1959 *Present :* **Basnayake, C.J., and Pulle, J.**

WICKREMARATNA, Appellant, *and* JOSEPHINE SILVA, Respondent

S. C. 108/58—D. C. Avissawella, 8622

Minors—Action instituted by minor without next friend—Not void ab initio*—Scope of defendant's right to have action dismissed—Civil Procedure Code, ss. 476, 478.*

Where a defendant makes an application under section 478 of the Civil Procedure Code to have the plaint taken off the file on the ground that the action was instituted hy a minor without a next friend, the Court is entitled to refuse the application if it is shown that the plaintiff came of age after the date of the institution of the action and prior to the date of the defendant's application.

APPEAL from an order of the District Court, Avissawella.

H. W. Jayewardene, Q.C., with *S. B. Lekamge* and *N. R. M. Daluwatte*, for defendant-appellant.

No appearance for plaintiff-respondent.

Cur. ad. vult.

December 10, 1959. BASNAYAKE, C.J.—

This is an appeal from the order of the District Judge refusing to allow an application by the defendant under section 478 of the Civil Procedure Code to have the plaint taken off the file.

[1] *(1952) 54 N. L. R. 449.*

The plaintiff seeks to recover Rs. 5,000 as damages from the defendant for seduction. On 6th May 1957 when the action was instituted she was a minor, but it was not instituted in her name by a next friend as required by section 476 of the Civil Procedure Code. Summons could not be personally served on the defendant though it was re-issued several times. On 30th September 1957 the plaintiff's Proctor moved the Court under section 60 of the Civil Procedure Code to prescribe the following mode of service of summons " by affixing the same to the front door of the last known place of abode of the defendant at Kahahena, Waga ". This application was allowed and on 8th November 1957 the defendant's Proctor filed his proxy and moved for a date to file answer. The Court fixed 15th November 1957 for the purpose. The answer was not filed on that day, nor was it filed on 2nd December 1957 or 19th December 1957, the further dates that were given. It was eventually filed on 28th January 1958. On 11th February 1958 the case was called for fixing the date of trial and it was fixed for 29th May. On 8th May the plaintiff's Proctor filed the list of witnesses and documents and moved for summons. On 20th May the defendant's Proctor with notice to the Proctor for plaintiff moved that the trial fixed for 29th May be postponed as the defendant could not get ready " due to certain difficulties ". On 29th May the trial was refixed for 3rd October. On 18th September the plaintiff's Proctor obtained summons on the witnesses. On 30th September 1958 the defendant made an application by way of summary procedure under section 478 of the Civil Procedure Code that the case be taken off the trial roll. The plaintiff had come of age on 20th January 1958. The District Judge after hearing counsel dismissed the defendant's application.

I see no reason to interfere with the order made by him. An application under section 478 must be made while the plaintiff is a minor. The present application does not fall within the ambit of that section as it has been made long after the plaintiff ceased to be a minor. The power given to the Court to order that the case be taken off the file is designed to enable a minor to regularise his or her plaint by having a next friend appointed. In the case of a minor who has come of age at the time of the application, taking the case off the file would serve no purpose as he is competent to proceed without a next friend. The Indian Courts appear to have taken the same view of the corresponding section of the Indian Civil Procedure Code as that expressed by me here. It is sufficient to mention the case of *Beni Ram Bhutt v. Ram Lal Dhukri* [1], and *Rattonbai v. Chabildas Lalloobhoy and others* [2]. The rule of procedure in England too is expressed in the same permissive form as ours. It states :

> " Infants may sue as plaintiff by their next friend, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose. (Order 16, r. 16.)

[1] *I. L. R. (1886) 13 Calcatta 190 at 193.* [2] *I. L. R. (1888) 13 Bombay 7.*

This rule has not been regarded as rendering an action *ab initio* bad. It is not necessary for the purpose of this judgment to refer to the English cases. It would be sufficient to cite the following passage from Simpson on Infants (p. 294, 4th Ed.)—

> " If an action be commenced without a next friend, the defendant may move for it to be dismissed, with costs to be paid by the Solicitor who issued the writ ; but, his proper course would appear to be to apply by summons on notice to stay proceedings, until a next friend be appointed."

An action instituted by a minor without a next friend being designated in the plaint is not void *ab initio*. Under the Roman-Dutch Law :

> " .....if a minor has figured in a judicial proceeding without curator, having perchance been held to be a major by mistake and thus not having been shut out by any exception being raised to his *persona*, a judgment delivered against him indeed is of no weight, but one given for him will be effective." (Voet, Bk. V, Tit. I., s. 11—Gane Vol. 2, p. 15.)

This view finds support in the provisions of the Civil Procedure Code which do not declare a suit instituted by a minor without a next friend void *ab initio* nor do they provide that such an action should be dismissed ; but they leave room for the omission to be rectified without the action being automatically dismissed. Even in a case to which section 478 (2) applies it vests a wide discretion in the court. It empowers the court to make such order in the matter as it thinks fit.

The appeal is accordingly dismissed.

PULLE, J.—I agree.

Appeal dismissed.