

(1982) 08 CAL CK 0030
In the Calcutta High Court
Case No : Matter No. 90 of 1971

Controller of Estate Duty

APPELLANT

Vs

Purushottamdas Bangur

RESPONDENT

Date of Decision : 24-08-1982

Acts Referred:

Estate Duty Act, 1953 — Section 36, 5

Citation : (1984) 146 ITR 44

Hon'ble Judges : Suhas Chandra Sen, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : Ajit Kr. Sengupta and Ram Chandra Prosad, for the Appellant; D. Pal, R.N. Murarka and A.K. Dey, for the Respondent

Judgement

sabyasachi Mukharji, J.—In this reference u/s 64(3) of the E.D. Act, 1953, the following question has been referred to this court:

"Whether, on the facts and in the circumstances, of the case, and on a proper construction of the partnership deed dated the twenty-second day of April, one thousand nine hundred and forty-six, the Tribunal was right in holding that the value of the deceased's share in the assets of the firm constituted under the said deed should be estimated in accordance with the provisions of the said partnership deed and should not be estimated to be the price which it would fetch if sold in the open market at the time of the deceased's death ?"

2. The estate duty proceedings arose, consequent on the demise of one Sri Narayandas Bangur, on 23rd July, 1955. Sri Bangur was a partner along with four others in a firm called Mugneeram Bangur & Co. This firm was constituted under a partnership deed dated 22nd April, 1946. According to the deed Narayandas Bangur had, 1/53 portion of share in the firm. Narayandas Bangur left behind him two sons, Sri Bengu Gopal Bangur and Sri Purushottamdas Bangur. These two persons were the accountable persons in the estate duty proceedings. They submitted a return of estate duty valuing the interest of Narayandas Bangur in the firm at Rs. 15,86,089. The valuation was made by the accountable persons

with reference to Clause 6 and 12 of the partnership deed, that is, by taking into account the immovable and movable assets of the firm at cost. The value taken of immovable assets was Rs. 57,87,710. The Assistant Controller considered that the market value of such assets would be Rs. 1,09,62,010. He adopted such value for computing the interest of Narayandas Bangur which passed on his death, and the resultant adjustment about an increase in the assessment of the principal value of the estate by Rs. 10,73,911. Before the Asst. Controller the accountable persons relied on the provisions of the partnership deed as containing restrictions regarding the valuation and contended that the estate duty had to be valued on the basis of the said provisions. The Asst. Controller rejected this contention and held that the terms of the partnership deed did not bind the Revenue. The Asst. Controller observed in his order as follows :

"The value of the deceased's share in movable and immovable property as a partner in a firm shall be estimated to be the price which it would fetch if sold in the open market and not in accordance with the partnership deed. It is certain that if his share had been sold on the date of death to any stranger in the open market he would not have realised from the purchaser the value with reference to the partnership deed only. In view of the partnership agreement the value to the extent as may be ascertained as per partnership deed, if any (may pass), to the legal representatives under certain circumstances but the excess over the said value will pass to the surviving partners. But it is immaterial to whom how much passes. The value of the interest of the deceased passing on his death has, therefore, been rightly taken by me by revaluing the immovables. "

3. The accountable persons appealed to the Appellate CED and it was contended before him that the terms of the partnership covered the nature as well as the extent of the interest of the deceased in the partnership firm. The Appellate Controller, however, was of the view that the only method of valuing the interest of the deceased was in accordance with Clauses 6 and 12 of the partnership deed.

4. Reference was also made before him to the fact that Purushottamdas Bangur did not join the firm having given up his right to do so by his letter dated 4th August, 1955. He was paid only the appropriate share due to him as a result of the accounts being made in accordance with Clauses 6 and 12 of the partnership deed. The Appellate Controller was of the opinion that it was neither proper nor permissible to ignore the express provisions of the partnership which governed the right and interest of the deceased in the partnership business and that the valuation of the shares on the basis of the dissolution of the firm was not possible. As there was to be no dissolution of the firm in the event of the death of any of the partners, according to him, the valuation of the partnership business as a going concern was out of question. In the circumstances, the only method of valuing the interest of the deceased was, in his view, in accordance with Clauses 6 and 12 of the partnership deed. He directed the Asst. Controller to make the valuation accordingly. It may be necessary at this stage to refer to the partnership deed which is dated 22nd April, 1946, between the contracting

parties. After reciting several clauses and distributing the shares to the parties the Partnership deed provides as follows :

"That at the end of each accounting year even in the case of death or retirement of a partner in the said accounting year as stipulated in clauses No. 12 and 13, respectively, the stock-in-trade shall, as usual, be valued at the market rate and the properties, investments and other assets shall, as usual, be valued at cost."

5. It further provides at Clauses 11, 12 and 13, which are as follows:

"11. That none of the parties hereto shall be entitled to sell, transfer, assign or mortgage his share in the firm to anybody except with the consent of all the other co-partners.

12. That in the event of death of the parties hereto the firm shall not stand dissolved but shall continue to be carried on by the surviving partners together with the legal representative or representatives of the deceased partner unless any of the said legal representatives should express his or their unwillingness to enter into the partnership or the surviving partner should consider "him or them as undesirable element and in such cases the said legal representative or representatives of the deceased partner shall be entitled to be paid off from the assets of the partnership the amounts standing to the credit of the said deceased partner together with his share in joint capital account, if any, increased or decreased by the share of the profits or losses of the said deceased partner up to the date of his death as determined proportionately on time basis at the end of the accounting year in which the death of the said partner took place. The partnership, thereafter, shall continue with the surviving partners under the same name and style.

That in case any of the parties hereto may desire or intend to retire from the partnership he shall be entitled to do so after giving in writing clear thirty days" notice to all the other parties hereto and in such case the said partner shall cease to be partner on expiry of the said thirty days and the said retiring partner or his executors or administrators or assigns or legal representatives shall be paid off from the assets of the partnership the amounts standing to the credit of the said retiring partner together with his shares in the joint capital accounts, if any, increased or decreased by the share of profits or losses of the said retiring partner up to the date of his retirement as determined proportionately on time basis at the end of the accounting year in which the said partner retired. The partnership, thereafter, shall continue with the remaining partners under the same name and style ".

6. The Revenue went up in appeal against the order of the Appellate Controller. It was alleged on behalf of the Revenue that the provisions of the partnership deed had no effect on the question of valuation for purposes of estate duty and that the valuation was of the right of the deceased in the partnership assets irrespective of what was provided in the deed. According to the Revenue, what Narayandas Bangur could have got on dissolution of the partnership was the real

value and the crediting of the amount to one of the sons of the deceased in accordance with the valuation envisaged in the partnership deed was irrelevant. On behalf of the accountable persons it was submitted that the firm was to continue notwithstanding the death of a partner, that no abstract concept of a legal right in the deceased or his representative entered into the issue and that what was necessary was to look into only what Narayandas Bangur during his lifetime could have got if he chose to retire from the firm or what his representative would get in accordance with the clauses of the partnership deed. In substance his submission was that the clauses of the partnership deed bound not only the deceased but his successors also and the Revenue could not put itself in a position higher than that of the deceased or his successors. In support of the Revenue's submission reliance was placed on the decision of the Australian High Court in *Perpetual Executors and Trustees Association of Australia Ltd. v. Federal Commissioner of Taxation* 94 CLR 1. It was held that that case fully governed the present controversy. The two Members constituting the Bench were agreed on the conclusion. While the Judicial Member considered that Clause 6 of the partnership deed was not relevant for the present purpose, the Accountant Member took a different view. The result of applying the relevant decisions bearing on the point was to hold that Section 5 of the E.D. Act applied and that the valuation would have to be in accordance with the provisions of the partnership deed. It was held that the two Clauses 12 and 13 were complementary, one applying during the lifetime of the partner and the other after his death. If Narayandas could not have got any credit for the difference between the cost and the market value under Clause 13 and if his estate could not get more than what was due under Clause 12 then, in the view of the Tribunal, it would be too much to expect a person to offer to purchase the interest of the deceased in the partnership at a higher figure. After referring to Section 36 of the E.D. Act, the Tribunal was of the view that it was not possible to ignore the rights available to the deceased in the property which was sought to be taxed and if the extent of the right was regulated in a certain manner it would not be possible to extricate oneself from such restrictions and proceed on a hypothetical basis of absence of any restriction. The Tribunal, therefore, confirmed the conclusion of the Appellate Controller.

7. Thereafter, the question as mentioned hereinbefore has been referred to this court. In order to understand the controversy it is necessary, therefore, to examine how the obligation in the facts and circumstances of the case to assess the duty and pay the duty on the death of the deceased in the instant case arose. Section 5 of the E.D. Act stipulates levy of estate duty in the following terms :

"(1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the territories which immediately before the 1st November, 1956, were comprised in the States specified in the

First Schedule to this Act, and in the Union Territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with Section 35."

8. Section 7 of the said Act stipulates interest ceasing on death in the following terms:

"(1) Subject to the provisions of this section, property in which the deceased, or any other person had an interest ceasing on the death of the deceased, shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law."

9. Section 36, to which reference may instantly be made while dealing with the section, deals with the problem how the principal value was to be estimated. Sub-section (1) of Section 36 stipulates that the principal value of any property should be estimated to be the price which, in the opinion of the Controller, it would fetch if sold, in the open market at the time of the deceased's death. Sub-section (2) stipulates that in estimating the principal value under this section the Controller should fix the price of the property according to the market price at the time of the deceased's death and should not make any reduction in the estimate on account of the estimate being made on the assumption that the whole property was to be placed on the market at one and the same time: provided that where it was proved to the satisfaction of the Controller that the value of the property had depreciated by reason of the death of the deceased, the depreciation should be taken into account in fixing the price. Section 37 which is a special section deals with the valuation of shares in a private company where alienation was restricted. We are not directly concerned with Section 37 because we are not concerned with the problem of shares of a private company. Section 40, which, in our opinion, is not relevant for our purpose to which also our attention was drawn, deals with the valuation of benefits from interests ceasing on death. Before we embark upon the controversy for the present purpose it must be mentioned that in this case the Tribunal has specifically held on the authority of the decision of the Privy Council that Section 7 would not apply in the instant case." There is no question challenging that finding of the Tribunal. Therefore, we need not enter into the controversy in the facts and circumstances of the case, in view of the question referred to us and in view of the specific finding of the Tribunal whether Section 7 would at all be applicable to the problem before us, and if so how it should be applied. We are making this observation in view of the fact that certain decisions were referred before us where this controversy arose and the courts have dealt with the controversy in the context in which the controversy arose. Then there is another fact or which has to be borne in mind and that in this case the accountable persons are the heirs of the deceased and not any one of the partners of the firm as such.

Therefore, that is a factor which has also to be borne in mind in view of certain decisions to which our attention was drawn, Looking at the construction of sections it appears to us that applying the principles of Section 5 we must first bear in mind in a case of this nature what passes on the death of the deceased, i.e., what was the property and what were the contents of the property which the deceased had which passed on his death. The second aspect is that the property has to be valued. In this case also there is no dispute that the principle of valuation in view of Section 36 has to be the market value of the property. But it has to be borne in mind that the market value of the property must be of the property that passes, i.e., the property in respect of which the deceased had a disposing right because he could not on his death pass anything higher than what he had possessed at the time of his death. Therefore, it is necessary to determine first the contents of his property or his rights and then to find out how it should be valued. Now in this case we have said that the assessee was a partner in the firm and his share was subject to the conditions under Clauses 11, 12 and 13 which we have set out in extenso hereinbefore. It appears to us, in this case, that Clauses 12 and 13 are complementary, one applying during the lifetime of a partner and the second on his death. If the deceased partner, Naraindas, during his lifetime could not have got any credit for the difference between the cost and market value under Clause 13 and if his estate could not get more than what was due under Clause 12, then it would be too much to expect a person to offer to purchase the interest of the-deceased in the partnership at a higher figure. Section 36 of the Act provides for the principal value of any property and in that view of the matter in the background of the relevant sections, in our opinion, the appropriate approach should be to value the property on the basis of the market price.

10. It may now be appropriate, in this context, to refer to the observation of Mc Tiernan J. in the decision of the Australian High Court, 94 CLR 1, 16. In our view it would be appropriate for us to quote the said observation of the learned judge which is as follows:

"The property consisting of that share and interest was a bundle of rights in the partnership assets. To give effect to the declaration of the Judicial Committee the property must be valued on the basis that it includes the share and interest of Thomas in the goodwill, and this element is not to be severed. The property to be valued existed under the articles of partnership. It must be valued with all the conditions including the restrictions attached to it by the articles."

11. His Lordship was referring to the aforesaid passage in the judgment of the Privy. Council which had remanded the case to the Australian High Court for a determination of the valuation, the Privy Council determining the principle. We would briefly refer to that decision presently. But before we do so we must observe that the conclusion which we are arriving at is in consonance with the decision of the Australian High Court in the case of Perpetual Executors and Trustees Association of Australia Ltd, v. Federal Commissioner of Taxation, 94

CLR 1. Dixon C.J., in that case, also observed at page 15 of the said judgment as follows :

"It is a right in respect of assets but it is a right, or a congeries of rights, growing out of the partnership articles. Thomas's interest was delimited and described by the provisions of the deed of partnership and the "value" of the interest as at his death or indeed at any other time must depend upon the measure of enjoyment those provisions allow and the extent to which the share or interest may be expressed in or converted into money. The provisions which control the value of the interest at death or those which confer on the surviving partners a right to take over the whole interest for a sum computed under the terms of the deed. They are provisions which describe and characterize the interest as much as any other. They go to the essential nature of the interest. If at the date of death there was any uncertainty as to the exercise of these rights, no doubt their existence would not be decisive. It would be a factor, a powerful factor no doubt, but not more. But we know that there was never antecedently any such doubt. What the interest was worth to the deceased immediately before his death or to his "estate" or executors immediately after his death, therefore, depended on calculation only. For it was then certain that the options would be exercised. The result is that for the entire share including goodwill there could not reasonably be any greater value in the interest of Thomas in the partnership at his death than the price obtainable from his partners, that is to say, ? 156.254. That is its value for the purpose of estate duty. This conclusion no doubt expresses a proposition of fact rather than of law. But it seems to me to be so evident a result that in answer to the first question it may safely be said that it is not open to find a larger value."

12. As we mentioned before, the said decision came up before the Australian High Court as a result of the remand by the Privy Council of the case of *Perpetual Executors and Trustees Association of Australia Ltd. v. Commissioner of Taxes of the Commonwealth of Australia* [1954] 25 ITR 47. In that case the principal asset of a testator was his interest in a partnership pursuant to a deed of partnership which, inter alia, conferred options on the surviving partners to purchase the testator's share in the capital on his death and further provided that in computing the amount of purchase money payable on the exercise of any option no sum should be added or taken into account for goodwill. After the testator's death in 1944 the partners who survived him duly exercised the options conferred on them and the purchase price was ascertained in accordance with the provisions of the deed, no sum being added or taken into account for goodwill. The executors of the testator's will in their statement of the testator's estate gave as the value of the, testator's interest in the partnership the price at which, pursuant to the deed, they were obliged to sell it to the surviving partners. Thereafter the Commissioner of Taxes apparently founding on the *Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation* (Milne's case) [1944] 69 CLR 270, made an assessment which included the additional item "proportion of goodwill" in the partnership, ? 20,000 on the

ground that within the meaning of Section 8(4)(e) of the E.D. Assessment Act the testator had a beneficial interest in the property (the goodwill) at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person and was "deemed to be part of" his estate in which it was held that the whole of the testator's interest in the partnership property, including the goodwill, was assessable to duty as being "personal property" within Section 8(3)(b) of the Act, which provided that "for the purposes of this Act the estate of a deceased person comprises... his personal property wherever situated...if the deceased was, at the time of his death, domiciled in Australia". Being so assessable, necessarily followed that that interest could not be assessable u/s 8(4)(e), which was concerned only with property not actually assessable as part of the estate falling within Section 8(3) but which was to be deemed to form part of his estate. It was held that the Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation (Milne's case) [1944] 69 CLR 270, was wrongly decided. It was further observed that the observation of Hamilton J. in Attorney General v. Boden [1912] 1 KB 539, 556; 1 EDC 566 (KB), to the effect that where a partnership deed provided that no allowance for goodwill should be made to a partner or his estate on his death his interest in the goodwill did not pass on his death, was dissented from. In such a case as that the deceased partner's interest in the goodwill passed with his interest in the other assets to his legal personal representative, and the fact that its value was not to be taken into account in calculating the price receivable by the estate for his interest in the partnership was irrelevant.

13. Lord Cohen, delivering the judgment in the Privy Council, observed about Milne's case, referred to hereinbefore, when the present case came up before their Lordships, as follows (pp. 57-60 of 25 ITR (ED)):

"When the case came before their Lordships, Mr. Cross attacked the reasoning of the majority in Milne's case [1944] 69 CLR 270, but he did not seek to defend the reasoning of the minority. He argued that Mr. Thomas's interest in the goodwill was only part of his interest in the partnership assets and that the whole of such interest was part of the personal property forming part of Mr. Thomas's estate and fell within Section 8(3)(b). Mr. Pascoe Hayward, for the respondent, did not seek to support that part of the majority in Milne's case, which was based on a severance between the deceased's interest in goodwill and his interest in the other partnership assets. See, e.g., where Starke J. said : " The question whether the commissioner was right in so including the value of the goodwill in his assessment depends upon several provisions of the Estate Duty Assessment Act. By Section 8(3)(b) the estate of a deceased person comprises, inter alia, his personal property if the deceased was at the time of his death domiciled in Australia. No doubt the partnership interest of the deceased was part of his estate, yet that interest did not include goodwill, for the partnership deed itself expressly provided that no allowance should be made to the deceased or his representatives in respect of the value of the goodwill of the business.

Mr. Pascoe Hayward argued that the whole of the deceased's interest in the partnership assets, including goodwill, fell to be assessed u/s 8(4)(e). Their Lordships' reasons for rejecting this argument will appear sufficiently from the reasons which their Lordships will now proceed to give for thinking that Milne's case [1944] 69 CLR 270, was wrongly decided. In Milne's case three questions were submitted for the opinion of the Full Court, the first and third of which were as follows :--"(1) Whether the dutiable estate of the testator included any and if any what interest in the goodwill of the said partnership. (3) Whether the testator had at the time of his death any beneficial interest in the said goodwill which by virtue of the said indenture of partnership passed or accrued on or after his death or devolved on or after his death on any of the said surviving partners of the said firm of Sanderson & Co."

It is clear from the judgments that the Full Court treated the first question as asking whether the interest of the deceased in goodwill was dutiable u/s 8(3). All the judges answered question 1 in the negative except Rich J., who found it unnecessary to answer the question. The majority answered question 3 in the affirmative. It is clear from their judgments that all the judges, with the possible exception of Rich J., proceeded on the basis that the deceased's estate never became entitled to a share in the value of the goodwill and that the majority regarded the deceased's share in goodwill as something severable from his interest in the other assets of the partnership and passing or accruing to another person u/s 8(4)(e). Their Lordships are unable to accept either of these propositions. In their Lordships' opinion the interest of Milne in all the partnership assets, including goodwill, vested in his administrator on his death, although his executors would be bound, if the option were exercised, to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed. For this reason their Lordships accept the alternative proposition advanced by Mr. Pascoe Hayward, with which Mr. Cross did not quarrel, that the whole of the deceased's interest in the partnership property, including goodwill, was assessable to duty u/s 8(3)(b). Being so assessable, it necessarily follows that that interest cannot be assessable u/s 8(4), which deals only with property not actually assessable as part of the estate falling within Section 8(3) but which is to be deemed to form a part of the estate.

This conclusion is sufficient to dispose of the matter so far as the respondent's case rests on Section 8(4)(e), but their Lordships feel bound to add that they feel grave doubt whether considering only the language of Section 8(4)(e) the respondent can bring the facts of this case within it. To do so he must rely on the exercise of the option, for it is plain that if it is not exercised, Section 8(4)(e) will have no application. That option under Clause 9 of the partnership deed is to be deemed to have been given by the legal personal representatives of Mr. Thomas, and on its being exercised there comes into being a contract of sale between them and the option holders. Such a transaction seems to their Lordships somewhat remote from a transaction of the kind which the language of Section 8(4)(e) appears to contemplate.

In Milne's case [1944] 69 CLR 270, Latham C.J., one of the minority, relied on the decision of Hamilton J. (as he then was) in Attorney-General v. Boden [1912] 1 KB 539 ; 1 EDC 566 (KB), for the proposition that where a partnership deed provides that no allowance for goodwill should be made to a partner of his estate upon his death his interest in the goodwill did not pass upon his death.

In Attorney-General v. Boden, the deceased had carried on business in partnership with his sons under a deed which contained a provision that on his death his share was to accrue to his sons in equal shares subject only to their paying out to his representatives the value of his share as at the date of his death ascertained by proper valuation without any valuation of or allowance for goodwill. The Crown claimed duty u/s 2(1)(b) of the Finance Act, 1894, on the footing that the deceased's interest in goodwill was property in which the deceased had an interest ceasing on the death of the deceased. The defendant claimed that the share in goodwill passed on the death of the deceased u/s 1 of the Finance Act, 1894, and, therefore, could not fall within the ambit of Section 2 in view of the decision of the House of Lords in Earl Cowley v. IRC [1899] AC 198; 1 EDC 193 (HL). They submitted, however, that it was really unnecessary to decide this point since the transaction between the father and his sons fell within the ambit of Section 3(1) of the Act, which exempts from duty property passing on the death of a deceased by reason only of a bona fide purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit. Hamilton J. upheld this submission. His decision on this point would have been sufficient to dispose of the case, but he also dealt with the other point which he described (see p. 555) as a minor point [1912] 1 KB 539. On this he came to the conclusion that the case fell within Section 2(1)(b) and not within Section 1. Their Lordships are unable to agree with this view. In their opinion the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative, and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant."

14. Then His Lordship discussed the decision in the case of Attorney-General v. Boden [1912] 1 KB 539; 1 EDC 566 (KB), referred to hereinbefore and noted the submissions made by the learned counsel appearing on behalf of the respondent by Mr. Pascoe Hayward. In order to appreciate the submissions, it would be relevant to refer to the arguments made by Mr. Pascoe Hayward which are appearing at pp. 60-62 of the decision as follows;

"Mr. Pascoe Hayward, however, submitted that even if their Lordships came to the conclusion they have indicated, their Lordships ought to dismiss the appeal either (a) on the ground that the record of the hearing before Williams J. indicated an agreement that if the share in-goodwill formed part of the assessable estate [and their Lordships have indicated that it is assessable property u/s 8(3)], its value was agreed at ? 20,000 ; and (b) on the ground that

the contention advanced by Mr. Cross which their Lordships consider well founded, viz., that the share in goodwill was assessable only u/s 8(3), was not open to the appellant as it was not to be found either in the reasons in their case or in their notice of objection.

So far as the first of these points is concerned, Mr. Pascoe Hayward himself said that there are three possible views as to the ambit of the argument : (1) that the parties were envisaging that Mr. Thomas's share in the goodwill was assessable u/s 8(4) but his interest in the other assets was assessable u/s 8(3), in which event the agreed value would not apply if his share in all the assets were assessable u/s 8(3); (2) that the agreed value was to apply if the deceased's share in all the assets including goodwill fell within Section 8(4)(e) ; (3) that the agreed value was binding no matter under which sub-section the deceased's share in the assets fell to be assessed.

Seeing that the parties were obviously dealing with the matter on the footing that the issue would depend on whether the majority or the minority view in Milne's case [1944] 69 CLR 270, was to prevail, the first of these alternatives seems the most probable, but their Lordships were informed that there was some correspondence relating to the agreement which was not available to their Lordships. In these circumstances their Lordships are not prepared to say more than that it would obviously be improper for them to hold that the appellants are precluded by the agreement from succeeding on this appeal.

On the second point their Lordships need not spend any time in examining the appellant's case, for their Lordships are satisfied that if the contention advanced by Mr. Cross was within the ambit of the notice of objection, it is sufficiently covered by their third reason, to which their Lordships have already referred. If, however, it was not within this notice of objection a question of jurisdiction would arise since Section 27(3) of the Estate Duty Assessment Act, 1914-42, limits the objector to grounds stated in his objection. Had the appellant confined his notice of objection to stating as his ground that (see paragraph 25 of the notice of objection), the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to Section 8(4)(e)" there could have been no doubt but that the appellant was entitled to argue that it could not be deemed to be part of the estate u/s 8(4)(e) because it was actually part of the estate u/s 8(3). Mr. Pascoe Hayward submits that the appellant is deprived of his right to present this argument because," as he says, the preceding paragraphs show that paragraph 25 was not directed to this point. Their Lordships, however, think that the necessary foundation for the argument is to be found in paragraphs 23, 24 and 25 when read together, and must therefore refuse to dismiss the appeal on the ground that the argument falls outside the grounds stated in the objection.

Mr. Cross invited their Lordships, if they reached this conclusion, to allow the appeal and amend the assessment by striking out the ? 20,000 added u/s 8(4) (e) in respect of the deceased's proportion of the goodwill of Maples. Their

Lordships are not prepared to adopt this course, which would mean that the respondent could only claim duty in respect of this item u/s 8(3) if he could make a new assessment. Their Lordships do not know whether this would be possible or not and do not find it necessary to investigate the possibility. The appellant has succeeded only on a ground which was not argued either before Williams J. or before the Full Court. In these circumstances, their Lordships consider that the proper course to adopt is to declare that the deceased's interest in the goodwill, as in the other assets of the partnership, is part of the testator's estate within Section 8(3) and is not to be deemed to be part thereof u/s 8(4) and to remit the matter to the High Court to make such order as the High Court may think fit on the footing of this declaration. This order will enable the parties to advance before the High Court such arguments as they may think proper having regard to that declaration. In particular, but without restricting in any way the generality of the arguments, (1) it will enable the respondent to allege that the agreement referred to on p. 17 of the record binds the appellant to accept the figure of ₹20,000 as the value of the deceased's interest in the goodwill under whatever sub-section it is held to form part of the assessable estate; (2) it will enable the appellant to allege (a) that the respondent is bound by the valuation made pursuant to the partnership deed which represents the utmost the estate can ever receive ; alternatively, (b) that if it is open to the respondent to go behind the figure thus ascertained, the existence of the option must be taken into account in arriving at the value of Mr. Thomas's interest in the partnership assets. Both these points were raised before their Lordships, but in view of the advice which their Lordships propose to tender to Her Majesty, their Lordships express no opinion thereon.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and set aside the orders of Williams J. and of the Full Court and to declare that the share and interest of the late Frederick Charles Henry Thomas in the assets of the firm or partnership carried on under the name or style of " Maples ", including the goodwill thereof, was part of his estate within Sub-section (3) of Section 8 of the Estate Duty Assessment Act, 1914-42, and that no part of such share or interest is to be deemed to be part of his said estate under Sub-section (4) of the said section, and to refer this matter back to the High Court of Australia to reconsider the objection of the appellant to the assessment made by the respondent in the light of the declaration aforesaid and in particular, but without prejudice to the generality of the foregoing, to determine (a) whether any binding agreement has been made between the appellant and the respondent which fixed the value of the said share and interest of the said Frederick Charles Henry Thomas in the business and assets of the said firm, including the goodwill thereof, and if not, (b) what value ought to be placed thereon u/s 8(1) of the said Act having regard to all relevant circumstances."

15. It is in this background, the decision of the Australian High Court has to be understood. Chief Justice Cohen at p. 13 of the Commonwealth Law Reports dealing with the interest of the partnership on demise, had observed as follows :

"The conclusion that Thomas's interest in the assets of the partnership including goodwill passed to the executors and fell within Sub-section (3) of Section 8 as his personal property at the time of his death, left no question outstanding but the value to be attached to the interest for the purpose of duty. The Commissioner does not appear to have contested the view that the price receivable from the surviving partners exercising the option represented the value of the nineteen and a half per cent." interest of the deceased in the partnership assets, if the value of the share of goodwill was not to be reflected in the total. According to the report Mr. J.K. Stamp put the case for the executors as it resulted from the application of Sub-section (3) of Section 8 as follows :

"There is no justification for attributing to the estate a value greater than it can possibly derive from the assets ; the estate is the aggregation of rights associated with obligations that cannot be severed from it, and those rights and obligations can only bring it in this case, and cases like it, the purchase price. This is quite plainly a Section 8(3)(b) case. The purchase price should be taxed; that is fair for everyone, is realistic, and conforms with the facts of the case. The purchase price is treated as substituted for the asset sold, which includes the goodwill and that is all that really comes into the estate of the deceased."

Their Lordships, however, did not pronounce upon this argument. One reason, it seems, for not doing so was that some uncertainty existed as to the scope of an agreement made between the parties at the hearing here in the original jurisdiction whereby the value of goodwill was fixed at ? 20,000, if it was to be included. It was urged for the commissioner that the agreement covered the case of liability under Sub-section (3) and was not confined to liability under Sub-section (4) or in other words, under the decision in Milne's case [1944] 69 CLR 270 (Australia). Unfortunately the uncertainty as to the scope of the agreement could not be resolved at the time, although now the parties concur that no agreement had been made between them as to the value of the deceased's share of the goodwill of the partnership in so far as such value is not material to the appeal.

For this and other reasons their Lordships' report did not go beyond deciding that the appeal to the Queen in Council ought to be allowed and that a declaration ought to be made that the share and interest of Thomas in the assets of the partnership including the goodwill was part of the estate within Sub-section (3) of Section 8 and that no part of such share or interest is to be deemed to be part of his estate under Sub-section (4).

For the rest, the matter was referred back to this court to reconsider the objection of the executors to the assessment in the light of this declaration and in particular (If, as is the case, the agreement already mentioned is found not to be binding for present purposes) to consider what value ought to be placed upon the share and interest of Thomas including goodwill."

16. The conclusion which we have reached, in our opinion, is in consonance with

both the principles laid down by the Privy Council as well as by the Australian High Court. The other decisions to which our attention was drawn, in the facts and circumstances of this case, as we have noted, and in the background of the question which we have to decide are not very much relevant and material. Our attention was drawn to Section 42 of the Partnership Act as well as to Section 48 of the said Act, which lay down certain provisions applicable to the partnership and the partners, subject of course, to the contract between the parties and it was highlighted that, in this case, the contract between the parties limited the interest of the deceased in the partnership and the value should be depreciated to that extent. On the other hand, our attention was drawn to Dymond's Death Duties, 14th Edn., at pp. 779-782, which deals with the position at the relevant time. We may note that in the next edition (namely, 15th) this observation has been deleted. Similarly, our attention was drawn to Balsbury's Laws of England, 3rd Edn., Article 8, in aid of the proposition that the value of the interest of a partner was irrelevant. These observations must be understood in the context in which the observations were made.

17. Our attention was also drawn to the decision in the case of Surajmall Gouti Vs. Controller of Estate Duty, , as well as to another decision of this High Court in the case of Controller of Estate Duty Vs. John Gregory Apar and Another, . But, in view of the peculiar facts and circumstances of this case and in view of the limited question posed before us, it is not necessary to embark on an examination of the details of these decisions. Similarly, reference was made to the decision of the Gauhati High Court in the case of Controller of Estate Duty Vs. Kanta Devi Taneja and Laxmi Devi Taneja, . In our opinion, in the facts and circumstances of this case, it is not necessary to examine the details of this decision. Our attention was also drawn to the decision in the case of Controller of Estate Duty, Bombay City-I Vs. Fakirchand Fatehchand Sachdev, . In the view, we have taken it is also not necessary to discuss this decision in detail.

18. Learned advocate for the Revenue drew our attention to the decision of the House of Lords in the case of Christie v. Lord Advocate [1936] AC 569; 2 EDC 529. There also the controversy arose, in our opinion, under a different context. Therefore, it is not necessary to examine the said decision in detail. In our opinion, similar is the position in the case of IRC v. Ethel Maclean Crossman [1937] AC 26 ; 2 EDC 537, to which our attention was drawn.

19. In the aforesaid view of the matter, in the facts and circumstances of the case, in our opinion, what passed on the death of Narayandas Bangur, deceased herein, was his interest in the partnership hedged in as it was and on condition as it was with the limitation imposed by the terms of the partnership including Clauses 11, 12 and 13, as we have set out hereinbefore. But that by itself will not conclude the matter. These are the factors to be taken into consideration but the valuation must be made u/s 36 which provides for the principal value of any property being estimated to be the price which, in the opinion of the Appellate Controller, it would fetch in the open market. It is true that in the open market it

may or may not fetch the higher price but the valuation must be made for the principal value after taking into consideration this fact. So, the Tribunal was right to this extent that this factor could not be ignored for the purpose of making the valuation but the Tribunal, in our opinion, was not correct in saying that this actual term of the partnership would be only conclusive and the price would only be known as to what it would fetch, in the open market. We would, therefore, answer the question referred to us by saying that on the facts and in the circumstances of the case and on a proper construction of the partnership deed dated the twenty-second day of April, One thousand nine hundred and forty-six, the value of the deceased's share in the assets of the firm constituted under the said deed, in view of the provisions of the partnership deed, should be estimated with this condition as to what it would fetch in the open market. We would, therefore, answer the question accordingly, and remand the matter to the Tribunal.

20. The parties will pay and bear their own costs.

Suhas Chandra Sen, J.

21. I agree.