VALLIAMMAI ACHI

v.

NAGAPPA CHETTIAR & ORS.

January 23, 1967

[K. N. WANCHOO, R. S. BACHAWAT AND J. M. SHELAT, JJ.]

Hindu Law—Joint family property bequeathed by will—Effect on character of property.

Indian Succession Act, (39 *of* 1925) *s.* 180—*Scope of election under.*

A Hindu died after making a will in respect of certain joint family properties and appointed his son as the executor. The son obtained probate of the will, provided for the legacies indicated therein and came into possession of the residue of the property. Thereafter, he adopted the plaintiff. The adoptive father died after the Hindu Succession Act came into force and the plaintiff filed the suit claiming two-thirds share of the properties left by his father. The defendants (*viz.*, the widow and mother of the plaintiff's adoptive father) contended that the conduct of the plaintiff's adoptive father in obtaining the probate of the will and carrying out its terms amounted to an election and therefore the father became absolute owner of the residue of the properties bequeathed to him by the will, and as the election to take under the will would bind the plaintiff also he could not claim half the property on the ground that it was joint family property of himself and his father. The trial Court decreed the suit, which in appeal was upheld by the High Court. The defendants appealed to this Court.

HELD: The appeal must be dismissed.

The character of the property did not change because of the will and it would still be joint family property in the hands of the plaintiff's father as far as his male issue was concerned. Further, as soon as the plaintiff was adopted he acquired interest in the joint family property in the hands of his adoptive father and this interest of his was independent of that of his father. In such circumstances even if his father could be said to have made an election there could be no question of the plaintiff being bound by that election, for he was not claiming through his father. [453 C, E-F]

Election under s. 180 of the Indian Succession Act, would only arise where the legatee derives some benefit from the will to which he would not be entitled except for the will. In such a case he has to elect whether to confirm the will or dissent from it. But where there is no question of the legatee deriving any benefit from the will to which he would not be entitled except for the will the fact that he confirms the will and accepts what the will provides would not amount to election, for he would have in any case got what the will gave him. Thus election only arises where the legatee has to choose between his own property which might have been testator and which the testator has given to the legatee by the will. [451 H.452 C]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 806 of 1964.

Appeal by special leave from the judgment and decree dated July 13, 1962, of the Madras High Court in Appeal No. 347 of 1958.

A *C. B. Agarwala, B. Dutta, T. S. Krishnaswamy Iyengar, P. L. Meyyappan* and *J. B. Dadachanji*, for the appellant.

A. K. Sen and *R. Ganapathy Iyer*, for respondent No. 1.

K. R. Chaudhuri and *K. Rajendra Chaudhury*, for respondent No. 2.

B The Judgment of the Court was delivered by

Wanchoo, J. This is an appeal by special leave against the judgment of the Madras High Court. The facts are not now in dispute and may be briefly narrated. A suit was brought by Nagappa Chettiar, respondent No. 1 (hereinafter referred to as the respondent) against Villiammi Achi appellant and C Nachiammai Achi now dead and represented by her legal representative. The respondent claimed two-thirds share of the properties left by his father, Pallaniappa and prayed for a decree for separate possession of that share after partition. The facts on which this claim was based are not now in dispute and are these. The respondent is the adopted son of Pallaniappa having been D adopted in 1941. The appellant is the widow of Pallaniappa and Nachiammai Achi was Pallaniappa's mother. Pallaniappa's father also named Nagappa had considerable properties. This Nagappa made a will on June 10, 1934 by which after making certain dispositions in favour of certain persons including his own wife he gave the residue of his property absolutely to Pallaniappa and appointed E him as the executor of the will. In one place the will stated that all the property except a small part was the exclusive and self-acquired property of the testator while at the end the testator said that he had made the will with the full consent of his son Pallaniappa After Nagappa's death in July 1934 Pallaniappa obtained probate of the will and after providing for the legacies to others as indicated therein came into possession of the residue of the property. In F 1941 the respondent was adopted by Pallaniappa.

In the trial court there was a dispute between the parties whether Pallaniappa and his father were members of a joint Hindu family and whether properties left by Pallaniappa's father were the joint family properties of both. But it has been found that all the properties left by Pallaniappa's father were joint family properties of G Pallaniappa and his father which Pallaniappa could acquire by survivorship on his father's death. This finding was upheld by the High Court and is not now in dispute. We have to proceed on the basis that even though Pallaniappa's father said in the will that the properties, except a small part, were his self-acquired properties, in fact all the properties mentioned in the will of Pallaniappa's H father were joint family properties of Pallaniappa and his father.

The case of the appellant was that even though the properties left by Pallaniappa's father were joint family properties which

Pallaniappa could acquire by survivorship, the conduct of Pallaniappa in obtaining probate of the will and carrying out its terms amounted to election and thereafter Pallaniappa became absolute owner of the residue of the properties bequeathed to him by the will. The consequence of this was that when Pallaniappa adopted the respondent in 1941 long after he had become the absolute owner of the properties, the respondent acquired no interest in the properties left by his grand-father by virtue of the adoption. Pallaniappa died on September 16, 1956 after the Hindu Succession Act, (No. 30 of 1956) came into force. As there was no joint family property of Pallaniappa and the respondent at the time of Pallaniappa's death, the respondent could not claim half the property on the ground that it was joint family property of himself and Pallaniappa, as Pallaniappa's election to take under the will of his father would bind the respondent also. Reliance in this connection was placed on s. 180 of the Indian Succession Act, (No. 39 of 1925) also.

The reply on behalf of the respondent to this contention was two-fold. In the first place, it was urged that there was no question of election even by Pallaniappa in this case and s. 180 of the Indian Succession Act would not apply. It was further urged that even assuming that there could be election by Pallaniappa the respondent would not be bound by that election as the property left by his grand-father was joint family property and the respondent would acquire interest therein as soon as he was adopted by Pallaniappa, even though Pallaniappa might have been the sole co-parcener for sometime *i. e.* between 1934 and 1941. This interest of the respondent in the joint family property was independent of his father Pallaniappa and even though Pallaniappa might be bound by any election that he might have made the respondent would not be so bound and would be entitled to treat the property as joint family property in the hands of Pallaniappa in which he would acquire interest on being adopted. In the second place the respondent's case was that in any case after his adoption Pallaniappa threw the entire property into the family hotch-pot and therefore it became joint family property by blending.

Two questions therefore arose for consideration in this case namely—(i) whether there was election by Pallaniappa and if so whether the respondent would be bound by it, and (ii) whether Pallaniappa threw the entire property into the family hotch-pot after adoption of the respondent and therefore it became joint family property in any case. The trial court accepted the case put forward on behalf of the respondent and decreed the suit passing a preliminary decree giving two-thirds share to the respondent and one-sixth each to the appellant and the mother of Pallaniappa.

The appellant then appealed to the High Court. The High Court dismissed the appeal. On the question of election, the

A High Court held that as Pallaniappa and his father were members of a joint Hindu family and as the entire property left by Pallaniappa's father was joint family property, Pallaniappa had interest in the residue as a survivor and in consequence there was no question of election by Pallaniappa for all the property he got by will would have come to him by survivorship. In such a case there B could be no question of election, for Pallaniappa had title to the property irrespective of the will. The High Court also held that in any case the claim of the respondent as a member of the joint family was not under his father but independent of him and therefore the respondent would not be bound, even if Pallaniappa were held to have made an election. The High Court also found in favour of the respondent on the question whether the property C was thrown into family hotch-pot after the adoption of the respondent and in the result dismissed the appeal.

The High Court having refused to grant a certificate to appeal to this Court, the appellant applied for and obtained special leave from this Court; and that is how the matter has come before us.

D The same two questions, as indicated above, arise for consideration in this appeal. We shall first consider the question of election in the background of the fact that the entire property left by Pallaniappa's father was joint family property of himself and Pallaniappa and that Pallaniappa had interest in that property as a member of a joint Hindu family. Section 180 of the E Indian Succession Act which enunciates the doctrine of election as known to English law for this country is in these terms :

> "Where a person, by his will professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the F latter case, he shall give up any benefits which may have been provided for him by the will."

It is urged on behalf of the appellant that s. 180 would apply to the facts of the present case for the property willed by Pallaniappa's father was not his which he could will away as it was joint family property in which Pallaniappa who was the residuary legatee had G also equal interest. Therefore Pallaniappa had either to confirm the disposition or dissent from it, and his conduct showed that he had confirmed it for he took out probate. Therefore it must be held that after probate was taken out the residue became the absolute property of Pallaniappa and lost its character as joint Hindu family property.

H Now it is clear from s. 180 that after the legatee elects to dissent from the will he must give up any benefits provided for him by the will. This shows that election under s. 180 would only arise

where the legatee derives some benefit from the will to which he would not be entitled except for the will. In such a case he has to elect whether to confirm the will or dissent from it. But where there is no question of the legatee deriving any benefit from the will to which he would not be entitled except for the will, the fact that he confirms the will and accepts what the will provides would not amount to election, for he would have in any case got what the will gave him. Thus election only arises where the legatee has to choose between his own property which might have been willed away to somebody else and the property which belongs to the testator and which the testator has given to the legatee by the will. The matter is brought out in Halsbury's Laws of England, Third Edition, Vol. 14, at p. 588, para 1091 in the following words :—

> "Where a testator by his will purports to give property to A which in fact belongs to B and at the same time out of his own property confers benefits on B....in such circumstances... B is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions. He is accordingly put to his election to take either under the instrument or against it. If he elects to take under the will he is bound and may be ordered to convey his own property to A; if he elects to take against the will and to keep his own property, and so disappoints A, then he cannot take any benefits under the will without compensating A out of such benefits to the extent of the value of the property of which A is disappointed."

Following this principle the High Court held that as the property which the will gave to Pallaniappa would in any case have come to him as a member of the joint family, there was no question of election even by Pallaniappa in this case. This view appears to us to be correct.

But even assuming that there was some kind of election by Pallaniappa we cannot see how the nature of the property left by Pallaniappa's father would change merely because Pallaniappa's father made a will giving the residue absolutely to Pallaniappa and Pallaniappa took out probate of the will. The property being joint family property Pallaniappa's father was not entitled to will it away and his making a will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot turn joint family property into absolute property of his son by merely making a will, thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether

A they are in existence at the time of partition or are born subsequently : [see Hindu Law by Mulla, Thirteenth Edition p. 249, para 223 (2) (4)]. If that is so and the character of the ancestral property does not change so far as sons are concerned even after partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the B joint family property (after making certain bequests) to the son. A father in a Mitakshara family has a very limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son. We are therefore of opinion that merely because Pallanappa's father made the will and Pallaniappa probably as a dutiful C son took out probate and carried out the wishes of his father, the nature of the property could not change and it will be joint family property in the hands of Pallaniappa so far as his male issues are concerned.

Further it is equally well settled that under the Mitakshara law each son upon his birth takes an interest equal to that of his D father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father...." (see Mulla's Hindu Law, Thirteenth Edition, p. 251, para 224). It follows therefore that the character of the property did not change in this case because of the will of Pallaniappa's father and it would still E be joint family property in the hands of Pallaniappa so far as his male issue was concerned. Further as soon as the respondent was adopted he acquired interest in the joint family property in the hands of Pallaniappa and this interest of his was independent of his father Pallaniappa. In such circumstances even if Pallaniappa could be said to have made an election there can be no question of the F respondent being bound by that election, for he is not claiming through his father.

In this view of the matter, it is unnecessary to consider the question whether Pallaniappa, after the respondent's adoption, threw the property into the family hotch-pot.

G The appeal therefore fails and is hereby dismissed with costs.

Y.P. *Appeals dismissed.*