1962 *Present:* **H. N. G. Fernando, J., and Sri Skanda Rajah, J.**

SIEBERT, Appellant, *and* NEW ASIA TRADING CO., LTD. and another, Respondents

S.C. 49 (Inty.) of 1961—D. C. Colombo, 49992/M

Action against minor—Attainment of majority soon after plaint is filed—Resulting position—Action not void ab initio—*Meaning of* " *Order* "— *Civil Procedure Code, ss. 5, 46, 48, 476, 479, 480, 493.*

Where, in an action instituted against a minor, the minor attains majority soon after the plaint is filed, it is not open to him to have himself discharged from the proceedings in terms of section 480 of the Civil Procedure Code. In such a case, the acceptance of the plaint is not an " order " within the meaning of section 480.

An action against a minor *simpliciter* is not void *ab initio*, and can be duly continued subject only to compliance with the requirement of section 479 of the Civil Procedure Code that a guardian should be appointed when the fact of minority is established.

APPEAL from an order of the District Court, Colombo.

S. Sharvananda, for Plaintiff-Appellant.

H. W. Jayewardene, Q.C., with *C. Ranganathan*, for the 2nd Defendant-Respondent.

Cur. adv. vult.

January 16, 1963. H. N. G. FERNANDO, J.—

This was an action by the Plaintiff for damages for injury alleged to have been suffered in consequence of the negligent driving of a motor car by the 2nd Defendant on 18th May 1958. The plaint was filed on 17th May 1960. Summons was ordered and was served on the 2nd Defendant whose proxy was filed thereafter. But instead of filing answer as ordered by the Judge, the proctor moved the Court as follows on 30th September 1960 :—

> " 2. The 2nd Defendant was a minor at the time of the institution of the above action. The 2nd Defendant attained majority on the 17th day of July 1960 . . . .
>
> 3. The Plaintiff did not take any steps to appoint a guardian ad litem over the 2nd Defendant for the purpose of this action.
>
> Wherefore the 2nd Defendant prays that the Court be pleased to discharge him from the above action and enter an interlocutory decree for this purpose in terms of Section 480 of the Civil Procedure Code."

This appeal is from the order made by the learned District Judge in terms of that motion by which order he purported to " discharge the 2nd Defendant from these proceedings ". For the appellant, it is not disputed that the 2nd Defendant was a minor at the time when the plaint was filed, but it is argued that since the 2nd Defendant did attain majority on 17th July 1960, the court should not have discharged him from the proceedings, but should only have ordered summons to be served on him afresh.

In support of the order of discharge, Mr. Jayewardene had to contend that in accepting the plaint the Judge had made an " order ", and that he was bound to discharge that order under Section 480 of the Code, and thus to discharge the 2nd Defendant from the entire proceedings. The basis of this contention was that every plaint filed against a minor, and every acceptance of such a plaint, is a nullity, unless the Plaintiff has previously taken steps to have a guardian appointed for the minor and names the guardian, in that capacity, as Defendant in the plaint. In other words Counsel sought to import into the Code, for the case of an action *against* a minor, provision corresponding to that which is expressly enacted in Section 476, namely that an action *by* a minor shall be instituted by his next friend.

But Section 479 of the Code clearly contemplates that the Court does have jurisdiction to deal with an action in which a minor, *simpliciter*, is named as Defendant, for it provides that if the Court is satisfied of the fact of the minority *of the Defendant to an action*, the Court shall appoint a guardian for the minor. The procedure for such an appointment is prescribed in Section 493, but there is nothing in that Section which suggests or even implies that the appointment must be made *before a plaint is filed.* In the instant case, therefore, Section 479 would have been applicable if the 2nd Defendant had not attained full age on 17th July 1960 ; a guardian would have been appointed under the Section, and the action would then have continued without a fresh plaint being filed. That being so, I cannot see how the plaint must be regarded as a nullity merely because the 2nd Defendant ceased to be a minor soon after the plaint was filed.

It is not helpful to consider the decisions upon which counsel relied, for they deal with cases of applications under Section 480 to discharge decrees or other binding orders. Counsel was not able to cite any decision holding that the acceptance of a plaint is an order which may be discharged under that Section. But I do find some assistance in a recent judgment of the Chief Justice (63 N. L. R. 569), holding that where a minor institutes an action as plaintiff, without a next friend and attains majority subsequently, the Court may allow the action to continue. Despite the apparently peremptory terms of Section 476, i.e. " every action by a minor *shall* be instituted in his name by an adult person . . . . ", the judgment declares that an action by a minor plaintiff instituted by himself is not void *ab initio*. Considering then that the only specific provision in the Code applicable to an action against a minor is Section 479, the terms of which in no way postulate or imply that such an action shall only be instituted by means of a plaint naming a guardian as defendant, I must hold that an action against a minor *simpliciter* is not void *ab initio*, and can be duly continued subject only to compliance with Section 479 itself, that is to say, with the appointment of a guardian when the fact of minority is established. If then the action instituted by means of the plaint originally filed is continuable when the appointed guardian becomes a party by the service of summons on him, there is no reasonable ground for the view that the action is not continuable if and when the minor himself becomes a competent defendant by his attaining majority.

In any event, the act of a Judge in accepting a plaint is not an " order " within the meaning of the definition of that term in Section 5 of the Code, which is " the formal expression of any decision of a civil court which is not a decree ". While an order rejecting a plaint is expressly included within the definition of " decree ", the act of accepting a plaint is not referred to in either definition.

Section 46 specifies the three courses open to the Judge upon presentation of a plaint, namely " the allowance of the filing of the plaint ", or the " return of the plaint for amendment ", or " the Rejection of the plaint ". But it is only with reference to the return or the rejection of a plaint that

the term " order " occurs in the Code. In these two cases, the Judge is required by Section 48 to sign a written *order* stating his grounds for the rejection or return, and his act of return or rejection thus acquires the character of being " the formal expression of a decision " as contemplated in the definition of " order ". The absence of similar express provision for an order to be made when a Judge allows a plaint to be filed supports the opinion that the act of accepting a plaint was not intended to be regarded as an " order " within the meaning of Section 5 and to be capable of being discharged under Section 480.

It would be manifestly unreasonable to expect every prospective plaintiff to make a preliminary investigation as to the actual age of every prospective defendant before filing an action. The imposition of such a condition precedent would in the vast majority of cases render nugatory the fundamental right to have recourse to the Courts. If a plaintiff, having striven to the best of his ability to fulfil such a condition, files action in the honest belief that the defendant is a major, but if it subsequently turns out that his belief was mistaken, it would surely be unreasonable that the filing of the action should not protect the plaintiff against the operation of the law of limitation.

In partition actions, it is not uncommon for a party to find himself unable to trace the registration of his own birth. The law relating to the registration of births expressly contemplates the possibility of delay or mistake in the matter of registration when it provides for late registrations and for rectification. That law does not and cannot prevent the possibility that the birth of a particular individual, whom a prospective plaintiff may desire to sue, may not have been registered at all. In such circumstances, a provision in the Civil Procedure Code casting on a prospective plaintiff the burden of ascertaining, before the period of limitation applicable to his claim expires, the actual correct age of the prospective defendant, would be worse than unreasonable : for it would be absurd. *Lex non cogit ad impossibilia.* Even particulars as to the name, description, and place of residence of a defendant are required to be stated in a plaint only " so far as the same can be ascertained ". It therefore does not cause me any surprise whatsoever to find that the Code does not impose upon a plaintiff the unreasonable and absurd burden which Mr. Jayewardena is forced to try to read into the law.

Nor have I any difficulty in accepting my brother's statement, based on his familiarity with the practice in many of our trial courts, that the matter of the minority of a defendant is usually dealt with after a plaint is filed naming as defendant a person who is subsequently claimed to be a minor, and that proof of minority is followed only by the appointment of a guardian for the minor, and not (as ordered in this case) by the " discharge of the minor from the proceedings ". The fact that the practice has not hitherto been considered worthy of disputation satisfactorily accounts for the lack (to my present knowledge) of any decision of this Court approving that practice.

I hold for the reasons stated that the District Judge wrongly made order discharging the 2nd Defendant from the proceedings in this action. I am inclined even to the opinion that the summons already served on the 2nd Defendant was effective, for his proxy was in fact filed, in response to that summons, after he had attained full age. Nevertheless, as we heard no argument on this incidental point, I am content to allow only the relief claimed by counsel for the Plaintiff.

I set aside the order appealed from, and direct the District Judge to issue fresh summons on the 2nd Defendant and thereafter to proceed with the trial against the 2nd Defendant upon the plaint already filed, subject of course to any application to the contrary which the Plaintiff may make. The 2nd Defendant must pay to the Plaintiff the taxed costs of the proceedings upon the motion for his discharge and of this appeal.

SRI SKANDA RAJAH, J.—I agree.

Order set aside.