1937 *Present* : **Poyser S.P.J. and Soertsz J.**

N. RAMASWAMY CHETTIAR *v.* THE ATTORNEY-GENERAL.

297—D. C. Colombo, 3,130.

Estate duty—Business carried on in Ceylon by member of Hindu joint-family—Use of ancestral funds—Movable property left by deceased—Entire property is not property passing on the death—Property a person is competent to dispose of—Property in the hands of a manager of Hindu estate—Meaning of the words "otherwise disposed of"—Action for recovery of estate duty overpaid—Ordinance No. 8 of 1919, s. 8 (1) (a) and (b).

Where the member of a Hindu joint-family carried on business with ancestral funds, the movable property left by him is joint-property.

The entire movable property left by him is not property passing on the death within the meaning of section 8 (1) of the Estate Duty Ordinance.

The manager of a Hindu joint-family who can only alienate for legal necessity, can only gift within limits and is accountable to others for ancestral property in his hands is not a person competent to dispose of the property within the meaning of section 8 (1) (*a*) of the Ordinance. The words "otherwise disposed of" in section 8 (1) (*b*) mean disposition by juristic acts and do not include by operation of law, such as the vesting of ancestral property in sons under the Hindu joint-family system.

Estate duty that has been overpaid may be recovered by action against the Crown.

Periacaruppen Chettiar v. Commissioner of Stamps (*38 N. L. R. 201*) and *Adaicappa Chetty v. Thomas Cook & Son* (*31 N. L. R. 405*) referred to.

THIS was an action brought by the administrator to recover a sum of money alleged to have been overpaid as estate duty on the estate of one Ramaswamy Chettiar. Ramaswamy Chettiar was the member of a Hindu joint-family who carried on business in Ceylon. He died leaving movable property in Ceylon and letters of administration to his estate were issued to his attorney in Ceylon. In the declaration furnished to the Commissioner of Stamps under section 21 of the Estate Duty Ordinance all the movable property of which Ramaswamy Chettiar was possessed was given as his separate property. The estate duty was assessed on this basis and a portion of the duty paid. The present claim for a refund was based on the assertain that Ramaswamy Chettiar was the member of a Hindu joint-family consisting of himself and his two sons and that only a third of the movable property left by him was liable to estate duty. The claim was not accepted by the Commissioner and the present action was instituted to recover the sum overpaid. The learned District Judge held that Ramaswamy Chettiar was the member of a joint Hindu family and that he traded in Ceylon out of ancestral funds. He gave judgment for the plaintiff.

E. A. L. Wijewardene, S.-G. (with him *Crossette-Thambiah*, C.C.), for defendant, appellant.—The evidence does not prove that the property that was partitioned was ancestral in the hands of Natchiappa.

If it was acquired property in Natchiappa's hands, then Natchiappa's sons, who got it under the partition, held it as acquired property. Therefore, on the death of Ramaswamy, the whole business of N. S. M. R. M. S. passed to his heirs.

The documents D 1-D 3 and the absence of the previous administrator from the witness box supports the view that this was not joint-family property of Ramaswamy. The burden is on the administrator to show that this was joint-family property.

Even if it was joint-family property Ramaswamy could have disposed of it according to the Hindu law, subject to certain restrictions. The property would therefore come under section 7 of Ordinance No. 8 of 1919.

Ramaswamy could have given title to a purchaser of this property which is movable property in Ceylon. The coparceners of Ramaswamy may have an action against Ramaswamy, but this would not affect the title of the purchaser. Therefore Ramaswamy had disposing power over this property. The only trusts that create an exception are to be found in section 8 (2) of Ordinance No. 8 of 1919.

The property was vested in Ramasamy absolutely in 1910. By his marriage in 1914 and the birth of his sons, Ramaswamy caused the property to be vested in himself and his sons. Therefore this property is governed by section 8 (1) (*d*) of Ordinance No. 8 of 1919.

The District Court has no jurisdiction under section 27 of Ordinance No. 8 of 1919. Where the Court is given jurisdiction it is so stated specifically—see sections 17 (8), 22 (3), and 33. The finding must be by the Commissioner of Stamps; otherwise it would be difficult to construe section 27 so as to give effect to the words "shall be found within three years". Section 27 applies only where the property has been over-valued in the declaration sent to the Commissioner of Stamps. It does not apply where it is found that the declaration has set out more property than actually belonged to the estate. Note the words "true value".

There is nothing repugnant to the law in making the Commissioner of Stamps the sole judge. In fact in this case he is not the judge in his own cause. The money to be refunded is not his personal property—see *Periacaruppen Chettiar v. Commissioner of Stamps*[1].

H. V. Perera (with him *Tisseverasinghe* and *Chelvanayagam*), for plaintiff, respondent.—There is ample evidence in support of the trial Judge's findings of fact which cannot therefore be disturbed.

The evidence is that the property with which we are concerned had a nucleus which was joint-family property. This nucleus, with which deceased did business, he obtained from his father.

Joint-family property even after partition continues to be ancestral property. The corpus is derived by the joint exertions of the family. The share which a coparcener obtains on partition of ancestral property is still ancestral property—see *Mulla* (*1936* ed.), *p. 242.*

It makes no difference that the father got no share of the partitioned property—see the evidence on this point of the Indian Vakil Mr. Krishnaswamy Iyer.

[1] *38 N. L. R. 201*

The members of a joint-family are not partners. They are entitled to certain floating rights which become crystallized only on partition. In the declaration made under Ordinance No. 6 of 1918, therefore, it would have been incorrect to have described the sons of the deceased as partners.

The head of a Hindu joint-family is a manager with certain limited powers—see *Mulla (op. cit.), p. 270.* The powers of the manager of a Hindu joint-family property have two aspects—

(*a*) in relation to the family ;

(*b*) in relation to the business.

The power of management with a limited power of disposition does not connote competency to dispose of the property as the manager pleases.

The language of section 27 of Ordinance No. 8 of 1919 is wide enough to make it applicable to every case where there has been a mistake of some kind. It will be extraordinary if the subject is left without a remedy in circumstances such as these. If the Legislature intended to give the Commissioner of Stamps the power to decide this matter finally, it would have used the appropriate words—see section 28.

Wijewardene, in reply.—An action must be based on a cause of action. The cause of action here can only be payment of money under a mistake of fact or a mistake of law. There is no evidence that money was paid under a mistake of fact. If it is payment under a mistake of law, no action lies—see *Nathan, vol. II., pp. 556 to 560.*

H. V. Perera (with permission).—There is here a statutory duty to return the money.

Cur. adv. vult.

March 5, 1937. SOERTSZ J.—

Ramaswamy Chettiar died leaving an estate in Ceylon that fell to be administered. Arunachalam who had held his power of attorney and had been the manager of his business here, applied for and obtained letters of administration. In this case, we are concerned with the question of what the true value of his property that was subject to estate duty was. In the declaration made by the administrator in compliance with section 21 of the Estate Duty Ordinance, he treated all the movables Ramaswamy died possessed of in Ceylon as the property of Ramaswamy alone, and the Commissioner of Stamps valued them for the purpose of estate duty at Rs. 389,085 and claimed a sum of Rs. 23,954.82 with interest at 4 per cent. from September 6, 1933, as the duty payable. When the administrator had paid a sum of Rs. 20,610.53 on account of the duty due, he and the others concerned in the administration of Ramaswamy's estate appear to have realized that only a third of the movables declared and assessed for the purpose of estate duty, belonged to Ramaswamy, and that estate duty had been overpaid. Arunachalam evidently felt too embarrassed to take action in the matter himself and renounced his administratorship. The present plaintiff took his place and launched this case to obtain a refund of the amount alleged to have been overpaid. He maintained that under Hindu law, Ramaswamy was entitled only to one-third of the movables in Ceylon and that the

other two-thirds belonged to his two sons. The trial Judge found in favour of the plaintiff and entered decree for him for a sum of Rs. 12,190 less 2½ per cent. discount, with interest at 9 per cent. from the date of the decree, and costs. He held that Ramaswamy was a member of a joint Hindu family and that the business he carried on in Ceylon was carried on with ancestral funds and that, therefore, the movables found at the time of his death belonged to him and his two sons jointly. The appeal is against those findings. The Solicitor-General who appeared in support of the appeal, pressed it on the following grounds: firstly, that there was not satisfactory evidence for holding that Ramaswamy was a member of joint Hindu family—secondly, that there was not satisfactory evidence for establishing the allegation that the funds with which Ramaswamy did business in Ceylon were coparcenary funds—thirdly, that assuming that Ramaswamy was a member of a joint family and that the funds he used were coparcenary, the whole estate must be deemed to have passed for the purpose of estate duty under section 8 (l) (*a*) and/or 8 (l) (*d*)—fourthly, that the questions whether there had been overpayment and whether there should be a refund were entirely for the decision of the Commissioner of Stamps and that Courts of Law had no jurisdiction in the matter—fifthly, that if the Courts had jurisdiction the plaintiff had misconceived his remedy when he proceeded by way of a regular action instead of by way of *Mandamus* or Petition of Right. The first two submissions involve questions of fact. In regard to these, it is important to bear in mind that Ramaswamy was a native of Sembanur in Southern India and was a Hindu, and that "the joint and undivided family is the normal condition of Hindu Society" (*Mulla*). Speaking of the members of this community doing business in Ceylon, Drieberg J., observed in *Adaicappa Chetty v. Thomas Cook & Son*[1] "they are Hindus from South India among whom the joint-family system prevails". With those facts in mind, it is easy to understand the trial Judge's acceptance of Swaminathan's evidence when he says "From my knowledge, this system of living in joint-family ownership has been the law and custom of my family and of my father and his father as long as I can remember", as sufficient proof of the fact that Ramaswamy was a member of a joint Hindu family. Once a joint Hindu family has been established it follows, almost as a corollary in the case of families, that in addition to "jointness" of food and worship, own property, that within that family there is a narrower body called the "coparcenary" composed of those members who acquire by birth an interest in that property. This coparcenary usually consists of sons, grandsons, and great grandsons, and the property that falls to them is ancestral property as distinct from self-acquired property. The question, then, is whether the property with which we are concerned in this case was coparcenary or self-acquired. On this question, Mulla says on page 256 of the 1936 edition of his *Principles of Hindu Law*, "there is no presumption that a family, because it is joint, possesses joint property or any property . . . . to render property joint, the plaintiff must prove that it was purchased with joint-family funds, or that it was produced out of the joint-family property, or by joint labour. None of these alternatives is a matter of

[1] *31 N. L. R. 405.*

legal presumption. It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence". This was the view adopted in *Periyacaruppan Chettiar v. The Commissioner of Stamps*[1]. The burden was therefore on the plaintiff to prove that Ramaswamy's business here was carried on with ancestral funds. For this too, he relies entitrely on the evidence of Swaminathan. Swaminathan testifies as follows—"during his lifetime Ramasamy lived in Sembanur with his family, and he had his business in Colombo. My father had lived in Sembanur before him. I and my other brothers and my father had our property in common. I am familiar with the system in India of owing property as a joint Hindu family. That is the nature of my property . . . . During my father's lifetime, the properties were divided. That was in 1910. It was divided among the five of us . . . . After that division I am aware that my brother Ramaswamy with the share that he got, did business in Colombo. He joined the three brothers including myself and carried on business inpartnership . . . . he was trading there with the monies that he got as his share out of the joint property . . . . that business was wound up . . . . At that winding-up each got his share. Ramaswamy carried on business under the vilasam of K. M. N. R. M. That was his own business. That was from 1915. That was the same business he was carrying on up to his death". This evidence if accepted affords ample proof that the joint-family to which Ramaswamy belonged owned a joint estate, and that the funds with which he conducted his Ceylon business came to him out of ancestral funds as a result of the 1910 partition. This evidence is very much stronger than the evidence upon which the unsuccessful plaintiff in *Periyacaruppan Chettiar v. The Commisisoner of Stamps* (*supra*) relied. The learned Solicitor-General, however, urges that the evidence of Swaminathan on these points, should not have been accepted by the trial Judge for two reasons, namely, that it is the evidence of an interested party, and that it is inconsistent with documents D 1, D 2, D 3. It is no doubt a fact that Swaminathan is interested, but on the other hand it is a near kinsman who would be able to speak with authority on matters of this nature.

In regard to th documents referred to, D 1 is the dclaration made by the first administrator Arunachalam under section 21, including all the movables as the property of the deceased. This is *primâ facie* a point against the plaintiff, but it is by no means conclusive. It is easy to understand Arunachalam taking the view that although Ramaswamy belonging to a joint-family, and carried on his business with coparcenary funds, the whole estate was, none the less, liable for estate duty. That I believe, was the assumption on which all Chettiar estates in Ceylon were administered till the question arose in a recent case and served to instruct local Chettiars as to the correct position in the matter. D 2 is an extract from the Registrar of Business Names. It shows that the business Ramaswamy carried on here was registered by him as his individual business. In my opinion, this can hardly be said to be a point against the plaintiff's case. The father as the manager or "karta" of the joint-family is entitled to carry on a business with coparcenary

[1] *38 N. L. R. 20.*

funds, and when he does so, either by himself or in partnership with a stranger or strangers, the other members of the joint-family do not become partners in that business. The manager is, however, accountable to the family in regard to that business. Mulla, on the authority of a number of cases cited by him on page 261 on his 1936 edition, says " it is competent to the manager of the joint-family business, acting on behalf of the family to enter into partnership with a stranger. But not all the members of the joint-family, but only such of its members as have in fact, entered into partnership with the stranger, become partners. The manager is, no doubt, accountable to the family, but the partnership is one exclusively between the contracting members and the stranger". That is the view adopted locally in *Adaicappa Chettiar v. Thomas Cook & Son (supra)* Ramaswamy therefore correctly described himself as the individual who was carrying on the business. D 3 serves but to confirm this view. It is a notice given by Ramaswamy's elder son to the Registrar of the fact that his father died on September 5, 1932, and that the business he had been carrying on, had come to an end. To say the least, I do not think these documents are inconsistent with the plaintiff's present case. The trial Judge himself considered these documents when he was examining Swaminathan's evidence and he came to the conclusion that that evidence was true, and that the claim made in this case was made *bona fide*.

I see no reason for disturbing these findings of fact. On these findings only a one-third share of the movables was the property of the deceased and only that share would, ordinarily, be liable for estate duty. But the Solicitor-General contends that by operation of sections 8 (1) (*a*) and 8 (1) (*d*) the entire movables must be deemed to have passed because they were (*a*) " property of which the deceased was at the time of his death competent to dispose " and/or because they were (*d*) " property which the deceased having been absolutely entitled thereto has caused to be transferred to or vested in himself and any other person jointly either by disposition or otherwise ".

In my opinion upon a proper interpretation of both those sub-sections of section 8, these contentions fail. The words " competent to dispose of " are explained in section 2 (2) as follows :—" A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property ; and the expression " general power " includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit ".

Now, under the Hindu law governing joint-families, the manager or " karta " as large, indeed very large powers. He may enter into contracts, he may borrow money, give valid discharges, alienate property for " legal necessity " and may even make gifts of a proper kind and within reasonable limits. But, he is always accountable to the family for his acts, and his coparceners are entitled to pursue their shares improperly alienated and, in certain circumstances, to recover them. See the rulings of the Privy Council in *Deen Dayal v. Jugdeep Narain* [1], *Suraj Bansi Koer v. Sheo Persad* [2], *Hardi Narain v. Ruder Perkash* [3].

[1] *(1877) 3 Cal 198.* [2] *(1880) 5 Cal 148.*
[3] *(1883) 10 Cal. 626.*

It is obvious that a person who can only alienate for "legal necessity" can only gift within certain limits, and is accountable to others for the ancestral property in his hands, cannot be appropriately described as one who is free to dispose of that property "if he were *sui juris*" or "as he thinks fit". In regard to the submission that the entire property passed under section 8 (1) (*d*) the argument, as I understand it, was that it passed because the deceased had caused what had become his absolute property in consequence of the partition of 1910 to be vested in himself and his sons jointly when he married and begot them. It is contended that in that emergency the entire property was caught up by virtue of the word "otherwise" in the phrase "caused to be transferred to or vested . . . by disposition or otherwise". I find myself quite unable to subscribe to that proposition and I fully appreciate the tentative manner in which the learned Solicitor-General submitted it for our consideration. For one thing, it is hardly correct to say that Ramaswamy became absolutely entitled to the property in question on the partition of 1910, for although on that date, it became in a sense his absolute property it remained subject to the incidence of the law governing the community to which he belonged. Moreover, it seems clear that "otherwise" in the context means by disposition or other juristic acts, and does not include "by operation of law". The vesting of ancestral property in sons takes place in the joint family by operation of law, on their birth. *Mulla* says on page 230 "a coparcenary is purely a creature of law; it cannot be created by act of parties save in so far that by adoption a stranger may be introduced as a member thereof". It can scarcely be said that the birth of the male of the species lies so much at the bidding or under the control of the father as to justify its being spoken of in anything but a loose sense, as "caused" by him. "*Cui tanta deo permissa potestas*"?

The next point taken by the Solicitor-General is that the Commissioner of Stamps is the sole judge of the question whether there has been overpayment and whether there should be a refund. The Courts, he says, have no jurisdiction in the matter. In this connection we were referred to the case in *In re Nathan*[1]. That case arose on an application made under section 23 of 5 & 6 Victoria, Chapter 79, which is the counterpart of section 28 of our Estate Duty Ordinance. These sections provide that "when it is proved by affidavit or declaration on oath or affirmation and proper vouchers *to the satisfaction* of the Commissioners . . . .

Brett M.R., commenting on a similar argument, addressed to the Court said that it was not necessary to decide the point, but that he would "be very loth to hold that that is so, and to think that there is no remedy open to persons in the position of the prosecutor . . . . and that the officials in a department of the Government have been constituted the sole and exclusive judge whether they ought to be satisfied or not". In this case too, it is not necessary to decide that point for the plaintiff's claim is not made under section 28, but under section 27, of the Ordinance. In section 27 the words "to the satisfaction of the Commissioner" do not occur. The simple words are "if at any time within three years, ... the value of the *property on which estate duty has been paid is found*

[1] *L. R. 12 Q. B. 461.*

to exceed *the true value of the property subject to estate duty* . . . . it shall be lawful for the Commissioner of Stamps, and he is hereby required to return the amount of duty which had been overpaid". In the interpretation of this section I have derived much assistance from the judgment of Brett M.R. in the case of *In re Nathan* (*supra*). The learned Master of the Rolls points out that the section he was considering was an enabling section which gives power to servants of the Crown to whom money has been paid to get back, without a direct order from the Crown in each particular case, from some other department of the executive but which is, after all, from the Crown and out of the general fund into which it has been paid, the money which is to be repaid. But, if the servants in question do not act in pursuance of their power and the requirements imposed by the statute, the prosecutor's or plaintiff's right, if any, is against the Crown, for although the statute imposes a duty on the Commissioner it is not a duty which raises any relation between him and the plaintiff and therefore, the duty he owes is not to the plaintiff but to the Crown. It was money paid into his hands for the use of the Crown and he has no right to hold it against the directions given to him by the Crown. Here the Crown has given express directions by enacting that "*he is hereby required to return*" . . . .

The clear implication of these observations of the Master of the Rolls is that if the Commissioner neglects or refuses to perform the duty cast upon him by the statute an action lies. But that action lies against the Crown, provided of course, the Crown is liable to be sued. The point is that the subject is not left without means of relief if the official concerned refuses or fails to perform his duty. If it was the intention of the Legislature to establish so surprising a state of things, very clear words were required for the purpose. An action or some proceedings for the obtaining of redress must be held to lie. In England no *action* lies against the Crown. The subject must seek redress for his grievance by way of a *petition of right*. The position is, however, different in Ceylon. It was ruled by the Collective Court many years ago in *D. M. Jayawardene v. Juanis Fernando and the Hon. the Queen's Advocate*[1] that "the practice adopted here of suing the Crown in the name of the Queen's Advocate both in real actions for the recovery of specific property, and in actions for the recovery of money due *ex contractu* has prevailed here for a long series of years, and has been recognized by this Court in hundreds of decisions—indeed has not so far as we can ascertain been called in question until now . . . . Under the circumstances we think it too late, at this day, to contest in this Court the validity of this practice". An action, therefore, lies against the Crown and after the Civil Procedure Code was enacted, the Attorney-General is the proper party to be sued. It has not been contended that in this particular case an action does not lie against the Crown on any other ground. If therefore an action lies, the Solicitor-General's contention that the plaintiff should apply for a *Mandamus* fails, for a *Mandamus* is a last resort and lies only when there is no other remedy. Likewise, his contention that the plaintiff's remedy was by petition of right fails for as pointed out in the Collective Court case such a proceeding is not known locally.

[1] *4 S. C. C. 77.*

In reply to respondent's Counsel, the Solicitor-General contended further that the plaintiff must base his action either on an allegation of mistake of fact or mistake of law. He said that there is no evidence that there was any mistake of fact—Arunachalam who could have spoken on the point had not given evidence. There could be no action founded on a mistake of law, because the correct view in Roman-Dutch law was that taken by Kotze J. in *Rooth v. State*, that ignorance of law or mistake of law excuses no one. See *Nathan, vol. II. (1913 ed.), pp. 617. 618.* But the simple answer to this argument is that the present action is founded on the statute which gives a person who is found to have overpaid estate duty, the right to a return of the amount overpaid during a certain period, regardless of the cause of the overpayment. In my opinion, the appeal fails and must be dismissed with costs.

POYSER J.—I agree.

Appeal dismissed.