

(1984) 02 CAL CK 0012
In the Calcutta High Court
Case No : Matter No. 760 of 1977

Commissioner of Gift Tax

APPELLANT

Vs

Nani Gopal Mondal

RESPONDENT

Date of Decision : 24-02-1984

Acts Referred:

Estate Duty Act, 1953 — Section 5
Gift Tax Act, 1958 — Section 26(1)
Partnership Act, 1932 — Section 14, 29(2), 45, 47, 48
Registration Act, 1908 — Section 17(1)

Citation : (1984) 41 CTR 64 : (1984) 150 ITR 469 : (1984) 18 TAXMAN 315

Hon'ble Judges : S.C. Sen, J; R.N. Pyne, J

Bench : Division Bench

Advocate : A.K. Sengupta, for the Appellant; Sanjay Bhattacharya and Chandrima Bhattacharya, for the Respondent

Judgement

Pyne, J.—In this reference u/s 26(1) of the Gift-tax Act, 1958, the following question has been referred by the Tribunal for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that no gift-tax is leviable in respect of the assessee's share in the goodwill of the partnership firm, Nani Gopal Mondal and Bros., as determined by the Gift-tax Officer ? "

2. In this case the assessment year involved is 1969-70, for which the relevant date (of gift) is April 7, 1968. The assessee, Nani Gopal Mondal, was a partner of M/s. Nani Gopal Mondal and Bros, carrying on business in gold, silver and silk goods, etc., at Bishnupur in the district of Birbhum in the State of West Bengal. Originally, the business which dealt in gold and silver was carried on" by the HUF of Nani Gopal Mondal and others, which at the relevant time consisted of three brothers, namely, Nani Gopal Mondal, Benurkar Mondal and Ambujakasha Mondal. On the 1st day of the accounting year 1355, Ramnabami, there was a partition and as a result of the partition, each brother got 1/3rd share in the said

business. Thereafter, they formed a partnership which took over the business carried on by the undivided family in a running state. In the partnership firm each of the said three persons held 1/3rd share. On September, 14 1944, a partnership deed was executed and Clause 7 of the deed stated that on the death of any partner, the partnership would not be dissolved but the remaining partners would take in heirs and legal representatives of the deceased partner as partners in his place and the partnership business would continue. According to Clause 14 of the said deed, no new partner would be introduced into the business without the concurrence or opinion of the then existing partners. It appears that Benukar Mondal, a partner, died on October 21, 1967. After his death, in his place, his five sons, namely, Radha Charan Mondal, Bishnu Charan Mondal, Shyama Charan Mondal, Apurba Charan Mondal and Adaitya Charan Mondal, were admitted to the partnership, each holding 1/15th share in the partnership. A partnership deed was executed on October 23, 1967, wherein there were seven partners namely, Nani Gopal Mondal and Ambujakasha Mondal, each holding 1/3rd share and, the aforesaid five sons of Benukar Mondal, deceased. Clause 8 of the partnership deed provided that on the death of any partner, the partnership would not be dissolved but the remaining partners would take in the heirs and legal representatives of the deceased partner in his place and the partnership business would continue. Another clause, namely, Clause 1.5, which was added, provides that the partnership was a partnership at will liable to be dissolved on mutual consent.

3. When the partnership was in existence, the assessee by a deed of gift dated April 7, 1968, made a gift of his 1/3rd share in the partnership to his three sons. The said deed was registered on August 1, 1968. In the said deed of gift, the partnership business assets including cash in hand, cash at bank, stocks, sundry debtors, furniture, etc., including goodwill are valued at Rs. 2,12,849.97 and the assessee's share is determined at Rs. 70,949.99 for the purpose and levy of stamp duty. In the schedule of the said deed of gift the total value of all the assets excluding goodwill is worked out at Rs. 2,12,850, and the share of the assessee comes to Rs. 70,950.

4. The assessee filed a gift-tax return declaring a gift of Rs. 70,950. The GTO noticed that while the deed of gift refers to the business assets of the partnership firm even including goodwill, the value of the goodwill was not included in the aforesaid amount. It was stated before the GTO that due to fall in the silk business, no goodwill should be attached to the gifted share. This was, however, not accepted by the GTO in view of the gradual increase in the profit of the firm in the subsequent years. The GTO, accordingly calculated the value of the goodwill of the entire firm at Rs. 84,968 and included 1/3rd share of this, that is, Rs. 28,320, in the property gifted by the assessee to his sons.

5. Being aggrieved by the said assessment, the assessee made an appeal before the AAC who, however, held that the GTO was right in estimating the value of the goodwill at Rs. 28,320. He, however, held that the assessee did not run a

partnership concern but a proprietary one.

6. Being aggrieved by the said order of the AAC, the assessee preferred a further appeal before the Tribunal. Before the Tribunal, counsel for the assessee, inter alia, contended that the assessee could not transfer his 1/3rd share in the firm of Nani Gopal Mondal and Bros, and that in the case of a running business of partnership, no partner could predicate that he had a definite share in a particular property of the firm and that the assessee did not have any share in the goodwill of the firm and, therefore, there was no question of his making a gift of his goodwill to his sons. The learned counsel for the assessee relied on the decisions in the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, and Controller of Estate Duty Vs. Shri Ved Parkash Jain, , and Commissioner of Gift-Tax, Kerala Vs. P. Gheevarghese, Travancore Timbers and Products, . The Revenue, on the other hand, relied on the decision of Madras High Court in the case of Commissioner of Gift-tax Vs. A.M. Abdul Rahman Rowther, , and submitted that the doctrine that a partner could not transfer his share of goodwill to others applied only in cases of transfer to his legal heirs and not in cases of transfer to other partners and that there could be a valid transfer of goodwill to partners.

7. Considering the decisions cited on behalf of the-parties, the Tribunal held :

"There are thus two views before us, one in favour of the assessee and the other in favour of the Department. It is a well-known principle that if the interpretation of a fiscal enactment is open to doubt, or where two interpretations are possible, the construction most beneficial to the subject should be adopted. Respectfully following the above principle, we hold that the assessee, being a partner in the firm of Nani Gopal Mondal and Bros., could not say that he had a definite share in a particular property of the firm including goodwill. Obviously, therefore, he could not make a gift of the goodwill and, therefore, its value cannot be included in the value of the gift. We, therefore, direct that the sum of Rs. 28,320 being the value of the assessee's share of goodwill in the above firm should be excluded from the assessment. Before we close we may state that there was no dispute before us about the valuation of the goodwill as such."

8. In the above view of the matter, the Tribunal allowed the assessee's appeal.

9. On behalf of the Revenue it was submitted that " goodwill" is a property of the partnership and when a partner transfers his share in the partnership or it devolves upon his heirs and legal representatives after his death and according to the partnership deed the partnership will continue after the death of a partner and there is a transfer of share of the property to the transferee or legal representatives, as the case may be, then such share will include the outgoing or deceased partner's share in all the assets of the firm including his share in the goodwill. Regarding the case of Controller of Estate Duty Vs. Shri Ved Parkash Jain, , it was submitted, the said case was under the E.D, Act and, therefore, the principle laid down therein is not applicable to the case where the share of the

partner in the partnership is gifted to a donee. Various cases were cited on behalf of the Revenue in support of the proposition that " goodwill " is an asset of the partnership and it is liable to gift-tax where a partner transfers his share in the partnership.

10. On behalf of the assessee, it was submitted that by transferring one-third share in the partnership, it could not be said that a partner had transferred any part of the goodwill of the firm, It was further Submitted that in the case of a running business of a partnership, no partner could predicate that he had a definite share in any particular property of the firm. The assessee did not have any share in the goodwill of the firm and, therefore, no question of his making a gift of any goodwill of the firm would arise. In support of the above submission, reliance was placed on several decisions to which I shall refer hereinafter.

11. In order to show the nature of interest which a partner has in a partnership firm and its assets and properties, various cases were cited by the parties at the Bar. These cases no doubt relate to assessment of estate duty and do not relate to gift-tax, yet they throw considerable light on the question regarding the nature of a partner's interest in the partnership and assets and properties of the firm.

12. In the case of Commissioner of Gift-Tax, Kerala Vs. P. Gheevarghese, Travancore Timbers and Products, , the assessee who was the sole proprietor of "a business, converted it into a partnership by a deed dated August 1, 1963. The partnership was to consist of the assessee and his two daughters. The capital of the partnership was Rs. 4 lakhs of which his contribution was Rs. 3 lakhs 50 thousand and the contribution of the capital of Rs. 25 thousand from the assessee's account to the account of each of the daughters. All the assets of the proprietary business were, transferred to the partnership and in these assets, the assessee and his two daughters were entitled to shares in proportion to their share capital. The profits and losses of the partnership were, however, divided in equal shares among all the three partners. It was held that though according to the deed of partnership, goodwill was a part of properties and assets of the business which the assessee had transferred to the partnership, the departmental authorities never treated all the assets and property of the assessee which were transferred to the partnership as the subject-matter of gift. Nor was it claimed before the Supreme Court that the property and assets valued at Rs. 4 lakhs were the subject-matter of the gift. All that the Department did and persisted in was to pick out only one of the assets of the assessee's proprietary business, namely, its goodwill, and regard that as the subject of the gift. This approach was wholly incomprehensible and no gift-tax was payable on the goodwill of the assessee's business.

13. In the case of Commissioner of Gift-tax Vs. A.M. Abdul Rahman Rowther, , the assessee who was carrying on business as sole proprietor converted his business on June 9, 1954, into a partnership consisting of himself and his two daughters and this firm was recognised as genuine and entitled to registration

under the I.T. Act. On November 2, 1960, the assessee transferred Rs. 25,000 each to his daughter and son from his share capital account and on the next day a new partnership was entered into with, these two persons also. The new partnership deed provided that the gross assets and liabilities of the predecessor firm shall form the assets and liabilities of the new firm, the capital of the firm amounting to Rs. 1,25,000 shall belong equally to the five persons, namely, the assessee, his three daughters and son, and the profits and losses of the firm shall be divided among and borne by the partners in equal proportions. The question that arose for consideration was whether the assessee by gifting Rs. 50,000 share capital to his son and daughter and making them partners in the new partnership, transferred a part of his share in the partnership in their favour and by this process the assessee had made a gift of a share in the goodwill of the firm which he was entitled to. It was held there was a transfer of interest in property when the assessee took his daughter and son into the partnership, assigned them a portion of the share capital and realigned the shares in the partnership and the profit-sharing ratio, which amounted to a gift chargeable to tax and the redistribution of the profit-sharing ratio on the admission of the two new partners amounted to a "gift" by the assessee of a portion of his share in the goodwill of the firm.

14. In the case of *S. Devaraj Vs. Commissioner of Wealth-tax*, , the deceased was at the time of his death a partner in a firm, which was the managing agent of a mill, having 3/16ths share in the profits and losses of the firm. The Assistant Controller valued the share (of goodwill) of the deceased in the firm at Rs. 66,000 and included this sum in the estate duty assessment rejecting the contention of the accountable persons that the managing agency firm had no goodwill. It was held by the High Court, *inter alia*, that the Tribunal was in error in holding that the managing agency had no goodwill.

15. In the case of *Controller of Estate Duty Vs. John Gregory Apcar and Another*, , it was held that upon the death of the deceased partner, goodwill in the partnership business passed on to the accountable person and, therefore, it was liable to estate duty.

16. In the case of *Controller of Estate Duty Vs. Annaraj Mehta and Deoraj Mehta*, , it was held that what passes on the death of a partner is his share in the firm, that is, his interest in the entire unit of the firm. This has to include the goodwill.

17. In the case of *Controller of Estate Duty Vs. Ibrahim Gulam Hussain Currimbhoy*, , the partnership deed provided that the retiring partner or the legal representatives of a deceased partner would not be entitled to the goodwill of the business and that only the surviving or continuing partners would be entitled to the same and to continue to carry on the business under the same name and style. In this case, following the decision of the Supreme Court in the case of *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, , it was held that the interest of the deceased in the goodwill would

devolve upon the surviving partners whose share in such goodwill would be augmented to that extent.

18. In the case of *Smt. Surumbayi Ammal Vs. Controller of Estate Duty*, , the question that arose for consideration was whether the value of the estate of the deceased in the goodwill of the dissolved firm should be included in the estate of the deceased, It was held that though the accountable person in fact did not get any share in the goodwill, yet the deceased's share in the said goodwill passed on his death for the purpose of estate duty inasmuch as the deceased was entitled to his share therein.

19. In the case of *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, , it was held that the goodwill of a firm is an asset. In interpreting the deed of partnership, the court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement that the surviving partners are entitled to carry on business on the death of a partner, to be extinguished ; in the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets.

20. In *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, , after referring to several sections of the Indian Partnership Act, the Supreme Court observed as follows (p. 1303) :

" From a perusal of these provisions, it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership, it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership, to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the part-ship property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Clause (a) and Sub-clauses (i), (ii) and (iii) of Clause (b) of Section 48. It has been stated in *Lindley on Partnership*, 12th ed., at p. 375.

" What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share.....and which on his bankruptcy passes to his trustee".

The statement of law is based upon a number of decisions of the English courts.

One of these is *Rodriguez v. Speyer Bros.* [1919] AC 59, where, at p. 68, it has been observed :

"When a debt due to a firm is got in, no partner has any definite share or interest in that debt ; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm, and to receive his share of any surplus there may be when the liquidation has been completed ". "

21. The above observation of the Supreme Court was made in the context of the peculiar facts of that case. The facts of that case were that the members of two joint Hindu families, A and B, had entered into a partnership business of hulling rice, etc. Subsequently, a document styled as *karat* was executed between the two families. The document was unregistered and recorded the fact that the partnership had come to an end, that A family had given up its share in the machines, etc., and in the business and that it had made over the same to B alone completely by way of adjustment. In a subsequent suit for dissolution of the partnership and accounts brought by the members of A family, it was contended that since the partnership assets included immovable property and the document recorded relinquishment by the members of the A family of their interest in those assets, this document was compulsorily registrable u/s 17(1)(c) of the Registration Act and that as it was not registered, it was inadmissible in evidence to prove the dissolution of the partnership as well as the settlement of accounts. On the above facts it was held that the interest of the partners of A family in the partnership assets was movable property and the document evidencing the relinquishment of that interest was not compulsorily registrable u/s 17(1) of the Registration Act.

22. Although it was observed that what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of the property, and upon dissolution of the partnership, to a share in the money representing the value of the property, yet since a firm has no legal existence, the partnership property will vest in all the partners and, in that sense, every partner has an interest in the property of the partnership. It was further observed that the whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done, whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership.

23. It would, therefore, appear that in the above case where the partnership holds immovable property as an asset and by a document styled as *karar* in which it was recorded that the partnership had come to an end and a partner had given up his interest in some of the partnership assets to the other partners, then whether such document needs registration or not and no question arose as to whether goodwill of a partnership firm is an asset or not and when a partner

transfers his share or interest in the partnership to a third party or in case of the death of the partner when his interest in the partnership passes to his legal representatives, his share in the goodwill passes to the transferee or the legal representatives.

24. In the case of Commissioner of Income Tax, Central-II Vs. Bhupinder Singh Atwal, , it was observed that a partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law a firm as such has no separate rights of its own in the partnership assets and when one talks of a firm's property or firm's assets, all that is meant is the property or the assets in which all the partners have a joint or common interest. A partner in a firm, has a share in the assets of the firm including the capital, stock-in-trade, goodwill, etc., but he has no indivisible right to any particular asset as such. In case of dissolution, the entire partnership comes to an end and accounts are taken and the partners receive their share minus the liabilities. In the case of a retirement, other partners continue, but the retiring partner instead of his right of participation in the capital and assets in the business of the firm including his obligation as to the liabilities, takes the quantified money and retires from the firm and in lieu, of his receipt of the money, his interest in the partnership firm goes to the other remaining partners. Therefore, when a partner retires from a partnership, the amount of his share in the partnership assets after deduction of the liabilities and prior charges are determined. On taking accounts, what he receives is his share in the partnership.

25. Therefore, on the retirement of a partner from a firm, the retiring partner gets his monetary value that is represented by his share in the partnership and since no element of transfer of a capital asset, which attracts the provisions of Sections 45 and 47(ii) is involved, no capital gains is chargeable on the profit, if any, arising to the retiring partner from the receipt of such money.

26. In the case of Controller of Estate Duty Vs. Shri Ved Parkash Jain, , relying on the decision of the Supreme Court in the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, , it was held that during the subsistence of a partnership, no partner can deal with any part of its property as his own, nor can he assign his interest in a specific item of the partnership property to anyone. "His only right is to obtain such profits, if any, as fall to his share from time to time and, in case a partner assigns his share to another, then the assignee would get only the right to receive the share of profits of the assignor. Therefore, on the death of a partner, where the firm was continued after his death, no specific share in the goodwill passed on to his heirs as he did not own any specific share in the goodwill of the firm. u/s 5 of the E.D. Act, duty is leviable only upon the principal value of the property which passes on his death. Goodwill has no value in a going concern of partnership.

27. In the case of State Vs. Prem Nath, , it was held that the goodwill of a firm is an asset of the firm. The share of the deceased partner in which, along with his share in the other assets of the firm, devolves, for purposes of estate duty, on

his death, upon his legal representatives notwithstanding any Clause in the deed of partnership to the effect that the death of a partner shall not dissolve the firm and that the surviving partners are entitled to carry on the business on the death of the partner.

28. By this case, the case of *Controller of Estate Duty Vs. Shri Ved Parkash Jain*, was overruled. In this case, referring to the observations made in the case of *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, , the learned Judges observed that there the Supreme Court generally discussed the rights and duties of a partner and observed that during the subsistence of a partnership, no partner can deal with any part of the property as his own. The observation of the Supreme Court throws no light on the question whether the share of a partner in the goodwill of a firm passes or does not pass on the death of a partner. If the share of a partner in goodwill does not pass because no partner can deal with any portion of the property as his own during the subsistence of the partnership, the same argument may apply to the share of the partner in the other assets of the firm also. We do not think that we can accept such argument.

29. From the cases cited above, it appears that goodwill of a partnership business is a property of the firm in which a partner is entitled to a share. Although the above cases are under the E.D. Act, yet the principle laid down in the said cases regarding the nature of goodwill of a firm and the right of a partner in respect thereof is applicable to the instant case. In this connection, it may be mentioned that according to Section 14 of the Indian Partnership Act, property of a firm includes goodwill of the business. Further, according to Section 29(2), if a partner transfers his interest and the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled to. It further appears that under the proviso to Section 53 of the Indian Partnership Act, in case of dissolution, a partner or his representative may buy the goodwill of the firm and, u/s 55(1) of the Act, in settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the parties, be included in the assets and it may be sold either separately or along with other properties of the firm. It should also be noticed that it was held by the Supreme Court" in the case of *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, , that goodwill of a firm is an asset and, in the absence of a provision expressly made or clearly implied, the normal rule that the share of the partner in the assets devolves upon his legal representatives will apply to goodwill as well as to other assets. The principle laid down in the above case, in my view, applies to a case where a partner transfers his interest or share in the firm to a third party. Upon transfer, the share or interest in the property of the firm of the transferring partner including the goodwill becomes the share or interest of the transferee. In the instant case, Nani Gopal Mondal by the deed of gift transferred his share or interest in the firm which included his share of goodwill also. Hence, for the purpose of payment of gift-tax, the value of one-

third share of the assessee in the goodwill shall also be taken into account. It should be noted that no dispute has been raised regarding the value of the goodwill.

30. In the above view of the matter, I answer the question referred to this court for its opinion in the negative and in favour of the Revenue. There will, however, be no order as to costs.

S.C. Sen, J.

31. I agree.