# APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.*

1905. April 7, 17, 19.

JOHNSON AND ANOTHER (PLAINTIFFS), APPELLANTS, IN ORIGINAL SIDE APPEAL NO. 48 OF 1904,
PORTO NOVO CUNDASAMY AND OTHERS (PLAINTIFFS), APPELLANTS, IN ORIGINAL SIDE APPEAL NO. 51 OF 1904,

*v.*

THE MADRAS RAILWAY COMPANY (DEFENDANTS), RESPONDENTS IN BOTH.*

*Fatal Accidents Act (Indian)—XIII of 1855—'Representative of the deceased' who are—The right under the Act is distinct in each and is a several, not joint, right—Limitation Act XV of 1877, ss. 7, 8, art. 21, sched II—Representatives under Act XIII of 1855 not persons 'entitled to sue within the meaning of s. 7 nor 'joint creditors' or joint claimants within the meaning of s. 8 of the Limitation Act—Construction of statute.*

The word 'representative' in Act XIII of 1855 does not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian.

Under article 21, schedule II of the Limitation Act, the suit must be brought within one year from death unless the bar is saved by section 7 or 8 of that Act.

The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest.

*Pym* v. *The Great Northern Railway Co.* (4 B. & S., 396).

The beneficiaries are in the position of joint decree-holders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply for execution conferred on one or more of several joint decree-holders by section 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of section 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit.

The principle in *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

They are also not joint creditors nor joint claimants under section 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process.

*Ahinsa Bibi* v. *Abdul Kader Saheb*, (I.L.R., 25 Mad., 26), distinguished.

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* Original Side Appeal Nos. 48 and 51 of 1904, presented against the judgment of Mr. Justice Moore in Original Suit Nos. 76 and 159 of 1904, respectively.

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Sections 7 and 8 of the Limitation Act must be held to apply to suits under article 21 if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding, in the absence of express words, that they do not so apply.

THESE suits were brought under Act XIII of 1855 for compensation for death caused by the negligence of the defendant, the Madras Railway Company, resulting in what is known as the Mangapatnam accident. The accident in question took place on the night of the 11th September 1902. Civil Suit No. 76 of 1904 was instituted on the 28th April 1904 and Civil Suit No. 159 of 1904 was instituted on the 7th October 1904.

The plaintiffs in Civil Suit No. 76 of 1904 are the minor son and daughter of one Mr. Johnson, an Eurasian, who was killed in the accident, represented by their mother and guardian as next friend. No letters of administration or probate had been obtained to the estate of the deceased. The plaintiffs in Civil Suit No. 159 of 1904 are the minor sons of Narayanasawmi Mudali, a Hindu, who was killed in the same accident. They were represented by their mother and guardian as next friend. There were no executors or administrators inthis case also. The defendant pleaded *inter alia* in both the suits that the plaintiffs' claim was barred by limitation. In Civil Suit No. 76 of 1904 the defendant further pleaded that the plaintiffs were governed by the provisions of the Indian Succession Act and that they were not 'representatives' as that could only apply to executors or administrators. In Civil Suit No. 159 of 1904, the objection was again taken that the plaintiffs were not the representatives of the deceased. The contention that the plaintiffs were not 'representatives' was overruled in both cases by Mr. Justice Moore. The material portion of his Lordship's judgment is as follows:—

"The case has been posted for trial of two preliminary issues, namely, as to whether the plaintiffs are entitled to sue as representatives of their deceased father and as to limitation. Mr. Chamier for the plaintiffs contends that the plaintiffs are representatives of the deceased under section I of the Act, but that the widow should not be held to be a representative, while Mr. Napier for the defendant maintains that neither the minor children of the deceased nor his widow can be deemed to be his representatives. Mr. Napier argues that, according to legal phraseology in England, the

representative of a deceased person means his executor or administrator and no one else, that Mr. Johnson was a Eurasian governed by Act X of 1865 and that in considering what the word representative means in the Act of 1855 when applied to such a person, it must be held that it refers to his executor or administrator and cannot refer to any other person. Mr. Napier referred to several decisions which certainly support the contention that the words legal representative, personal representative and representative as used in statutes and judgments of Courts in England refer to executors and administrators only and can be applied to no one else. It does not, however, in my opinion follow that the word representative as used in the Act of 1855 when applied to a person governed by Act X of 1865 means an executor or administrator and no one else. The wording of the section to my mind shows clearly that this is not a correct view to take. It cannot have been the intention of the Legislature to declare by section I of the Act that a suit brought for the benefit of the wife or child of a deceased European shall be brought by his executor or administrator or representative, *i.e.*, executor or administrator. Mr. Napier attempts to remove this difficulty by the contention that in this section the words executor and administrator alone are applicable to persons governed by Act X of 1865 while those words and also the word representative are to be applied in the case of Hindus and Muhammadans. I cannot accept this interpretation. It must, I conceive, have been the intention of the framers of the Act that all the three words should be applicable to all persons with respect to whose estate a suit might be brought under the Act, whether Europeans, Eurasians, Hindus or Muhammadans. In other words, if a European or a Hindu has an executor or administrator such executor or administrator must bring the suit, but if there is no executor or administrator the suit can be brought by any person whom the Court holds to be a representative of the deceased. The next question to be considered is as to whether the Court should hold that, in the absence of an executor or administrator, the son of the deceased can, for the purposes of this suit, be deemed to be his representative. I am of opinion that it should be decided that not only the sons of the deceased but also his widow are entitled to bring a suit under the Act as his representatives. The Statute (9 & 10 Vict., Chap. 93.—1846) on which the Indian Act of 1855 is

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based, provides that the suit should be brought by the executor or administrator of the deceased. There is no mention of representatives. As it was found that, owing to the difficulty and expense of taking out letters of administration, persons entitled to compensation were prevented from recovering the same it was enacted in 1864 (27 & 28 Vict., Chap. 95) that in case the executor or administrator did not sue within six months, all or any of the persons for whose benefit the right of action was given by the statute of 1846 might sue in their own names. It was not, however, found to be necessary to amend the Indian Act of 1855, because it was, as I believe, considered, that the word representatives in that Act included all the persons for whose benefit the right of action was given. It must be remembered that the right of action conferred by the Act is not for the benefit of the personal estate of the deceased, but for the benefit of his wife, parent and child and further that, as held by the Court of Queen's Bench in *Blake* v. *Midland Railway Company*(1), the Act does not transfer to representatives the right of action which the person killed would have had 'but gives to the representative a totally new right of action on different principles.' There are not many reported decisions of the Courts regarding the provisions of the Act of 1855, but the view that I take, namely, that where there is no executor or administrator, any one or more of the persons for whose benefit the right of action is given can sue to enforce that right seems to be that which has been acted on by the Courts although there is no direct decision to that effect. *Lyell* v. *Ganga Dai*(2) for example, was a case that was very fully argued and eventually came before a Full Bench of five Judges. That was a suit brought by a widow (Ganga Dai) to recover damages on account of the death of her husband, and, as far as can be seen from the report, it was never even suggested that she was not entitled to sue as her husband's representative. Reference may also be made to *Vinayak Raghunath* v. *The G.I.P. Railway Company*(3) where it was held by Westropp, C.J., that an adopted son was entitled to bring a suit under this Act as legal representative. I therefore hold on the first issue that the plaintiffs are entitled to sue as representatives of the deceased."

(1) 18 Q.B., 93 at p. 110 (2) I.L.R., 1 All., 60.
(3) 7 B.H.C.R., 113.

On the question of limitation the learned Judge held that both the suits were barred under article 21 of schedule II of the Limitation Act and that section 7 of the same Act did not save the bar as there were, in both cases, the widows who could have brought the suits as representatives of their deceased husbands.

The plaintiffs in both cases appealed.

Mr. *D. Chamier* for appellants in Original Side Appeals Nos. 48 and 51 of 1904.

The Advocate-General (Hon Mr. *J. P. Wallis*) and Mr. *Napier* for respondent in both.

JUDGMENT.—In one of these cases the plaintiffs are the minor children of one, Johnson, a railway passenger, who was killed in the Mangapatnam railway accident. The plaintiffs sue with their mother, the widow of the deceased, as their next friend. In the other suit the plaintiffs are the minor children of a Hindu named Narayanasami Mudali, another railway passenger, who lost his life in the same accident. They also sue with their mother, the widow of the deceased, as their next friend. In neither case is there any executor or administrator of the deceased. The suits are brought against the Madras Railway Company for compensation under Act XIII of 1855, and were instituted after the expiry of one year from the death of the persons referred to. The question is whether the suits are time barred. The answer to this question must be in the affirmative with reference to article 21 of schedule II of the Indian Limitation Act unless the bar is saved by the provisions of section 7 or 8 of the Act.

Before proceeding to consider the applicability of these provisions to the cases, it is necessary to see what is the precise nature of the right conferred by Act XIII of 1855 under which the claims are made. As stated in the preamble of the Act itself the relations of a person whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of the death. The right to claim compensation in respect of such a death was created by the Act. It is provided that every suit shall be for the benefit of certain specified near relations of the deceased "and shall be brought by and in the name of the executor, administrator or representative of the person deceased."

The learned Advocate-General for the defendants contends that in the case of Europeans and Eurasians the only

"representative" of a deceased man is his executor or administrator, and that in this Act the word "representative" has no application to Europeans and Eurasians but is used only with reference to Hindus and Muhammadans. Mr. Chamier for the plaintiff contends that the word "representative" in the Act is equivalent to, and includes, all the "heirs" of the deceased. We do not think that either of these views is correct. That the word is not equivalent to "heirs" seems clear from the fact that in Act XII of 1855 which was passed on the same day as Act XIII, and which deals with a cognate subject, the right is given to bring a suit against "heirs or representatives" of the deceased wrong doer. Nor do we think that there is any reason for limiting the meaning of "representative" in the narrow way suggested by the Advocate-General. We think that the word means and includes all or any one of the persons for whose benefit a suit under the Act can be maintained. These persons are the representatives of the deceased, in the sense, that they are the persons taking the place of the deceased in obtaining reparation for the wrong done.

In cases where the deceased is represented by an executor or an administrator such an executor or administrator is given the power to sue for the compensation for the benefit of the specified relations. Where there is no executor or administrator or where there is one, and he fails, or is unwilling to sue, then in our opinion the suit may be instituted by, and in the name of, the representative of the person deceased. But one suit only is allowed to enforce the claims of all the persons beneficially entitled,—it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. The right of *each* beneficiary is only to receive compensation in proportion to the loss occasioned to *him* by the death of his deceased relative. From this it follows, and it was in effect so decided in *Pym* v. *The Great Northern Railway Co.*(1) with reference to the provisions of Lord Campbell's Act, that the right of the beneficiaries to compensation is a right distinct in each. In short the beneficiaries entitled to compensation under Act XIII of 1855 are not persons entitled to claim compensation *jointly*, but are parties entitled to relief *severally*, in respect of the same cause of action

(1) 4 B. & S. 396.

which is enforceable at the suit of all or any one of them suing for himself and the rest. If this is the correct view of the statutory right given to persons in the position of the plaintiffs in these cases, it is clear that section 7 of the Limitation Act has no application to suits such as the present, since in each case there is a widow of the deceased who was under no disability, and who could have sued, and therefore all the persons entitled to the compensation and capable of instituting the suit were not minors or otherwise incapable of suing within the period of one year prescribed by article 21. With reference to the view that in cases like the present the suit might have been brought by any one of the beneficiaries for the benefit of all, the case is analogous to that of a joint decree-holder who can, with the permission of the Court under section 231, Civil Procedure Code, take out execution of the decree for the benefit of himself and the other decree-holders, but who was held not to be a person entitled to apply in his own right within the meaning of section 7 of the Limitation Act. See the Full Bench decision in *Periasami* v. *Krishna Ayyan*(1), where it was held that the time with reference to an application for the execution of a decree passed in favour of several persons jointly, ran against all the decree-holders notwithstanding the minority of some of the decree-holders, and notwithstanding that any one of them might, with the permission of the Court, have executed the whole decree on behalf of all.

Passing now to section 8 of the Limitation Act, that also must be held to be inapplicable. Of course persons having claims such as those sought to be enforced here are not joint creditors, and unless they can be held to be *joint claimants* of the kind mentioned in the section the benefit thereof cannot be claimed by them. From the language of the whole section it is obvious that the term "joint claimants." is used with reference to persons whose *substantive* right is joint, or to put it otherwise, with reference to more than one individual possessing the same identical substantive right. The latter part of the section relating to the discharge by one of the joint creditors or claimants, without the concurrence of the others, conclusively points to the correctness of this view. The expression therefore does not comprehend persons whose rights are distinct and *different* but who are permitted to enforce

(1) I.L.R., 25 Mad., 431.

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such separate rights by one judicial process to which all are parties or by a process instituted by one on behalf of all, *Ahinsa Bibi* v. *Abdul Kader Saheb*(1) is distinguishable on the ground that the right to sue for an account and share of profits of the partnership sought to be enforced by the heirs of the deceased partner was joint and indivisible notwithstanding the several character of their interests *inter se* in the profits, if any.

Now with reference to suits brought for compensation under the Act as it stood before it was amended by Act IX of 1871, the question of the disability of any or all of the persons entitled to compensation was immaterial, and the suit had to be brought within a year from the date of death. Whether when the words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" in section 2 of Act XIII of 1855 were repealed and article 21 of the second schedule to Indian Limitation Act was introduced there was an intention to make a real change in the law, it is not easy to say. Having regard to the object and purpose of Act XIII of 1855 and the inexpediency of postponing the trial of questions of fact involved in a claim to be made under the provisions of the Act, it is not probable that the running of time was meant to be suspended on account of any disability on the part of some of the persons beneficially entitled. It is not improbable that the repeal of the provision as to limitation contained in Act XIII of 1855 as it stood before the amendment and the enactment of article 21 in lieu of it, were merely for the sake of symmetry as urged by the learned Advocate-General. Still the mere absence of evidence that the Legislature intended to effect a real change in the law would not justify the Court in holding that the present suits are barred by limitation if the language of section 7 or 8 was grammatically capable of application to them. That, however, as already pointed out, is not the case.

The conclusion of the learned Judge is therefore right and the appeals fail and are dismissed with costs.

Messrs. *Short & Bewes*—attorneys for appellants.

Messrs. *Orr, David & Brightwell*—attorneys for respondents.

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(1) I.L.R., 25 Mad., 26.