
(2004) 07 BOM CK 0026

In the Bombay High Court

Case No : First Appeal No. 214 of 1986 (with Cross-objection)

Mrs. Sujan Suresh Sawant

APPELLANT

Vs

Dr. Kamlakant Shantaram Desa

RESPONDENT

Date of Decision : 22-07-2004

Acts Referred:

Contract Act, 1872 — Section 55, 55(1)
Partnership Act, 1932 — Section 14, 15

Citation : AIR 2004 Bom 446 : (2005) 1 ALLMR 397 : (2005) 1 BomCR 763 :
(2005) 2 RCR(Civil) 609

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : C.R. Dalvi and R.G. Ketkar, for the Appellant; M.K. Nesari, for the Respondent

Judgement

V.C. Daga, J.—This appeal arises from a suit filed by appellant-Mrs. Sujan Suresh Sawant ("the plaintiff" for short) against the respondent - Dr. Kamlakant Shantaram Desai ("the defendant" for short), to seek dissolution and accounts of the partnership firm run under the name and style, "Dr. Desai's Late Dr. Navalkar Memorial Maternity and General Hospital", Dadar, Mumbai.

The Facts:

Summary of the facts giving rise to the present litigation is as follows:

2. One Dr. V.N. Navalkar during his life time was running his own Nursing and Maternity hospital known as "Radhabai Nursing Home" in the building known as "Nana Nivas", 813 183AB, Baburao Parulekar Marg, off Gokhale Road (South), Dadar, Bombay-28.

3. Dr. V.N. Navalkar died intestate on 1st August 1976 leaving behind his brother Shri Sitaram N. Navalkar as his sole legal heir entitled to inherit his estate.

4. Shri Sitaram Navalkar, being a retired person, not acquainted with the

discipline of medicine, had no experience of running hospital and maternity home. He, therefore, in order to perpetuate the memory of his brother late Dr. V.N. Navalkar, entered into agreement with one Shri (Dr.) Kamlakant Desai on mutually settled terms and conditions. He, under the agreement handed over running hospital to Dr. Desai. He thus, permitted Dr. Desai to run and manage the hospital in question. The terms and conditions thereof which were settled between the parties were reduced to writing in the form of agreement styled as Conducting Agreement dated 20th December, 1976.

5. Dr. Desai, after running the aforesaid hospital for sometime, entered into partnership with Mrs. Sujan Suresh Sawant, plaintiff - appellant herein; wife of one of his close friends, and Dr. Ramchandra Nerkar. Dr. Desai under deed of partnership dated 28th July, 1978 agreed to make available benefits of the conduction agreement dated 20th December, 1976 to the partnership firm without any reservation and consideration. royalty which was payable under the conducting agreement was agreed to be paid from the funds of the partnership firm, with effect from 1st December, 1978 onwards. The relevant Clause 11 with respect to this conditions reads as under

"It is specifically agreed that the benefits of the agreement dated 20th December 1976 between Mr. S.N. Navalkar and Dr. K.S. Desai and any extension thereof shall be made available to this partnership firm by the party of the first part without any reservation and consideration and the royalty payable under the above said agreement shall paid from the partnership funds from 1st day of July 1978 onwards. However, it is agreed between the parties hereto that any liability or loss arising from the agreement referred hereinabove or the extension thereof shall be borne by the parties hereto in equal proportion."

6. It appears that Shri Sitaram Navalkar did not approve the arrangement of partnership devised by Dr. Desai to run the hospital in question. He, therefore, filed a declaratory suit bearing S.C. Suit No. 6208/1078 in the Bombay City Civil Court, at Bombay to seek declaration that Dr. Desai is only the conductor of the hospital. This suit culminated in a consent decree on 17.1.1979; wherein Dr. Desai was declared as the "conductor" of the hospital.

7. By a Deed of Dissolution and Retirement dated 8th December, 1978 Dr. Nerkar retired from partnership firm. Consequently, a fresh partnership came to be formed between the present respondent and the appellant on 11th May, 1979. Clause 11 which existed in partnership deed dated 28th July, 1978 cited (supra) came to be deleted in this fresh deed of partnership dated 11th May, 1979.

8. In the year 1981, Shri S.N. Navalkar and other landlords filed L.E. & C Suit No. 105 of 1981 against Dr. Desai to seek possession of the hospital.

9. During the pendency of the suit, some dispute arose between two partners, Mrs. Sawant and Dr. Desai, parties to this appeal, which led to a notice at the instance of the defendant Dr. Desai; which ultimately, resulted in a suit for dissolution of the partnership firm with effect from the date of the suit i.e.

18.9.1981 at the instance of Mrs. Sawant being S.C. Suit No. 5374/1081. The plaintiff applied for preliminary decree for dissolution of partnership on 18.9.1981 and prayed for referring the matter to the Commissioner to be appointed by the Court for settlement of the Accounts.

10. In the aforesaid suit, trial Court passed a preliminary decree by consent of the parties, which reads as under:

"By consent of parties the suit is placed on board and called out. Same appearances. Bearing in mind the pl; pleadings on record and the submissions made at the bar, I pass the following order:

There will be a preliminary decree dissolving the partnership between the plaintiff and the defendant. I am referring the matter to the Commissioner, High Court, Bombay, for taking accounts of suit partnership. The Commissioner to act on a certified copy of the Roznama. Costs and further directions are reserved.

Mr. Jog from the Court Receiver's office is present. He has submitted accounts of deposit made by the defendant. The defendant is directed to deposit Rs. 1902.87 within 10 days i.e. on or before 30.4.1983. Further directions will be given in the matter by the Court Receiver after due notice in that behalf to the parties."

11. At this juncture, it will not be out of place to mention that during the pendency of the aforesaid suit, but prior to preliminary decree, plaintiff had taken out Notice of Motion No. 5488/82 praying that, in the event of preliminary decree, Court Receiver be directed to sell and dispose of the assets of the partnership firm, namely; benefits of the agreement dated 20th December, 1976 with goodwill of the partnership firm. The said notice of motion came to be rejected along with one another motion bearing Notice of Motion No. 3045/82 moved by the plaintiff. At the same time, defendant had also moved Notice of Motion No. 5210/82 with the following prayers:

"(a) that this Hon"ble Court be pleased to pass a preliminary decree dissolving the partnership between the plaintiff and the defendant and referring the matter to the Commissioner for Taking Accounts with a direction to the plaintiff to file all books of accounts, vouchers, cheques etc. before the Commissioner."

12. The City Civil Court while rejecting Notice of Motion No. 5488/82 allowed Notice of Motion No. 5210/82 by a composite order though different reliefs were claimed pending the hearing and final disposal of the suit No. 5373/82. The City Civil Court passed an order in terms of the prayer (cited supra) in the Notice of Motion No. 5210/82 and disposed of the same by an order dated 21st April, 1983. In the result, suit came to be decreed. The Commissioner came to be appointed to take accounts. The order of rejection of Notice of Motion No. 5488 of 1982 was the subject matter of challenge in A.O. No. 473/83. The said Appeal from Order on merits came to be dismissed vide order dated 15th July, 1983 passed by the learned Single Judge of this Court with direction to the trial Court to complete proceedings as expeditiously as possible in pursuance of the

preliminary decree; since trial Court, by that time, had already passed preliminary decree by consent of the parties as referred to hereinabove.

13. In pursuance of the direction issued in preliminary decree passed by the trial Court, the Commissioner came to be appointed. He was asked to take accounts. He was pleased to issue notices to the parties to the suit. He called upon them to file accounts from 1.7.1980 to 30.6.1981, whereas defendant was directed to file accounts were filed by the parties. Parties were permitted to lead evidence in support of their respective claims.

14. The plaintiff claimed her share in the goodwill and tenancy right. She valued her claim for goodwill at Rs. 2,50,000/-, whereas tenancy rights were valued at Rs. 7,50,000/-. She desired to lead evidence in support of these two claims set up by her. However, the Court Commissioner for the reasons recorded in his report did not permit the plaintiff to lead evidence with respect to these two claims holding that the tenancy rights and goodwill did not form part of assets of the partnership firm. So far as valuation of these items are concerned, he was of the view that the valuation of them being a technical matter, it should be decided by the Court alone through an expert valuer to be appointed by the Court.

15. The Commissioner, after examining the account books submitted his report to the trial Court. The plaintiff filed her objections to the report of the Commissioner before the trial Court and prayed that the tenancy rights and goodwill should be valued and her share be determined in respect of these two items said to be the assets of the partnership.

16. The trial Court after hearing the parties to the suit, was pleased to frame issue No. 2-A: reading as:

"Whether plaintiff was entitled to goodwill and tenancy rights in respect of partnership business and whether commissioner has erred in rejecting her claim."

The trial Court by a reasoned order found favour with the reasons given by the Commissioner. It approved the reasons and findings recorded by the Commissioner while rejecting plaintiff's claim with respect to the goodwill and tenancy rights.

17. The aforesaid judgment and final decree confirming report of the Commissioner is the subject matter of challenge in the present appeal.

The Submissions:

18. Shri C.R. Dalvi, learned Counsel appearing for the appellant while taking this Court through factual aspect of the case found fault with frame of Issue No. 2. he submits that the said issue as framed by the trial Court itself, is pregnant with the erroneous assumption that the Court Commissioner has rejected the claim of the plaintiff. According to him, the Commissioner did not reject her claim. he, only, prevented her from leading her evidence on these two claims set up by her, entertaining a belief that right to tenancy and good will themselves being in

dispute, it cannot be valued for the purposes of settling partnership accounts and the valuation thereof can only be done by an expert valuer. Shri Dalvi reiterated that the Commissioner did not reject any of the claims of the appellant. In his submission, trial Court proceeded to frame and determine issue on wrong premise as such the findings recorded by the trial Court while passing final decree is unsustainable. He submitted that the tenancy right and goodwill being part of the partnership assets, the plaintiff was entitled to claim share in the said assets of the partnership.

19. Per contra, Shri Nesari, learned Counsel appearing for the respondents tried to support the findings of the trial Court. He submitted that tenancy right were never brought in the partnership firm as assets of the partnership as such tenancy right did not constitute asset of the partnership firm. He further submitted that preliminary decree did not mention alleged tenancy rights and/or goodwill as assets of the firm as such it is not open for the appellant to challenge the same at this stage of the litigation. He further submitted that the appellant having accepted preliminary decree and having chosen not to challenge the same, now cannot be allowed to challenge the same. It is not open for the appellant to claim any right which has not been recognized in the preliminary decree. He further submitted that the appellant had taken out notice of motion just before passing of the preliminary decree and had prayed that the Court Commissioner be directed to sell and realize value of tenancy rights i.e. benefit of the agreement dated 20.12.1976 and good will constituting assets of the partnership firm. The said notice of motion was dismissed and the preliminary decree was passed. the appellant did file Appeal from Order No. 473/1983 against the order of rejection of the notice of motion and that appeal came to be dismissed by this Court vide judgment and order dated 15th July 1983. The said order, in his submission, has, thus, become final and conclusive; as such, according to him, it is not open for the appellant to raise the said issue once again in the present appeal. He pressed into service doctrine of "res-judicata" in support of his submission.

20. Shri Nesari, learned Counsel for the respondent further submitted that the defendant was always treated as conductor of the business as such he himself did not acquire, tenancy right. That being so, he could not have brought it in the partnership as his contribution. He further submitted that Clause 11 of the deed of partnership dated 28.7.1978 did not find place in the subsequent deed of partnership dated 11.5.1979 was only for sharing profits and losses of the business. No clause with respect to tenancy right and/or goodwill was included in the said Deed of Partnership. Even balance sheet for the year ended 30.6.1980 did not contain any value of tenancy rights or goodwill on its asset side. Learned Counsel for the respondent, thus, submitted that appeal is without any substance and liable to be dismissed.

Issue for Consideration:

21. the aforesaid rival submissions have given rise to the following issues:

- (1) Whether Dr. Desai had tenancy rights in the premises?
- (2) Whether alleged tenancy rights at any time constituted asset of the partnership firm?
- (3) Whether plaintiff is entitled to claim share in the value of the alleged tenancy rights and/or goodwill of partnership business.

Consideration:

22. Having heard the rival parties, before embarking the rival submission of the parties to the appeal, it is necessary to look at the terms and conditions of the Deed of Partnership, whereunder partnership between the parties to the appeal, was constituted. At the same time, relevant provisions for deciding the aforesaid issues are to be found in Sections 14 and 15 of the Partnership Act, 1932. Section 14 deals with property of the firm. It provides that property of firm includes all property and interest originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes goodwill of the business, of course, subject to contract between the partners. Section also clarifies that property right and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. Section 15 provides that subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business. In the backdrop of these statutory provisions, it is necessary to take stock of the terms and conditions of the partnership deed in order to ascertain nature of the contract inter-se between the parties. Clauses 11, and 14 of the partnership deed dated 28th July, 1978 between Desai and Smt. Sujan Sawant and Dr. Nerkar was as under:

"11. It is specifically agreed that the benefits of the agreement dated 20th Dec.. 1976 between Mr. S.N. Navalkar and Dr. K.S. Desai and any extension thereof shall be made available to this partnership firm by the party of the first part without any reservation and consideration and the royalty payable under the above said agreement shall be paid from the partnership funds from 1st day of July 1978 onwards. However, it is agreed between the partnership hereto that any liability or loss arising from the agreement referred hereinabove or the extension thereof shall be borne by the parties hereto in equal proportion."

"14. Goodwill of the firm and other rights which may accrue during the course of the conduct of the partnership business shall belong to the parties hereto in the proportion of their profit sharing ratio."

23. Dr. Nerkar retired on 8th December, 1978 i.e. after 9 months from the aforesaid partnership under the Deed of Retirement dated 8th December, 1978. He was paid Rs. 75,000/- in lumpsum in consideration of his share by the continuing partners. New partnership came to be constituted under the fresh deed dated 11.5.1979 between Dr. Desai and Mrs. Sawant. Perusal of the said

fresh partnership deed goes to show that Clauses 11 and 14 referred to hereinabove, which formed part of earlier deed of partnership, were omitted. with the aforesaid documentary to find out whether any tenancy rights were created in favour of Dr. Desai. If the answer is in the affirmative, then one has to find out whether the alleged tenancy rights alleged to be that of Dr. Desai, at any time, formed part of the assets of the partnership firm so as to say that it is available for division between the parties to the appeal.

Issue No. 1:

24. First of all, I propose to consider first issue as to whether Dr. Desai had any tenancy rights in the premises. The undisputed crucial documents available on record is agreement dated 28th December, 1976 between Shri Sitaram Nerkar and Dr. Desai. The said document describes Dr. Desai as the conductor. Recitals in the said document, unequivocally, make it clear that in order to perpetuate the memory of his brother, the owner of the property, proposed to Dr. Desai, that a general hospital in the same premises should be run and managed by him as the conductor on such terms and conditions as may be mutually agreed upon between them. In terms of the agreement between the parties, during the subsistence of the agreement, the conductor was required to pay certain fixed amount by way of royalty to Shri Sitaram Navalkar, owner of the hospital.

25. Lease of immovable property as understood in law is a transfer of right to enjoy property for certain time on payment of consideration mutually agreed between the transferor and transferee. The terms of the above document nowhere create any transfer of property in favour of Dr. Desai. Lease always creates interest in the property for consideration. The maternity home or hospital may have been located in the premises where hospital was being run but no interest in the premises or property was ever created under the agreement dated 28th December, 1976 though some terms and conditions of the agreement tend to project a picture of creating tenancy in favour of Dr. Desai.

26. In the aforesaid backdrop, the question is: Whether or not Dr. Desai was a tenant. This issue has been tried in one of the litigations between Navalkar and Dr. Desai, wherein Dr. Desai has been held to be the conductor of the business by virtue of consent decree dated 17.1.1979 passed in Declaratory Suit No. 6268/78. In view of the consent decree, status of Dr. Desai came to be judicially recognized as that of the conductor. The said decree is binding on Dr. Desai. If that be so, Dr. Desai was not at all a tenant though Dr. Desai may have projected himself as tenant in some other litigation. In view of the judicial pronouncement by the competent Court, Dr. Desai could not be said to be a tenant of the premises.

Issue No. 2

27. In view of the above finding, it is not necessary to dwell upon the second issue. However, parties have addressed on this issue at length; as such I propose to record my findings on this issue without prejudice to the above finding.

28. In *Arjun Kanoji Tankar v. Santa Ram Kanoji Tankar*, (1969) 3 SCC 555, a contention was raised that in any event, by virtue of Section 14 of the partnership Act, all the assets with the aid of which the business was carried on by the plaintiff must be deemed in law to have become the partnership assets under the deed of partnership. It was held that u/s 14 the property belonging to a person, in the absence of any agreement to the contrary, does not, on a person entering into a partnership with others, become the property belonging to a person, in the absence of any agreement to the contrary, does not, on a person entering into a partnership with others, become the property of the partnership; merely because it is used for the business of the partnership. It will become the property of the partnership only if there is an agreement express or implied that the property was, under the agreement of partnership, to be treated as the property of the partnership. This judgment was followed by this Court in *Nariman Aspandiar Irani v. Adi Merwan Irani*, 1990 Mh. L.J. 265.

29. In *Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat*, while considering the expression "Transfer of Property" the Supreme Court has observed as follows:

"In its general sense, the expression "Transfer of property" connotes the passing of rights in the property from one person to another. In one case there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be a reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. An exclusive interest in the property is a larger interest than a share in that property. To the extent to which the exclusive interest is reduced to a shared interest it would seem that there is a transfer of interest. Therefore, when a partner brings in his personal assets into the capital of the partnership firm as his contribution to its capital he reduces his exclusive rights in the asset to shared rights in it with the other partners of the firm. While he does not lose his rights in the asset altogether what he enjoys now is an abridged right which cannot be identified with the fullness of the right which he enjoyed in the asset before it entered the partnership capital."

It becomes apparent that when a partner brings in his personal asset into partnership firm as his contribution to the capital, an asset which originally was subject to the entire ownership of the partner, becomes now subject to the rights of other partners in it. In other words, the partner who brings in the asset reduces his exclusive right in the asset to the shared rights in it with other partners of the firm. Having examined the documents in question not a single document on record suggests that Dr. Desai came into partnership with tenancy rights assuming he had any such tenancy right. Even if one examines sweep of Clause (11) of the partnership deed dated 28th July, 1978 that clause only permits the partnership to reap the benefits of the agreement dated 20th

December, 1976 between Dr. Nerkar and Dr. Desai with an obligation on the firm to discharge the liability of Dr. Desai by reimbursing an amount of royalty to Navalkars. this Clause (11), unequivocally, suggests that the amount of royalty which Dr. Desai was liable to pay to Navalkar shall be reimbursed only from the accounts of partnership. But, that by itself cannot lead to an inference that alleged tenancy rights were brought by Dr. Desai in the firm by way of his contribution as a partner of the firm. That Clause (11) by itself would not make partnership a tenant of the premises as alleged. It is not necessary that every partnership for the purpose of its business should own and utilise its own partnership property only. It can utilise property owned by others for the purposes of its business. It would become property of the partnership only if there is an agreement, express or implied, that the property under the agreement of partnership to be treated as the partnership property. Therefore, for a property to become the property of the firm must have been brought into the stock of the firm by the partners, originally, when the firm was formed, or subsequently acquired by purchase or otherwise in the course of the business of the firm. Property belonging to a partner as his personal property; in the absence of any agreement does not ipso facto become the property of the partnership, merely because it is used for the business of the partnership. No evidence is available on record to reach to a conclusion that Dr. Desai had acquired tenancy right in the premises and that he came in the partnership with any such tenancy rights if any, with respect to the hospital premises. By no stretch of imagination any inference can be drawn that Dr. Desai walked into the partnership with the alleged tenancy rights, if any. I am, therefore, unable to reach to the conclusion that tenancy if any, at any time, became asset of the partnership firm. The finding, therefore, recorded by the trial Court in this behalf cannot be faulted with. Trial Court has, thus, rightly held that partners were not entitled to treat tenancy right as asset of the partnership firm. No fault can be found with the view taken by the Commissioner and confirmed by the trial Court while passing the final decree. Contention raised in this behalf by the appellant therefore, must fail.

As to the Goodwill:

30. With the aforesaid finding, let me, now, turn to another issue to consider: whether "goodwill" could be treated as asset of the partnership firm. Before embarking upon issue in hand, let me consider the concept of, meaning and nature of "goodwill". The term "goodwill" is not defined in the Indian Partnership Act or repealed provisions of the Indian Contract Act or under the English Partnership Act, 1980.

31. "Goodwill", as Lord MacNaghten described is "a thing very easy to describe, very difficult to define, in *IRC v. Muller and Co.* (1900) .ER 413 .

32. The term "Goodwill" signifies the value of the business in the hands of a successor, so as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something

more than a mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits. "Goodwill" may be the whole advantage belonging to the firm, its reputation as also connection thereof. It, thus, means that every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business whether connected with the premises of business or its name or style, everything connected with or carrying the benefit of the business.

33. In Halsbury's law of England, 4th Edn., Vol. 35, at pp.114-15, the law is stated in the following terms:

"201. Goodwill generally right to use name; sale to a partner -The goodwill of the business carried on by a partnership forms part of the assets to be realized on distribution. If the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners as still being partner with him. If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the firm name, and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned. On dissolution, a partner may advertise that he is no longer connected with a periodical that firm publishes.

Where the goodwill becomes on dissolution the property of one of the partner (either by purchase in the ordinary way or pursuant to a provision in the article), the outgoing partner or partners may not carry on a similar business in the name of the old firm, and may not solicit old customers."

34. The goodwill is generally considered to be an asset of the partnership. In the aforementioned volume of Halsbury's Laws of England at page 116; it is laid down when the goodwill is to be treated as an asset. It is not required to be included in the firm's periodical balance sheets: in absence of contrary agreement.

35. Section 14 clearly lays down that property of the firm includes goodwill of the business of the firm. Section 55 of the Act, further provides for sale of the goodwill after dissolution. This issue came up for consideration, before the Supreme Court in Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another, and in that the Supreme Court observed that under the provisions of partnership Act goodwill of the firm is expressly declared to be the property of the firm. Their Lordship observed:

.....

"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 share in the asset is, by virtue of the agreement, that the surviving partners are entitled to carry on the

business on the death of the partners, to be extinguished. 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 the legal representatives will apply to the goodwill as well as to other assets."

? Nature and meaning of goodwill - Vice Chancellor Wood in *Churton v. Douglas*, (1959) 174 : 28 LJ Ch. 841 quoted with approval the well known observation of Lord Eldon, where he said:

"Goodwill must mean every advantage-every positive advantage, if I may so express it as contrasted with the negative advantage of the late partner not carrying on the business himself- that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the late firm, or with any other matter carrying with it the benefit of the business."

36. The meaning and nature of goodwill if imposed in business as an asset of partnership are described in *Principles of Law of Partnership* by Underhill, 10th Edn. as under:

"The assets includes not only the stock-in-trade and book debts, furniture, tools, machinery etc, but also an intangible, but often very valuable, property called, "Goodwill"; and in the absence of agreement, and subject to possibly to one exception, it must be sold."

The word "Goodwill" is one very difficult to define, Lord Eldon said that it was nothing more than the probability of the old customers resorting to the old place. Clearly, however, it means more than that; for it often exists quite independently of locality.

37. It is , now, clear that the goodwill is an asset of the firm and may be taken into account when there is general dissolution of the firm. The words used in section 14 are "subject to contract between the partners" which clearly goes to show that the definition of the property given in the section shall hold good only in the absence of contract to the contrary between the partners. The parties may, by contract between themselves, agree that what other kinds of property can be included or excluded in the property of the partnership firm. As such, in order to determine whether particular property is an asset of the partnership, agreement between the parties has to be looked into. In the suit for dissolution of partnership goodwill of a firm is required to be included in the assets of partnership in absence of any contract to the contrary between the partners. The words "subject to contract between the partners" make it clear that the rules laid down in the section, are to be followed in absence of different stipulation in the deed of partnership.

38. Every partner has a right, in the absence of agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners. This, however, does not mean that the goodwill is to be taken into account only

when there is a general dissolution. Even the legal representative of a deceased partner will be entitled to a share in the goodwill of a partnership which is continued. When the goodwill has been fully appropriated by the surviving partner with all the advantages flowing from the old business connections it is impracticable to direct a sale of the goodwill between the partners, in such circumstances, it is apt to value goodwill and give a proportionate share of such value to the heirs of the deceased partner.

39. By virtue of Section 55(1) the goodwill has to be disposed of as provided by the agreement. Where the partners have made no provision for it by their agreement the goodwill has to be included in the asset. and in consequence of such conclusion it may either be allotted to any of the partners or may be sold, if it is to be sold, either separately or along with other property of the firm.

40. With this legal position, if one turns to the partnership deed dated 28th July, 1978 Clause 14 thereof clearly provides that the "Goodwill" of the firm and other rights which may accrue during the course of conduct of the partnership business shall belong to the parties to the agreement in the proportion of their profit sharing ratios. Subsequent to this agreement, Shri Nerkar retired from the partnership firm. His share was valued in lumpsum in terms of money in the sum of Rs. 75, 000/-, which included value of the goodwill. Accordingly, his account was settled and he was paid. With the exit of Dr. Nerkar, other remaining two partners namely; plaintiff and defendant entered into new partnership agreement on 11th May, 1979. Admittedly, this document does not contain any clause with respect to the sharing of goodwill. Absence of that clause by itself will not take away right to claim share in goodwill, which was recognised in the earlier deed dated 28th July, 1978.

41. Dr. Nerkar walked out of the partnership with his 1/3rd share in the goodwill leaving the balance 2/6th share in the goodwill for the benefit of the continuing partners. It was, thus, implied that the continuing partners shall enjoy the balance share of the goodwill, which remained with the continuing partners, in equal ratio. In other words, remaining share in goodwill of the firm was to be ascertained and distributed amongst remaining partners at the time of dissolution of the firm. u/s 55(1), while settling the account of a firm after dissolution, the goodwill has to be included in the asset subject to contract between the parties. The words "subject to contract between the partners", as already observed hereinabove, are judicially interpreted and understood to mean in the absence of contract to the contrary between the parties. Thus, goodwill has to be included in the asset of the partnership in the absence of any contract to the contrary to Section 55 of the Act. Mere absence of any provision with respect to the rights in goodwill is not sufficient to hold contrary to the mandate of the provisions of Partnership Act. There must be a provision in the agreement contrary to the provisions made in the Act. No such provision taking away the rights of the partners in the goodwill is to be found in any of the documents on record. Mere absence of provision in the partnership deed is not sufficient. There

must be a positive provision contrary to the mandate of the Act. In this view of the matter, it is obligatory on the part of the Court Commissioner to permit the parties to the suit to lead evidence with respect to valuation of the goodwill. Alternatively, assuming that the commissioner was right in holding that the valuation of the goodwill being technical matter required expert evidence, in that view of the matter, it was obligatory on the part of the trial Court to permit the parties to lead evidence with respect to worth of "goodwill" so as to settle account between the parties. In my considered view, the view taken by the trial Court, with respect to the claim of "goodwill", is not in accordance with law. The same is thus, liable to be set aside to that extent.

42. In view of the above finding, the impugned judgment and decree to the extent it refuses to treat goodwill of the partnership firm as asset of the partnership, is set aside and the proceedings are remitted back to the trial Court with further directions to determine value of the goodwill, if necessary, by permitting the parties to lead expert evidence so as to settle the accounts between the parties in accordance with law.

43. The trial Court is directed to dispose of remanded proceedings as expeditiously as possible; at any rate, within 6 months from the date of receipt of copy of this judgment. No other issues other than the issues relating to the right of tenancy and goodwill were raised and argued.

44. So far as cross objection filed by the respondent is concerned, the same is not pressed, hence dismissed as not pressed.

45. Needless to mention that the amount lying in investment, by way of deposit, made up by the trial Court shall continue to remain invested until remanded proceedings are decided on its own merits in accordance with law. In the result, appeal is partly allowed, cross objection stands dismissed as not pressed. No order as to costs.