

(e) He wrongly found that the summons served on the defendant is null and void and not in accordance with the rules and

(f) He wrongly dismissed the interim Order issued by him on the basis of s 93 of the Municipal Corporations Law, as a result of wrong interpretation

The Municipal Corporations (Nuisances) Rules published in the Subsidiary Legislation, Vol II, p 519 were originally published in the official Gazette of the Republic 1930, Supplement No 3 and were made under the provisions of the Municipal Corporations Law, 1930 (Law 26 of 1930) which with all the subsequent amendments till 1949 were incorporated in the Revised Edition of the Laws of 1949 as Cap 252 The subsidiary legislation was reenacted under the provisions of the Revised Edition (Subsidiary Legislation) Law, 1954 By Law 64/64 the Municipal Corporations Law, Cap 240 which became ineffective under the provisions of the Constitution was revived and regained its force till it was repealed and replaced by Law 111/85 No new regulations were made under Law 111/85 but by virtue of the provisions of s 11 of the Interpretation Law, Cap 1 read in conjunction with s 2 of the same law continued to be in force S 11 of Cap 1 provides as follows

> «11 Whenever any Law has already been or shall hereafter be repealed and other provisions are substituted by the repealing Law all public instruments, forms and appointments made or issued under the repealed Law, and in force at the time of such repeal, shall, until revoked of replaced, continue good and valid in so far as they are not inconsistent with the substituted provisions »

and the definition of «public instrument» under s 2 includes rules

or by-laws made or issued under the authority of any law.

S.93 of the Municipal Corporations Law, 1985, on which the learned trial Judge relied in reaching his conclusion provides as follows:

«93.- (1)Εάν το πρόσωπον εις το οποίον επεδόθη ειδοποίησις δυνάμει των διατάξεων του άρθρου 92 παραλείψη να συμμορφωθή προς οιανδήποτε των απαιτήσεων αυτής εντός της καθοριζομένης εις αυτήν προθεσμίας, ή εάν η οχληρία είναι ενδεχόμενον, κατά την γνώμην του συμβουλίου ή του δημάρχου, να επαναληφθή εις τα ίδια υποστατικά, το συμβούλιον:

(α) δύναται να άρη την οχληρίαν και οιοσδήποτε των υπαλλήλων ή εργατών του συμβουλίου δύναται να εισέρχεται εις τα υποστατικά, εις τα οποία υφίσταται η οχληρία και να εκτελέση εκεί οιανδήποτε πράξιν, η οποία ήθελε κριθή αναγκαία προς άρσιν της οχληρίας, και το συμβούλιον δύναται να ανακτά δι' αγωγής τα υπ' αυτού γενόμενα έξοδα από το εν παραλείψει πρόσωπον

(β) δύναται να προβή εις την λήψιν δικαστικών μέτρων προς εξασφάλισιν διατάγματος διά του οποίου να υποχρεούται το εν παραλείψει πρόσωπον να άρη την οχληρίαν.

(2) Το δικαστήριον ενώπιον του οποίου εκδικάζεται κατηγορία προσαφθείσα εναντίον προσώπου τινός, ως εις την παράγραφον (β) ανωτέρω προνοείται, δύναται κατόπιν αιτήσεων άνευ ειδοποιήσεως προς τον έτερον διάδικον (ex parte) να διατάξη το εν παραλείψει πρόσωπον να λάβη αμέσως τοιαύτα μέτρα, καθοριζόμενα εις το διάταγμα, οία ήθελον κριθή αναγκαία διά την άρσιν ή αναστολήν της οχληρίας ή διά την παρεμπόδισιν δημιουργίας ή επαναλήψεώς της, μέχρι της τελικής εκδικάσεως της υποθέσεως αναφορικώς προς ην προσήφθη η κατηγορία εναντίον του τοιούτου προσώπου:

Νοείται ότι η έκδοσις του τοιούτου διατάγματος υπόκειται εις τας διατάξεις του περί Πολιτικής Δικονομίας Νόμου, του περί Δικαστηρίων Νόμου και των περί

Πολιτικής Δικονομίας Διαδικαστικών Κανονισμών.

(3) Εάν οιονδήποτε πρόσωπον εναντίον του οποίου εξεδόθη διάταγμα δυνάμει των διατάξεων του εδαφίου (2) παραλείπη ή αμελή να συμμορφωθή προς το τοιούτο διάταγμα εντός της καθορισθείσης εν τω διατάγματι προθεσμίας, είναι νόμιμον διά το συμβούλιον να εκτελέση το τοιούτο διάταγμα και τα γενόμενα έξοδα διά την εκτέλεσιν τούτου καταβάλλονται εις το συμβούλιον υπό του προσώπου εναντίον του οποίου εξεδόθη το διάταγμα, και τα τοιάυτα έξοδα λογίζονται ως ποινή εντός της εννοίας του περί Ποινικής Δικονομίας Νόμου και η καταβολή τούτων εν συνεχεία επιβάλλεται.

(4) *Οιονδήποτε πρόσωπον εναντίον του οποίου* εξεδόθη διάταγμα δυνάμει του εδαφίου (2), το οποίον παρακούει ή παραλείπει να συμμορφωθή προς το τοι*ούτο διάταγμα, ανεξαρτήτως του εαν το συμβούλιον* προέβη εις την εκτέλεσιν ή εξετέλεσε το τοιούτο διάταγμα, είναι ένοχον αδικήματος και υπόκειται εις ποινήν *φυλακίσεως μη υπερβαίνουσαν τους έξ μήνας ή εις χρη*ματικήν ποινήν μη υπερβαίνουσαν τας τριακοσίας λίρας, ή εις αμφοτέρας τας ποινάς ταύτας.»

The translation in English reads as follows:

(«93.- (1) If the person on whom a notice was served in accordance with the provisions of section 92 fails to comply with any of its requirements within the period prescribed therein, or if there is a possibility, in the opinion of the corporation or the mayor, that the nuisance may be repeated on the same premises, the corporation:

(a) may abate the nuisance and any of the corporation's employees or workers may enter the premises in which the nuisance takes place and therein proceed to any act which may be deemed necessary for the abatement of the nuisance and the corporation may recover by action from the person in default the expenses incurred by it;

(b) may proceed to the institution of legal proceedings for the securement of any order by which the person in default will be compelled to abate the nuisance.

(2) The Court before which a charge preferred against a person is tried, as provided in paragraph (b) above, may upon

an ex parte application order the defaulting person to take such measures, defined in the order, which may be deemed necessary for the abatement or suspension of the nuisance or the prevention of its creation or repetition, until final determination of the case in which the charge was preferred against such person:

Provided that the issue of such an order is subject to the provisions of the Civil Procedure Law, the Courts of Justice Law and the Civil Procedure Rules.

(3) If any person against whom an order was issued on the basis of the provisions of sub-section (2) omits or neglects to comply with such order within the time specified in the order, it is lawful for the corporation to execute such order and the expenses incurred for its execution are paid to the corporation by the person against whom the order was issued and such expenses are considered as a sentence within the meaning of the Criminal Procedure Law and their payment becomes then imperative.

(4) Any person against whom an order was issued on the basis of sub-section (2), who disobeys or fails to comply with such order, irrespective of whether the corporation has proceeded to the execution or executed such order, is guilty of an offence and subject to a sentence of imprisonment not exceeding six months or to a fine not exceeding three hundred pounds, or to both such sentences.»)

The learned trial Judge considered the word «charge» (κατηγορία) mentioned in sub-section (2) as implying a criminal charge which has to be commenced by criminal proceedings. Sub-section (2) however should be read in conjunction with s.93(1)(b) which provides for the taking of judicial proceedings and sub-section (4) which specifically makes it an offence if a person fails to comply with an order issued by the Court under sub-section (2). Also s.94 provides for a fine not exceeding £300.- or imprisonment or both and s.96 provides for an additional sentence for contravention of the order of the Court.

A careful perusal of the contents of the above sections read together cannot lead to a construction that the relevant provisions in the rules are repugnant to the law. S.93(1)(b) clearly speaks of judicial proceedings to be taken. The use of the word «charge» in sub-section (2) cannot be interpreted as meaning that such

proceedings are proceedings of a criminal nature No criminal offence is created under section 93 entailing punishment What the Court is empowered to do is to issue an order directing a person, who has failed to comply with a notice served on him unders s 92 to abate the nuisance and if he fails to comply with such order then an offence is committed under sub-section (4) of s 93 subjecting the offender to the sentence contemplated thereunder and also under section 96

The object of Rules 3 and 4 of the Municipal Corporations (Nuisances) Rules is to give effect to the provisions of s 93(1) and (2) for presenting a person causing nuisance before the Court with the object of securing an abatement of the nuisance Then such proceedings come to an end with the issue of an order and failure to comply with such an order renders the person non-complying guilty of a criminal offence for disobeying the order of the Court

There is no doubt under the provisions of the law that any violation of the provisions of the law renders also a person liable to pure under the Criminal Procedure Law in which case all the prerequisites of a criminal prosecution and the rules regarding the burden of proof and evidence have to be applied This is however an alternative procedure to that contemplated by sections 92 and 93 of the Law and Rules 3 and 4 of the Municipal Corporations (Nuisances) Rules

In the result the finding of the learned trial Judge that the Rules can have no application in the present case is wrong

We come now to consider the question as to whether non-compliance by the appellants with the provisions of Rule 4 of the Municipal Corporations (Nuisances) Rules and Form No 2 set out in the Appendix to the said Rules amounts to a mere irregularity or a fundamental defect nullifying the proceedings

Under Rule 3 of the said Rules proceedings in the Court for an order to abate a nuisance shall be commenced by summons to be issued on an application on behalf of the Municipality desiring to commence such proceedings

Rule 4 provides as follows.

«Upon receipt of an application as aforesaid, the Court shall

issue a summons in accordance with the terms of the application, calling on the defendant to appear before the Court on a specified day for the purpose of the proceedings to be had.

The summons shall be sealed with the seal of the Court or, in lieu of being sealed, it may be signed by one of the judges.»

Form No.2 in the Appendix prescribes the form of the summons to be issued which embodies a command directed to the defendant to appear before the Court on a fixed date on the hearing of the proceedings for the obtaining of an order compelling such person to abate the nuisance described in the summons. At the end of such form it is prescribed that the summons shall be sealed with the seal of the Court or signed by a Judge.

From the wording of such Rule it appears to be mandatory that such summons should be issued by the Court and it should bear the seal of the Court or the signature of one of the Judges. Obviously the reason is because, as mentioned earlier, it embodies a command directing the defendant to appear before the Court.

The question which poses for consideration is whether non-compliance with Rule 4 and the Form set out in the Appendix amounts to an irregularity which does not render the proceedings void under Order 64(1) of the Civil Procedure Rules or to a fundamental defect in the proceedings which will nullify the proceedings.

0.64, r.1 of the Civil Procedure Rules provides as follows:

«Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.»

It corresponds to the old English 0.70, r.1 (see Annual Practice 1960, p. 1986). In the notes to the said Rules in the Annual Practice a distinction is drawn between proceedings which are null and void, and proceedings which are merely irregular in the sense that they involve non-compliance with any of the R.S.C. or with any rule of practice. In the first class of cases the party is entitled ex

debito justitiae to have the proceedings set aside without conditions, for they are a nullity, whereas in the second cases the proceedings are valid though irregular and the Court has an unlimited discretion as to what order it will make in the circumstances.

In the case of *Re Pritchard* (deceased) [1963] 1 All E.R. 873, the application of the rule was explained. In that case Upjohn, L.J. at p.881 said the following:

«I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within R.S.C., Ord. 70, and true nullities, though I agree that no precise definition of either is possible.»

And at p. 883:

«The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all..... (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement.....».

The decision in the above case and the explanation as to the application of 0.70, r.1 has been adopted in a number of cases of this Court. (*See, inter alia, Spyropoullos v. Transavia*, (1979) 1 C.L.R. 421 and *Demetriou & others v. Prodromou* (1983) 1 C.L.R. 300).

The decision in *Re Pritchard* was constantly followed also in England and as a result of the construction of the application of 0.70, r.1 in that case, in 1966 it was found necessary that the Rules of the Supreme Court in England should be amended and, in fact, they were amended in 1966 by repealing 0.70, r.1 and substituting same by 0.2, r.1 (see Annual Practice 1982) which reads as follows:

«1.- (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements

of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) .....

.....

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.»

It has been the practice of our Supreme Court in the exercise of its jurisdiction as Supreme Constitutional Court in proceedings under Article 140 of the Constitution or in administrative cases not to allow formal defects to prevent it from doing justice in a case on its substance especially when there are involved matters of great public interest and for the purpose of serving the interests of justice. In so doing it is exercising its power in accordance with the Supreme Constitutional Court Rules (see in this respect *Attorney-General v. Kouppi*, 1 R.S.C.C. 115, *Demetriou v. The Republic*, 1 R.S.C.C. 99 and *President of the Republic v. House of Representatives* (1985) 3 C.L.R. 872). In the last case Triantafyllides, P., in drawing the distinction of proceedings contemplated by 0.64 of the Civil Procedure Rules and proceedings to which the Supreme Constitutional Court Rules apply, had this to say at pp. 888-889:

«In concluding I should observe that I have not thought fit, in dealing with the matter of the irregularity of the commencement of the proceedings in this case, to resort to Order 64 of the Civil Procedure Rules, which are rendered applicable, mutatis mutandis, to proceedings to which the Supreme Constitutional Court Rules apply, by virtue of Rule 18 of such Rules, because I am inclined to treat the said Order 64 as not being fully consonant with the nature of the judicial competence to be exercised by this Court under Article 140 of the Constitution in a matter involving the constitutionality of legislation (and see, inter alia, by way of useful analogy, the cases of *The President of the Republic v. Louca*, (1984) 3

C L R 241 and *Rousos v The Republic* in which judgment was delivered on the 8th February 1985 and has not yet been reported)

Stylianides, J in his judgment in the same case at p 895 had this to say

«If I were to apply O 64 of the Civil Procedure Rules, I would declare this reference as a nullity that could not be remedied Both the majority judgment in *Re Pritchard (Deceased)* [1963] 1 All E R 873 that was adopted and applied by this Court in *Spyropoullos v Transavia* (1979) 1 C L R 421 and *Andreas Demetriou and Others v George Prodromou* (1983) 1 C L R 301, leave no room for describing the defect in the commencement of these proceedings otherwise than a nullity »

Bearing in mind the above authorities we have reached the conclusion that non-compliance with rule 4 concerning the issue and service of a summons calling upon the respondent to appear before the Court, in that such summons was not sealed by the Court or signed by a Judge of the Court but it was issued and signed by counsel for the appellants amounts to a fundamental defect in the proceedings which renders the issue of such summons a nullity The summons, therefore, which was issued and served on the defendant has to be set aside

Though the learned trial Judge rightly came to the conclusion that the non-compliance with rule 4 was a fundamental irregularity nevertheless this was not a ground for setting aside the application filed by the appellants for the issue of such summons especially in view of his finding for the description of the proceedings as «action» and the parties as «plaintiffs» and «defendants» are still irregularities which could be cured by amending the application

In view of our findings as above we conclude that the issue and service of the summons is set aside but the application may proceed for hearing after a summons is properly issued and served on the defendant As to the interim order, bearing in mind that it was issued on the basis of the application under the provisions of s 93(2) the discharge of such interim order for the reasons given by the trial Judge was wrong and has to be set aside in view of our finding that the application can proceed

In the result the appeal succeeds to the above extent. The interim order remains in force and should be made returnable on a date to be fixed by the Judge who will be handling the case.

In the circumstances we make no order for costs.

Appeal partly allowed.
No order as to costs.