1949 *Present :* **Wijeyewardene C.J. and Gratiaen J.**

THE ATTORNEY-GENERAL, Appellant, *and* VALLIAMMA ATCHIE, Respondent

S. C. 512—D. C. Colombo Special 10/Testy. Case No. 8,802

Estate duty—Hindu undivided family—Recognition in Ceylon—Joint business—Not an ordinary commercial partnership—Overpayment of estate duty—Power of District Court to order repayment—Estate Duty Ordinance (Cap. 187), sections 34, 40, 54 (2), 73.

A business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership.

For purposes of exemption from payment of estate duty, section 73 of the Estate Duty Ordinance, as amended by section 5 of Ordinance No. 76 of 1938, gives recognition in Ceylon to the law of South India by which a Hindu undivided family, as a legal *persona*, may own and possess movable or immovable property.

Upon an appeal to the District Court under section 34 of the Estate Duty Ordinance, the District Court has jurisdiction to enter a decree for the repayment of money, together with legal interest, against the Crown where the assessee has been compelled to pay as estate duty a sum which he was not liable to pay.

APPEAL from a judgment of the District Court, Colombo.

One K. M. N. Natchiappa Chettiar died on December 30, 1938. The executrix of his estate was required by the Commissioner of Estate Duty to pay as estate duty the sum of Rs. 285,308·48. The District Judge, on an appeal under section 34 of the Estate Duty Ordinance, entered decree in favour of the executrix on the basis that the deceased was a member of a Hindu undivided family and, therefore, under section 73 of the Estate Duty Ordinance, no estate duty was payable ; he held, however, that he had no jurisdiction to enter decree against the Crown for the return of the sum overpaid to the Commissioner of Estate Duty. The Crown, thereupon, appealed to the Supreme Court, and the executrix filed cross-objections.

M. F. S. Pulle, K.C., Acting Attorney-General, with *H. W. R. Weerasooriya, Crown Counsel*, for the Crown.

H. V. Perera, K.C., with *V. A. Kandiah* and *N. M. de Silva*, for the executrix respondent.

Cur. adv. vult.

June 24, 1949. GRATIAEN J.—

K. M. N. Natchiappa Chettiar died on December 30, 1938. The amount of duty payable in respect of his estate under the Estate Duty Ordinance (Chapter 187) was assessed at Rs. 290,784·12. Notice of objection to this assessment was forwarded to the Commissioner of

1——J . N. A 94570—1,040 (1/50)

Estate Duty who, however, affirmed the assessment under Section 37. A petition of appeal was accordingly filed on behalf of the executrix of the estate in the District Court of Colombo, and in terms of Section 40 of the Ordinance the appeal was proceeded with as an action between the executrix and the Crown. Pending the hearing of the appeal the executrix was required to pay to the Commissioner of Estate Duty the full amount of duty claimed from the estate, and it is common ground that, certain adjustments having subsequently been made, the balance sum paid by the executrix and not since repaid to her amounts to Rs. 285,308·48.

The executrix claimed total exemption from estate duty by virtue of the provisions of Section 73 of the Ordinance, as amended by Section 5 of Ordinance No. 76 of 1938, on the ground that the deceased was a member of a Hindu undivided family, and that the property in respect of which estate duty has been assessed was not his separate property but the joint property of the undivided family of which he was a member. It was claimed in the alternative that, apart from the operation of Section 73, the property of a Hindu undivided family could not be regarded as having " passed on the death " of one of its individual members within the meaning of the Ordinance. In the view which I have taken, this alternative proposition does not require to be considered.

Certain preliminary legal objections were unsuccessfully raised on behalf of the Crown in the lower Court and in an interlocutory appeal to this Court. Hence the delay in the final determination of the proceedings. When the trial was eventually resumed the learned District Judge entered a declaratory decree in favour of the executrix on the basis that the property belonged to a Hindu undivided family of which the deceased was a member, and that the exemption conferred by Section 73 of the Ordinance accordingly applied. He held, however, that, although no estate duty was in fact payable under the Ordinance, he had no jurisdiction under the Ordinance to enter a decree against the Crown for the return of the sum of Rs. 285,308·48 which, on the basis of his judgment, had been overpaid to the Commissioner of Estate Duty. The Crown now appeals to this Court from the judgment of the learned Judge. The executrix has filed cross-objections against that part of the judgment which refuses her a decree for the return of the sum paid by her under protest in terms of Section 44 (2) of the Ordinance.

The main question which calls for decision is whether the property in Ceylon in respect of which the assessment was made has been proved to be the property of a Hindu undivided family and not the separate property of the deceased. The learned Judge held on the evidence (*a*) that the deceased was a member of a Hindu undivided family, (*b*) that this family owned on the relevant date certain joint property in India, (*c*) that the property in Ceylon in respect of which estate duty has been claimed by the Commissioner was similarly joint property belonging to the family. At the proceedings in the lower Court the Crown had strenuously contested each of these facts, but the learned Attorney-General frankly, and I think very properly, conceded before us that the evidence on points (*a*) and (*b*) which I have enumerated could not

reasonably be challenged. In view of this admission, the only issue of fact which remains for our decision is whether the learned Judge was correct in holding that the property in Ceylon was not separate property which the deceased possessed to the exclusion of the undivided family to which he belonged. It is, of course, well settled law that " a member of a Hindu undivided family can make separate acquisition of property for his own benefit which would remain free and separate in his hands unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate. "—*per* Lord Buckmaster in *Annamalai Chetty v. Subramaniam Chetty* [1].

As the Crown now accepts the position that the deceased did belong to a Hindu undivided family which possessed joint property in India, it is perhaps convenient at this stage to set out the relevant facts which have been clearly proved and are no longer in dispute. The deceased belonged to a South Indian trading family of Nattucottai Chettiars whose male members for at least three successive generations had also been engaged in business in Ceylon. His grandfather was K. M. N. Natchiappa (who for convenience will be called " Natchiappa 1"). Natchiappa 1 had two sons, K. M. N. Suppramaniam (the deceased's father) and K. M. N. Natchiappa (who for convenience will be called " Natchiappa 2 "). Natchiappa 1 and his two sons lived, after the fashion of a Hindu undivided family, in a common home with common worship and a common mess, and the family, as an undivided unit, owned property which, in India at any rate, admittedly possessed all the characteristics of " joint property " as understood in the system of law obtaining in that country. After Natchiappa 1's death, his two sons and their respective families continued to live in the ancestral home as an undivided family and to possess the Indian property belonging to the family as joint property. (As the position with regard to the property in Ceylon remains controversial, I shall for the time being leave the facts relating to it out of my narrative.) After some years the brothers Suppramaniam and Natchiappa 2 agreed that there should be a separation of the respective branches of their family, and in accordance with the recognised usage in such cases a deed of partition—A8 of 1912—was drawn up by arbitrators selected for the purpose. The legal effect of such a partition is not in dispute. The severance of the two branches from the original undivided family becomes final and complete, but the ancestral property which passes to each branch under the partition remains joint property in the hands of that branch which now assumes as a fresh unit the character of a Hindu undivided family. So it was with the family of the deceased's father Suppramaniam and the ancestral property which it received under A8. The contention for the Crown in the Court below was that A8 operated only as a division between Suppramaniam and Natchiappa 2 of the assets of a commercial partnership as opposed to the assets of a Hindu undivided family. This position has now been abandoned as far as the Indian assets are concerned, but it is still adhered to with some show of tenacity in respect of the Ceylon assets which were dealt with by A8. The issue must therefore be examined. The Crown no longer argues that A8 must be regarded as

[1] *A. I. R. (1929) P.C. 1.*

effecting either a partition of the assets of a commercial partnership *and of nothing else* or (as the executrix has consistently claimed) the partition *simplicitor* of the joint property of a Hindu undivided family. No suggestion was made at the trial to any witness who claimed to speak with personal knowledge of the execution of A8 that it was intended to operate partly as a division of one species of property and partly as a division of the other. Nor is there any evidence that it is customary to complicate the formal separation of the branches of a Hindu family and the consequent division of their ancestral property, involving as it does certain special legal consequences, by introducing into the partition other assets separately owned by individual members to the exclusion of the undivided family. The language in A8 certainly appears to treat the Ceylon assets as being in no way different from the Indian assets.

The property in Ceylon which was dealt with by A8 consisted of the assets of a money-lending business which had admittedly been jointly carried on until 1912 by the brothers Natchiappa 2 and Suppramaniam (I shall assume that it has not been *conclusively* proved to be identical with the original business of Natchiappa 1, although I agree with the learned Judge that on the evidence this was very probably the case). There is no evidence that there was any deed of partnership between the brothers regulating the terms of this business enterprise on a strictly commercial basis, nor do the books of the business disclose any distribution of profits such as one would expect in the case of a commercial venture as opposed to a joint family business. The learned trial Judge enjoys the advantage of professional experience of the usages of Chetty traders in Ceylon and after an exhaustive analysis of the oral and documentary evidence in the case he arrived at the conclusion that the Ceylon assets dealt with by A8 were the joint property of a Hindu undivided family in exactly the same way as the Indian assets admittedly had been. I find the reasons for arriving at this conclusion irresistible, and I do not consider it necessary to refer in detail to the evidence which admittedly tends to support the case for the executrix. It is no doubt true that as against this evidence, certain documents relied on by the Crown, might seem to point to a different conclusion unless an attempt be made to understand them with reference to the business methods of Chetty money-lenders which are matters of common knowledge. For instance, the idea of a Hindu undivided family which owns property as a unit or association distinct from its individual members has for many years been acknowledged and has received both statutory and judicial recognition in this country, but it is well known that members of such families in the transaction of their business have invariably encountered difficulties in seeking to adjust to the requirements of our local laws the special features attaching to the personal laws of their country of domicile. It is in relation to this background that one must interpret the endeavours of Suppramaniam to comply with the provisions of the Business Names Registration Ordinance of 1918. Similarly, it is in this light that one should seek to understand his attempts, before finally retiring from Ceylon, to leave the joint property of his undivided family in the hands of his son, the deceased, who succeeded him in the management of the family business. So it is again that I find nothing specially sinister in the

behaviour of the deceased when the time was approaching for him to retire in his turn from the management of the business. The same motive which influenced Suppramaniam when he purported first to admit his son as a "partner" of the business and then to transfer to him entirely his interest in the so-called "partnership" for a patently fictitious consideration, is to my mind the explanation for the later devices of the deceased who, in anticipation of death, purported by a last will to "dispose" not only of the Ceylon assets but also of what was admittedly joint property in India belonging to the undivided family. That motive was to preserve the joint property of the undivided family in the hands of succeeding generations of its male members in such a way that, so far as business acumen and legal ingenuity could achieve the desired end, the laws of Ceylon should in no way prevent the joint property of a Hindu undivided family from remaining within the family by survival. I am in complete agreement with the learned Judge that the evidence in the case convincingly establishes that the business carried on in Ceylon by Natchiappa 2 and Suppramaniam under the vilasam "K. L. M." was the joint property of the undivided family of which they were both members, and that after the division in 1912 of the property by the deed A8, Suppramaniam continued to carry on the identical business under the new vilasam "K. L. M. S. P." not on his own account but as the joint property of the new undivided family of which he was now the head. When Suppramaniam retired to India and later died, the business remained in the hands of his son, the deceased, as joint family property and not as separate property possessed by him for his own benefit to the exclusion of the family.

It was argued by the Crown that, on the authority of *Bhuru Mal v. Jaganath*[1], the onus was on the executrix to prove affirmatively that the business of K. L. M. carried on by Suppramaniam and Natchiappa 2, and the later business of K. L. M. S. P. were in fact the joint property of an undivided family. Even if this be so, the burden has been amply discharged. Moreover, in the present case we have clear evidence that there was a Hindu undivided family possessed of some property at least which was admittedly joint. The Ceylon property was also possessed *jointly* by the male members of the undivided family, and in the absence of any evidence of a commercial partnership the terms of which were inconsistent with the incidence of joint family property, I think that the only reasonable inference which can be drawn from the proved facts is that the business was joint family property and not the separate asset of any individual member of the family. The facts of the present case seem to approximate to those which were considered by the Privy Council in *Rampershad Tewarry v. Sheochurn Doss*[2] when it was held that a business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership. The position would no doubt be different in the case of a business separately acquired and carried on by a single member of the family. In that event the principles laid down in *Annamalai Chetty v. Subramaniam Chetty* (*supra*) and *Bhuru Mal v. Jaganath* (*supra*) would no doubt apply.

[1] *A. I. R. (1942) P. C. 13.* [2] *10 Moore's Indian Appeals, 490.*

As far as the appeal of the Crown is concerned, it remains only to consider a legal submission made by the learned Attorney-General which I hope I have not misunderstood. The substance of his argument appears to be that even though the Legislature may have intended by Section 73 of the Estate Duty Ordinance, both in its original and its amended form, to give recognition to the law of South India by which a Hindu family, as a legal *persona* which is distinct from its individual members, may own and possess movable or immovable property, the fact remains that no such Hindu law has in fact been introduced by express legislation as part of the law of Ceylon. In the circumstances, it is urged, Section 73 of the Ordinance is wholly inoperative. With the greatest respect, I think that the argument—or at least the argument as I have understood it—is fallacious. We have not been referred to any doctrine of our common law to which the concept of a family capable of owning property as a legal *persona* is inherently repugnant. In practice, however, the continued ownership of property by an unincorporated association the identity of whose members changes from time to time must inevitably create problems. It is an essential feature of the law of South India relating to the joint property of a Hindu undivided family that on the death of any member of the family the remaining members take not by survivorship but by survival. In the case of movable property situated in Ceylon and belonging to a Hindu undivided family, no difficulties arise on the death of a member of the family, because the law applicable would be the law of the deceased's country of domicile. In the case of immovable property, however, the laws of the country of domicil would not govern the case. It was therefore felt that the original language of Section 73 of the Estate Duty Ordinance exempting " any " joint property of a Hindu undivided family from the operation of the Ordinance might create some difficulty in the case of immovable property (*vide* the observations of Fernando J. and the admissions of Counsel on this point in *Periakaruppan Chettiar v. Commissioner of Stamps*[1]). It was for this reason that Section 73 was in my opinion amended by Ordinance No. 76 of 1938 to read as follows :—

" Where a member of a Hindu undivided family dies, no estate duty shall be payable—

(*a*) on any movable property which is proved . . . . to have been the joint property of that family ;

(*b*) on any immovable property when it is proved . . . . that such property, *if it had been movable property*, would have been the joint property of that family."

The intention was to resort to a fiction which would remove in the case of immovable property the difficulties which do not attach to the movable property belonging to a Hindu undivided family. In rejecting the submission made by the learned Attorney-General, I am comforted by the knowledge that a Hindu family is, for income-tax purposes, taxed by the Crown as a " body of persons " capable of owning property in this country and deriving income therefrom. In that respect at least no anxiety seems to exist as to whether the clear intention of the

[1] *(1936) 38 N. L. R. 201.*

Legislature to regard a Hindu family as an owner of property has been frustrated. It is on behalf of the same " body of persons " for whose benefit exemption from the payment of estate duty is claimed. The Crown cannot have it both ways. In my opinion the appeal of the Crown against the judgment of the learned District Judge should be dismissed with costs, and I would make order accordingly.

I now proceed to consider the cross-appeal of the executrix. On various dates between May 30, 1940, and February 22, 1941, the Commissioner of Estate Duty has, pending the appeal, recovered from her in terms of Section 44 (2) sums aggregating Rs. 293,330·89. On May 5, 1941, a sum of Rs. 8,022·41 was repaid to the executrix. In the result the nett amount overpaid to the Commissioner as estate duty, on the basis of the learned District Judge's judgment with which I am in agreement, amounts to Rs. 285,308·48. The estate has been deprived of the use of this money for a period which already exceeds eight years. The question is whether the learned District Judge has correctly decided that the provisions of the Ordinance give him no jurisdiction to enter a decree ordering the Crown to refund the money to the executrix. In my opinion he is vested with such jurisdiction, and this is certainly a case in which it should be exercised. I can find nothing in the Ordinance which compels me to hold that an assessee who has been required to pay as estate duty a sum of money on the basis of an erroneous assessment must rest content with the cold comfort of a declaratory decree to the effect that the assessment was wrong.

Section 34 of the Ordinance entitles a person aggrieved by the amount of any assessment of estate duty to appeal to the appropriate District Court against the assessment. The jurisdiction conferred on the Court is not a purely appellate jurisdiction such as is vested in this Court, for example, when a case is stated by the Board of Review under the provisions of the Income Tax Ordinance (Chapter 188). Once a petition of appeal has been filed and a copy thereof served on the Attorney-General as required by Section 38, the appeal proceeds not merely as a contest between the assessee and the Commissioner but " *as an action between the appellant as plaintiff and the Crown as defendant* " (Section 40). The provisions of the Civil Procedure Code are brought into operation, and, where an action lies against the Crown, the relief claimed by the plaintiff need not be restricted to a mere declaratory decree. The second proviso to Section 40 makes express reference to the decree which shall be entered in the " action ". Under this proviso the decree is required to contain a declaration as to the amount if any, which the assessee is liable to pay as estate duty, but it does not state that the relief granted in the action must necessarily be confined to such a declaration. Indeed, the learned Attorney-General concedes that these decrees invariably order the payment of costs in favour of the successful party, and there is a very clear indication that the language of Section 54 (2) contemplates the possibility of a decree capable of execution for the payment of money to the Crown (should the Crown succeed). I do not find any provision which precludes, in appropriate cases, the entering of a decree for the repayment of money against the Crown where an assessee has been compelled to pay as estate duty a sum which he was not liable to pay.

In such cases the extent of the assessee's grievance must be the measure of the relief which he has a right to claim in the action which is proceeded with under Section 40 against the Crown. It is for this reason that at a certain stage the Crown, represented by the Attorney-General, steps in and the Commissioner of Estate Duty drops out as a party to the litigation. The appeal proceeds as an " action " so that, in the interests of finality, a decree capable of execution may be entered either in favour of the Crown or against it as the case may be. In the present case I would enter a decree in favour of the executrix against the Crown for the payment of a sum of Rs. 285,308·42 overpaid by her as estate duty, together with legal interest at 5 per cent. in terms of Section 192 of the Civil Procedure Code from the date of action until the date of this decree, and thereafter on the aggregate amount of the decree until payment in full. The executrix is entitled to her costs of this appeal and in the Court below.

WIJEYEWARDENE C.J.—I agree.

Appeal dismissed.
Cross-appeal allowed.

1949 *Present :* **Wijeyewardene C.J. and Pulle J.**

KUHAFA *et al.*, Appellants, *and* VAIRAVAN CHETTIAR, Respondent

S. C. 273—D. C. Galle, 8,540

Action on cheque—Several defendants—Joint and several liability—Judgment obtained against some defendants—No bar to action against the other defendants—Bills of Exchange Ordinance (Cap. 68), sections 55, 57.

Where parties are jointly and severally liable a creditor recovering judgment against one of them is not precluded thereby from subsequently recovering judgment against the others.

APPEAL from a judgment of the District Judge, Galle.

In an action on a cheque instituted under Chapter 53 of the Civil Procedure Code the plaintiff sued the drawer, the payee and two endorsees. Judgment was at first entered against the 1st and 2nd defendants for failure to obtain leave to appear and defend within seven days of the service of summons. Subsequently, after trial, judgment was entered against the 3rd and 4th defendants also. The 3rd and 4th defendants thereupon appealed on the ground that plaintiff was not entitled to ask for judgment against them, as judgment had already been entered against the 1st and 2nd defendants.

M. H. A. Aziz, for 3rd and 4th defendants appellants.

H. W. Jayewardene, with *L. C. Gunaratne*, for plaintiff respondent.

Cur. adv. vult.