

(1974) 09 MAD CK 0034

In the Madras High Court

Case No : Tax Case No. 269 of 1968 (Reference No. 88 of 1968)

Controller of Estate Duty

APPELLANT

Vs

Ibrahim Gulam Hussain Currimbhoy

RESPONDENT

Date of Decision : 27-09-1974

Acts Referred:

Estate Duty Act, 1953 — Section 10, 2(16), 5, 6, 7

Citation : (1975) 100 ITR 320

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V. Balasubrahmanyam and J. Jayaraman, for the Appellant; V. Ramachandran, for the Respondent

Judgement

Ramanujam, J.—One Abdul Rahim Currimbhoy died on January 10, 1960. He was a partner till his death in the firm of Messrs. Abdul Rahim and Brothers which was originally constituted by a deed of partnership dated September 22, 1949, but subsequently reconstituted as and from December 10, 1953, by a subsequent deed dated April 22, 1954. The firm was carrying on business in crockery, glassware and hardware. The deceased's share in the partnership was 3 annas in the rupee in terms of the reconstituted partnership deed dated April 22, 1954. Clause 14 of that partnership deed was as follows :

"The retiring partner or the legal representatives of the deceased partner shall not be entitled to the goodwill of the business as the surviving or continuing partners alone shall be entitled to the goodwill and to continue to carry on the business under the same name and style."

2. In the books of the firm the goodwill account stood at Rs. 16,148 as on October 31, 1959. The deceased had, on October 26, 1954, gifted to his five sons, Yusufali, Nazimali, Akbarali, Abdullah, Anvarali and to his daughter, Zarinabai, a sum of Rs. 10,000 each. This was done by debiting to the deceased's account in the books of the firm and by giving corresponding credit in the individual accounts of the six donees in the books of the same firm. Under

the reconstituted partnership deed dated April 22, 1954, the deceased's major sons, Yusufali and Nazimali, had become partners with one anna share each and his three minor sons were admitted to the partnership to the extent of one anna in the rupee. The deceased's daughter, Zarinabai, was not a partner in the said firm. The sum of Rs. 50,000 gifted to the five sons remained deposited with the firm as their share capital and the capital account of each of the five sons of the deceased stood credited in a sum of Rs. 50,000 in the books of the firm. The amount of Rs. 10,000 gifted by the deceased to his daughter also remained invested as a deposit in her account with the same firm.

3. On the death of the deceased, the executor of the estate of the deceased as accountable person contended that Clause 14 of the partnership deed dated April 22, 1954, specifically disentitled the retiring partner or the legal representative of the deceased partner for claiming any interest in the goodwill of the firm and that, therefore, there was no passing of any interest in the goodwill on the death of the deceased. The Assistant Controller of Estate Duty negated the said contention and held that the deceased was competent to dispose of his share in the partnership property in terms of Section 6 of the Estate Duty Act (hereinafter referred to as "the Act"), that the cesser of interest in terms of Section 7 need not benefit the legal heirs of the deceased and that, therefore, the deceased's share in the goodwill of the firm could also be subjected to charge u/s 5 of the Estate Duty Act. In that view he estimated the value of the goodwill at Rs. 84,000 on the basis of three years' purchase price of five years' average profits and included in the estate of the deceased a sum of Rs. 12,722 by way of the deceased's 3/16ths share in the goodwill of the firm.

4. The Assistant Controller also held that in regard to the amount of Rs. 60,000 gifted by the deceased to his five sons and one daughter, the gifted amounts having remained in the firm in which the deceased was a partner, the donees could not be said to have enjoyed the property gifted to the entire exclusion of the deceased. According to the Assistant Controller, the income earned by the donor and the donees as partners from and out of the business carried on by them was with the help of the monies invested by them as capital and, as the monies were by way of gift by the deceased, the donees had not enjoyed the monies gifted to the entire exclusion of the deceased donor and, therefore, it attracted Section 10 of the Estate Duty Act.

5. The accountable person took the matter in appeal to the Appellate Controller of Estate Duty but without success. Then the matter was taken in appeal to the Tribunal. As regards the goodwill the Tribunal held that the legal representatives of the deceased were not entitled to the goodwill of the business in view of Clause 14 of the partnership deed dated April 22, 1954, that even during the lifetime of the deceased partners were not entitled to the goodwill of the business which was the property of the firm as a whole, that no partner can claim any definite share in a particular asset of the firm and as such no question of any cesser of interest arises in terms of Section 7, and that the

deceased was not competent to dispose of any part of the goodwill and, therefore, it was not a property within the disposing capacity of the deceased in terms of Section 6. Thus, the Tribunal held that the inclusion of 3/16ths share in the goodwill in the principal value of the estate of the deceased was not justified.

6. As regards the question whether the sum of Rs. 60,000 being the monies gifted by deceased to his children could be brought to charge u/s 10 of the Estate Duty Act, the Tribunal took the view that by reason of the donor being a partner of the firm in which the amounts gifted were deposited or invested, it cannot be said that the possession and enjoyment of the property taken under a gift was not retained to the entire, exclusion of the donor, that as a partner is not the owner of any specific share in any particular partnership property the deceased had no right or "interest in the monies invested by the donees in the firm in which he was a partner and that, therefore, he could not be said to have enjoyed the deposits made by the donees. In that view the Tribunal held that the sum of Rs. 60,000 gifted to the sons was not hit by the provisions of Section 10. Aggrieved against the decision of the Tribunal the revenue has sought and obtained a reference to this court and the following two questions have been referred:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the inclusion in the principal value of the estate of a sum of Rs. 12,722 by way of the deceased's 3/16ths share in the goodwill of the firm was unjustified ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the gifted property of Rs. 60,000 was not hit by the provisions of Section 10 of the Estate Duty Act, 1953 ? "

7. As regards the second question, it is seen that it is covered by the decision in T.C. No. 292 of 1968 Radhabai Ramchand Vs. Controller Of Estate Duty, Madras, , just now rendered. In view of the said decision, this question has to be answered in the negative and in favour of the revenue.

8. As regards the first question it is submitted by the learned counsel for the revenue that the view taken by the Tribunal that the deceased's share in the goodwill at the moment of his death did not constitute property passing on his death as contemplated by Section 2(16) so as to attract the charge u/s 5 of the Act, or an interest ceasing on his death as contemplated by Section 7 or a property which the deceased was competent to dispose of so as to attract Section 6 of the Act, is erroneous. Mr. Balasubrahmanyam, for the revenue, contends that Clause 14 of the partnership deed has not been properly construed by the Tribunal. He point out that Clause 14 which prevents a retired partner or a legal representative of a deceased partner claiming any share in the goodwill of the business cannot be taken advantage of to contend that the deceased had no interest in the goodwill at the time of his death, that goodwill being one of the assets of the firm all the partners including the deceased were entitled to a share

therein, that the deceased's share in the firm's assets which is legally chargeable to duty should also include the goodwill as part of the assets and that there is no reason as to why one particular asset of the firm which is in the form of a goodwill should alone be excluded from charge merely because Clause 14 of the partnership deed provided a different mode of devolution of the share of a partner in the goodwill. It is further pointed out that even under Clause 14 there is the passing of the deceased's share in the goodwill to the surviving partners though not to the legal representatives and, therefore, there is definitely passing of the deceased's share in the goodwill on the death of the deceased to the surviving partners.

9. We are inclined to accept the contention of the learned counsel for the revenue. It is true that in terms of Clause 14 of the partnership deed the legal representatives of a deceased partner were not entitled to claim any interest in the goodwill of the business and that they are specifically disentitled to claim any interest therein. But that is not to say that the deceased had no interest in the goodwill at the time of his death. Admittedly, the deceased was entitled to a 3/16ths share in all the assets of the firm including the goodwill of the firm so long as he was alive. Therefore, the fact that he had a 3/16ths share in the goodwill at the moment of his death cannot at all be disputed. It is also true/ during the subsistence of a partnership, no partner can claim to be entitled to a share in any particular asset or to hold any specific interest in any particular asset of the firm and as such the deceased in this case cannot, during his lifetime, claim a 3/16ths share in the goodwill which is one of the assets of the firm. But that is the legal position in respect of all the assets of the partnership. It is not in dispute that the deceased's 3/16ths share in the firm's other assets had been taken to be dutiable and the same has not been questioned by the accountable person. Why should there be a difference in respect of one asset alone? u/s 14 of the Partnership Act, property of the firm includes also the goodwill of the business. Section 29 of the Partnership Act contemplates the transfer of a partner's interest in a firm even during the continuance of the firm though the rights of the transferee of a partner's interest are in certain respects qualified. Clause 23 of the partnership deed dated April 22, 1954, also contemplates the transfer or assignment of a partner's share to the other partners. Thus, the reasoning of the Tribunal that no partner can claim to have a particular or definite share in the firm's assets runs counter to Clause 23 which recognises the right of a partner to assign or transfer his interest in the partnership. Once the deceased is found to have had an interest in the partnership at the time of his death, his interest in the partnership should be taken to be property passing on his death. One is not concerned with the question as to whom the property passes, or whether it is the legal representative of the deceased or the surviving partner who got the benefit. So long as some interest of the deceased in the partnership changes hands either by operation of law or by the terms of the partnership deed, it should be taken to be a passing on his death. Dymond's Death Duties, 14th edition, at page 57, quotes

the following observations of Lord Parker in *Attorney-General v. Milne*, [1914] AC 765; 2 EDC 8, 21 (HL).

"The expression "passing on the death" is.....evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this Section (s.1) it is absolutely immaterial to whom, or by virtue of what disposition, the property passes."

10. As pointed out by Lord Warrington in *Adamson v. Attorney-General*, [1933] AC 257 2 EDC 419 (HL) for the purpose of finding out whether there was any passing of property on the death of the deceased, it is irrelevant to consider the several interest of the persons beneficially entitled and the question is not to whom has the property passed, but the question is whether it has passed at all.

11. To find out whether there was passing of property of the deceased on his death, one has to ascertain whether the property has changed hands and, for that purpose, attention must be focussed upon a comparison between the persons beneficially interested in the property, the moment before the relevant death and the persons so interested the moment after his death and upon the question whether the death effected an alteration in rights. In this case, admittedly, the deceased had 3/16ths share in the partnership. It is also not in dispute that there was a goodwill for the business of the firm. The goodwill being an asset of the firm belonged to the firm, that means to all the partners. The death of Abdul Rahim Currimbhoy in this case has resulted in augmenting the interest of the surviving partners in the goodwill in view of Clause 14 of the partnership deed. Therefore, there is definitely a passing of the deceased's interest in the goodwill.

12. In *S. Devaraj Vs. Commissioner of Wealth-tax*, it was held by this court that the interest of a deceased in the goodwill of a managing agency firm had vested by operation of law and by the terms of the partnership deed in the accountable person and, on such vesting, the liability to estate duty in respect of that item stood attracted. In that case the deceased was at the time of his death a partner in a firm which was the managing agency of a mill having 3/16ths share in the profit and loss of the firm. The share of the deceased in the firm was valued at Rs. 66,000 which included a specified sum as value of the goodwill. It was contended for the accountable person before the Tribunal that the managing agency firm had no goodwill and that in any event the accountable person not having obtained any amount towards the value of the deceased's share in the goodwill of the firm, it should not be taken that there is passing of the interest in the goodwill. The Tribunal accepted both the contentions and held that the goodwill cannot be attached to the managing agency firm as the managing agency was covered by an agreement and was more of a personal nature and that, in any event, as no amount was actually paid to the accountable persons by way of the deceased's share in the goodwill of the business, no share in the goodwill passed to the accountable persons on the death of the deceased. This court held that the managing agency business had a goodwill and that Section 53

was attracted in that case as the interest of the deceased in the goodwill of the managing agency firm had vested by operation of law and by the terms of the partnership deed in the accountable persons and, therefore, the liability to estate duty arose.

13. In *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, the partnership deed contained the following clause:

" " This partnership shall not "be dissolved or determined by the death of any of the parties hereto but the same shall be continued as between the surviving partners on the same terms and conditions but with such shares as shall then be determined." "

14. Based on the above clause the surviving partner had contended that the goodwill being merely a right to the name, place of business and the reputation of the firm, the share of the deceased partner in the goodwill of the firm devolved only on the surviving partners and not upon the legal representatives of the deceased partner. While rejecting that contention the Supreme Court expressed :

" The goodwill of a business is however an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which made the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features. An agreement between the partners that the name, the place of business and the reputation of the firm are to be utilised by the surviving partners will not necessarily warrant an inference that it was intended that the heirs of the deceased partner will not be entitled to a share in the goodwill."

15. It is true, in that case, the share in the goodwill was taken to devolve on the legal representative. But even if there is no devolution of the deceased's interest in the goodwill on the legal representatives, but there is devolution only to the surviving partners, still the legal vesting of the goodwill as an asset of the firm on the surviving partners under Clause 14 of the partnership deed in this case should be taken to have changed hands and as such there was passing of the property on the death of the deceased.

16. The learned counsel for the accountable person relies on the decision of the Gujarat High Court in *Mrudula Nareshchandra Vs. Controller Estate of Duty*, in support of his submission that the share of a deceased partner in a goodwill cannot be included in the principal value of his estate. In that case the deceased was a partner in a firm. Clause 10 of the partnership deed provided that the firm shall not stand dissolved on the death of any of the partners and the partner dying shall have no right whatsoever in the goodwill of the firm. On the death of the deceased the Assistant Controller of Estate Duty while valuing the estate of the deceased came to the conclusion that the share of the deceased in the goodwill of the firm in which he was a partner was liable to be included in the

principal value of his estate. The question arose as to whether the value of the goodwill could be taken into account while arriving at the principal value of the estate of the deceased. The court held that, though the interest of the deceased in the firm was property within the meaning of the Estate Duty Act, still in view of Clause 10 of the partnership deed the interest of the deceased in the goodwill ceased or came to an end on his death resulting in fresh rights accruing in favour of the surviving partners who did not derive their interest as the representative of the deceased, and, therefore, it cannot be said that the property passed within the meaning of Section 5. According to the learned judges in that case, what happened on death was that by virtue of Clause 10 the interest of the deceased in the firm's goodwill ceased without being inherited by his heirs, that the rights in the goodwill have, therefore, lost its continuity, identity and mobility and, therefore, it cannot be treated as passing of property from one person to another as contemplated by Section 5. With respect, we are not inclined to agree with the reasoning of the learned judges in that case. It has been pointed out by the Supreme Court in *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, that the Partnership Act does not operate to extinguish the right in the assets of the firm of a partner who dies when the partnership agreement provides that on death the partnership is to continue. Therefore, it cannot be successfully contended that the interest of the partner in the assets of the partnership including the goodwill of the firm is extinguished on his death. Therefore, the interest in the goodwill which the deceased possessed and could dispose of along with his entire interest in the firm at the time of his death came to devolve on the surviving partners and their share in the interest of the goodwill is augmented to the extent of the share of the deceased as per Clause 14 of the partnership deed. This will straightaway attract Section 5 of the Act. We have to, therefore, hold that there was in fact passing of property on the death of the deceased so as to attract Section 5. Question No. 1 is, therefore, answered in favour of the revenue.

17. The result is, both the questions referred are answered in favour of the revenue. The revenue will be entitled to its costs. Counsel's fee Rs. 250.