1953 *Present :* **Gratiaen J. and Gunasekara J.**

V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased), *and* ATTORNEY-GENERAL, Respondent.

S. C. 236—D. C. Colombo 38 (Special)

Estate Duty—Hindu undivided family—Death of sole surviving "co-parcenary member" —Liability of estate for estate duty—Estate Duty Ordinance (Cap. 187), ss. 6 and 73, as amended by Ordinance No. 76 of 1938, s. 5.

The sole surviving "co-parcenary member" of a Mitakshara Hindu undivided family died in February, 1938, leaving no male issue in existence. His son had predeceased him, and the actual survivors of the family were all females and included his widow.

Adopting the *ratio decidendi* in *Attorney-General v. Ramaswami Iyengar* (55 N. L. R. 481) and following it to its logical conclusion—

Held, that all the property which was in the possession of the deceased at the time of his death was the joint property of the undivided family. Although the deceased had been "competent to dispose" of the joint property after his son's death, and although the joint property would, for that reason, normally be deemed to have "passed" on his death within the meaning of section 6 of the Estate Duty Ordinance so as to attract estate duty, the exempting provisions of section 73 protected the property from taxation.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. V. Chelvanayakam, Q.C.*, *Peri Sunderam* and *S. Sharvananda*, for the appellants.

Walter Jayawardena, Crown Counsel, with *V. Tennekoon* and *G. F. Sethukavaler*, Crown Counsel, for the respondent.

Cur. adv. vult.

October 12, 1953. GRATIAEN J.—

This is an appeal against a judgment of the District Judge of Colombo upholding an assessment made by the Commissioner of Estate Duty under the provisions of the Estate Duty Ordinance (Cap. 187) in respect of the estate of a person who has been conveniently described throughout the proceedings as "Arunachalam Chettiar (snr.)". He died on 23rd February 1938 shortly after the Ordinance came into operation, and was the father of Arunachalam Chettiar (jnr.) in connection with whose estate a separate assessment had been made under the provisions of the earlier Ordinance, No. 8 of 1919 (*vide* the proceedings in *S. C. 235 of 1951/D. C. Colombo 37 Special**). The assessees in each case were the administrators of the estate of Arunachalam Chettiar (snr.). They appealed against both assessments and, by agreement of parties, the relevant evidence, which overlapped to a considerable extent, was recorded in consolidated proceedings in the Court below.

During Arunachalam (jnr.)'s lifetime, i.e., until 9th July 1934, he and his father were the only "co-parcenary members" of an undivided family which, regarded as an entity, owned considerable "joint property" in various countries including Ceylon. We have already* held that no part of that property had actually or even notionally "passed" upon the son's death to his father so as to attract duty under the provisions of Ordinance, No. 8 of 1919. The basis of our decision, shortly stated, was that, under the Mitakshara law, the joint property belonged to the entire family group to the exclusion of its individual members.

The earlier Ordinance did not make express provision for the case of joint property belonging to a Hindu undivided family in relation to the

* See page 481 (*supra*).—Ed.

question whether estate duty is payable upon the death of one of its members. In the Ordinance passed in 1938 (Cap. 187), however, which is concerned with the estates of persons dying on and after 1st April 1937, section 73, as originally enacted, declared as follows :

> " Where a member of a Hindu undivided family dies, no estate duty shall be payable on any property proved to the satisfaction of the Commissioner to be the joint property of that Hindu undivided family."

Shortly afterwards, a declaratory amendment to section 73 was passed by section 5 of Ordinance No. 76 of 1938, so as to remove doubts and difficulties which might exist in the case of immovables belonging to an undivided family—*vide A. G. v. Valliammai Atchie* (1949) 51 N. L. R. 169 at 174, which was upheld by the Privy Council in (1952) 53 N. L. R. 505. Section 73, as amended, now reads 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 movable property of that family. "

Upon the death of Arunachalam Chettiar (jnr.), what had previously been the entire " joint property " of the undivided family to which both he and his father had belonged as "co-parcenary members" came into the hands of the father by survivorship (and not by succession) as " the sole surviving co-parcener ". It so remained throughout the period 9th July 1934 to 23rd February 1938, when the father died leaving no male issue in existence to continue the line. The actual survivors of the family were all females—namely, his step-mother, his widow, his unmarried daughter, and his daughter-in-law.

The assessees claim exemption under section 73 from duty in respect of the deceased's estate on the ground that they have established the following facts :

(*a*) that he continued, until he died, to be a member of a Hindu undivided family ;

(*b*) that all the property in his possession at that time was the *joint property* of the undivided family.

If both these propositions be established, section 73 admittedly operates *even if, but for the statutory exemption, the property would be deemed to have " passed on his death " within the meaning of section 6 of the Ordinance.*

It is beyond argument that, under the Mitakshara law which governs the case, Arunachalam Chettiar (snr.) did continue until the time of his death to be a " member of a Hindu undivided family ". That family had been undivided in status during the lifetime of his son, and the son's death did not operate to disrupt the family. Indeed, the undivided

status of the family continued even after the death of Arunachalam Chettiar (snr.) himself. " Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue *until the death of his widow renders the continuation of the line by adoption impossible* ".—*A. I. R. 1918 P. C. 192.* In other words, " A Hindu undivided family cannot be brought finally to an end while it is possible in nature and in law to add a male member to it "—*A. I. R. 1943 P. C. 196.* The High Court of Nagpur has held that a right of a widow to adopt a son to her deceased (co-parcenary) husband is preserved even if no single co-parcener exists, that is to say, even if at the time of adoption the Hindu undivided family " has been *reduced to a female,* i.e., the adopting mother "—*A. I. R. 1942 Nag. 19 at 23,* the *ratio decidendi* of which was approved by the Privy Council in *A. I. R. 1943 P. C. 196.*

The learned District Judge accepted the contention that this first qualification for exemption under section 73 was fulfilled. He took the view, however, that the death of Arunachalam Chettiar (jnr.) operated to divest the family of the *joint property* which it had previously owned, and that the property thereafter became vested (albeit provisionally) in Arunachalam Chettiar (snr.) as absolute owner. He accepted the opinion of Mr. Rajah Aiyar, the expert witness called by the Crown, that the term " joint property " is synonymous with " co-parcenary property ", and that " until the contingency of an addition of a male member, whether in nature or in law, arises " a sole surviving co-parcener becomes the " full owner " of what had previously been joint property belonging to the undivided family.

Mr. Bhashyam, who was called as an expert by the assessees, disagreed with Mr. Rajah Aiyar's opinion on this vital issue. He took the view that the fortuitous circumstance that the " co-parcenary unit ", so to speak, of an undivided family has at any point of time been reduced to a single individual does not divest the family of its " joint property "; the undivided status of the family continues, and so does its joint estate.

We are once again confronted with the duty of deciding for ourselves upon the conflicting evidence of two distinguished lawyers in regard to a question of foreign law with which we are unfamiliar.

I have arrived at the conclusion that Mr. Rajah Aiyar's opinion, and the learned Judge's acceptance of his view upon this question, cannot be accepted. I must assume, for the purposes of this appeal, that our decision in the connected case* correctly explains the concept of " joint property " belonging to a Hindu undivided family. An undivided family, being an entity consisting not merely of its co-parcenary members but also of others, must be regarded as " the true owner " of the joint property; the co-parceners for the time being collectively constitute, so to speak, " the holding members " of the larger entity; and the *karta* for the time being is the " managing member ". To what extent, if any, can the temporary reduction of the " co-parcenary unit " to a single individual affect the ownership of what had previously been the joint property belonging to the entire undivided family whose corporate

* See page 481 (*supra*).—Ed.

existence has admittedly not been brought to an end ? It seems to me that we can only answer this question by adopting the *ratio decidendi* of our earlier decision and following it to its logical conclusion.

If it be correct to say that, when two or more co-parceners exist, they do not *own* the joint property in undivided shares, I do not see how it can logically be concluded that, when only one of them remains, he automatically becomes the owner of the entire property which he and his co-parceners had previously held for the benefit of the true owner, namely, the undivided family. On the contrary, it seems to me that, so long as the co-parcenary unit (irrespective of the number of persons who comprise it at any point of time) continues to hold that property, there can be no change of ownership *until the family, as a corporate entity, has itself finally ceased to exist.*

It is important to bear in mind that a person's *rights* of ownership may well be subject to very wide *powers* vested in someone else. For example, all the co-parceners, acting collectively, possess unfettered powers of alienation over the joint property which is owned by the undivided family (i.e., an entity including but not confined to the co-parceners themselves.) They may alienate the entire joint property by collective action, or they may gift it away. If they so prefer, they may dispose only of some part of the joint property, in which event what remains in their hands continues to belong to the family whose undivided status is still preserved.

In the same way, if there is only a single co-parcener for the time being (as there was in the present case after 9th September 1934) all the unfettered powers of alienation previously vested in the co-parcenary group become centred in the individual. He too is free to defeat the existing property rights of the undivided family, wholly or partially, by exercising those powers in any way he pleases : (*1905*) *I. L. R. 39 Mad. 437 ;* so much so that even a male who subsequently enters the family (by birth or by adoption) may well find his " birthright " to have been diminished or even extinguished *in toto*. In other words, there is nothing except the dictates of his own conscience to prevent a single co-parcener from frittering away the joint estate, to the detriment of the other members of the family (be they alive or yet unborn).

Some of the authorities referred to by the experts, in discussing a single co-parcener's extensive *powers of alienation*, certainly use words suggesting that he is, in a certain sense and for all practical purposes, regarded as " the owner of the joint property " or as " in the position of full owner "—*A. I. R. 1929 Mad. 296.* But this does not mean that he is in truth the absolute owner of the joint property to the exclusion of the quasi-corporation to which an undivided family is often equated. His responsibilities and obligations as manager or *karta* of the property in his possession are not extinguished, and female members still enjoy the right, *based on their continued membership of the undivided family*, to be maintained by him out of the common fund. *A. I. R. 1940 Mad. 664 ; A. I. R. 1953 Mad. 159.* So again, a widow of a deceased co-parcener—e.g., in this case, the widow of Arunachalam Chettiar (jnr.)—could

enforce against him her claim to maintenance *quoad* what would have been her husband's share upon a partition if he were still alive. *A. I. R. 1947 P. C. 143.* I have not been referred to any authority which suggests that the position of an " inferior " member of an undivided family is (so long as the joint property is in the hands of a single co-parcener) any different to what it had previously been when the property was in the hands of a larger co-parcenary unit.

From all these circumstances, I cannot but conclude that, so long as a single surviving co-parcener refrains from exercising his power to place the property beyond the reach of the undivided family by alienation, the property continues to belong to the entire family. Although, therefore, Arunachalam Chettiar (snr.) at the time of his death was " competent to dispose " of the joint property throughout the relevant period following his son's death, and although the joint property would, for that reason, normally be deemed to have " passed " on his death within the meaning of section 6 of the Ordinance so as to attract estate duty, the exempting provisions of section 73 protect the property from taxation.

I concede that if at any time (before a Hindu undivided family capable as such of owning joint property to the exclusion of its individual members has been established) a man governed by the Mitakshara law enjoys full *dominium* over even ancestral property which has come into his hands, he continues to hold it " as his very own " *until a son is born to him* so as to diminish his individual interest in the property—because it is only then that such ancestral property would be brought by operation of law into the joint ownership of the newly-established Hindu undivided family —*A. I. R. 1937 P. C. 36.* I also agree that " the mere existence of a wife or daughter " is not sufficient to create an undivided family and thereby convert a man's individual property into " joint " property. But the converse proposition does not automatically follow, and, to my mind, it would make a mockery of the undivided family system if the temporary reduction of the co-parcenary unit to a single individual were to convert *what was previously joint property belonging to an undivided family* into the separate property of the surviving co-parcener.

By enacting section 73, the legislature has now given formal recognition to the concept of an undivided family (in spite of constant fluctuations in its composition) as an *entity* capable of owning property. The term " *of* an undivided family " in section 73 means " *belonging to* an undivided family ". Nevertheless, it has been argued for the Crown, the phrase " *joint property* " implies that there should always be *at least two co-parceners* actually alive to hold the property in " community of interest and unity of possession ". I disagree. The word " joint " in this context merely emphasises *the concept of unity attaching to the entire undivided family* which is the true owner of the property concerned.

For these reasons, I have come to the conclusion that the learned District Judge was wrong in deciding that section 73 does not apply to this case. I would therefore set aside the order under appeal, and substitute a decree (*a*) declaring that no estate duty was payable under the Estate Duty Ordinance (Cap. 187) in respect of the estate of Arunachalam Chettiar (snr.), and (*b*) ordering the Crown to refund to the

appellants the sum of Rs. 700,402·65 with legal interest thereon from the date on which these proceedings were instituted in the District Court. The appellants are also entitled to their costs in this Court and in the Court below.

It is unnecessary to express an opinion on certain subsidiary issues which would only have arisen for consideration if the principle of the Commissioner's assessment had been affirmed.

GUNASEKARA J.—I agree.

Appeal allowed.