

## APPELLATE CIVIL.

*Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.*

PARU AND ANOTHER—MINORS BY THEIR GUARDIAN

I. K. RAMUNNI NAIR (THIRD AND FOURTH APPELLANTS IN  
APPEAL SUIT No. 200 OF 1894 ON THE FILE OF THE HIGH COURT),  
PETITIONERS,

1904.  
November  
1, 2.

v.

VARIANGATTIL RAMAN MENON (SECOND RESPONDENT),  
RESPONDENT.\*

*Civil Procedure Code—Act XIV of 1882, s. 368—Appeal by guardian, abatement of—Laches of guardian, effect of—Application on behalf of minors to restore appeal—Right to apply joint and not several—Limitation Act XV of 1877, s. 7.*

Where two majors and the guardian of two minors jointly preferred an appeal in which they were jointly interested, and on the death of the sole respondent the appeal was allowed to abate under section 368 of the Code of Civil Procedure, the minor appellants cannot on the application of another guardian have the appeal restored and proceeded with.

*Per DAVIES, J.*—The order of abatement under section 368 of the Code of Civil Procedure is absolute. The minors being bound by the acts of their guardian, there was no appeal pending and the application could not be treated as an application under section 368 of the Code of Civil Procedure to which the provisions of section 7 of the Limitation Act might be applied, as section 368 of the Code of Civil Procedure contemplates an appeal pending. Even if it could be so considered, the application would be barred as the minors were interested jointly with others who laboured under no disability. *Periasami v. Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

*Per SUBRAHMANIA AYYAR, J.*—On the death of the respondent, the right to have his representatives added as parties vested jointly and not severally in the appellants, whatever may be the nature of their interests in the subject matter of the appeal. *Periasami v. Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

THE facts are fully set out in the judgment.

*V. Krishnaswami Ayyar* for petitioners.

Sir *V. Bhashyam Ayyangar* for respondent.

\* Civil Miscellaneous Petition No. 487 of 1904, praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to declare as null and void or set aside, the order of abatement passed in Appeal Suit No. 200 of 1894 on its file and to allow the appeal to be proceeded with in due course of law. (Original Suit No. 39 of 1892 on the file of Sub-Court of Calicut.)

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ORDER—DAVIES, J.—Appeal No. 200 of 1894 was preferred jointly by two majors and by the guardian of two minors, all of whose interests were joint. The sole respondent died after the appeal was filed, no application was made by the appellants or any one of them to bring in the legal representative of the deceased respondent, and the appeal was declared to have abated under the penultimate clause of section 368 of the Code of Civil Procedure by our order dated the 11th August 1896.

The minors through another guardian now ask that that order may be set aside and the appeal be proceeded with. It seems to me that the abatement provided for in the penultimate clause of section 368 is absolute, and it is far too late now that the parties have been in appeal to the Privy Council to allow a review, and I would dismiss the application on this ground alone.

But I am further of opinion that the minors are bound by the act of their original guardian. It was he who filed the appeal on their behalf, and it was he who neglected to bring in the legal representatives of the deceased respondent. The result was that there was no appeal, and it is clear that the minors cannot, because they are minors, either revive the appeal that has abated or make a fresh appeal as it would be time-barred. The minors claim the benefit of section 7 of the Limitation Act treating this as an application under section 368 of the Civil Procedure Code, but I do not think that section is at all applicable, as there is no appeal pending in which an application under section 368 can possibly be made. If, however, any question under section 7 of the Limitation Act arises, then the minors would be out of Court under the ruling of the Full Bench in *Periasami v. Krishna Ayyar*(1), as there were others joined with them who were not under disability at the time.

I therefore dismiss the petition with costs.

SUBRAHMANIA AYYAR, J.—I am of opinion that on the death of the respondent the right to have his representative made respondent in his stead did not, as contended by Mr. Krishnaswami Aiyar, vest severally in each of the appellants, but jointly in all of them, without reference to the question whether the right of the appellants in the subject of the appeal itself was several or joint. Consequently the minor appellants were not entitled to the benefit

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

of the provisions of section 7 of the Limitation Act (*Periasami v. Krishna Ayyan*(1)). I agree therefore in dismissing their petition with costs.

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v  
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GATTIL  
RAMAN  
MENON.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

SAMBASIVA CHETTI AND ANOTHER—MINORS BY THEIR GUARDIAN  
RUKMANI AMMAL (PETITIONERS—LEGAL REPRESENTATIVE OF  
FOURTH DEFENDANT), PETITIONERS, 1904.  
October 28.

*v.*

VEERA PERUMAL MUDALI AND OTHERS (PLAINTIFFS),  
RESPONDENTS.\*

*Civil Procedure Code, ss. 108, 234, 368—Death of defendant after ex parte decree  
—Application by representatives of the defendant to be brought on record.*

Section 368 of the Code of Civil Procedure only applies to the case of a defendant who dies before a decree is passed.

Where, therefore, a defendant dies after a decree *ex parte* has been passed against him, his representatives cannot apply to set aside the *ex parte* decree unless the plaintiff has brought them on the record as representatives under section 234 of the Code of Civil Procedure.

Section 108 of the Code of Civil Procedure applies only to the defendant against whom the *ex parte* decree is passed.

THE facts necessary for this report are set out in the judgment.

*K. Jayanadha Ayyar* for petitioners.

*K. R. Subrahmania Sastri* for respondents.

JUDGMENT.—On the 24th April 1903, a decree was passed by the District Munsif *ex parte* against the fourth defendant in the suit.

The fourth defendant died in May-June 1903, and on the 9th September 1903, the petitioners put in a petition before the District Munsif under section 108, Civil Procedure Code, as the

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

\* Civil Revision Petition No. 138 of 1904, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of A. C. Tate, Esq., District Judge of South Arcot, in Civil Miscellaneous Appeal No. 10 of 1903, presented against the order of the Court of the District Munsif of Tirukkoyilur in Miscellaneous Petition No. 469 of 1903 in Original Suit No. 102 of 1903.