

(1978) 06 BOM CK 0044

Bombay High Court

Case No: Estate Duty Reference No. 6 of 1968

Urmila

APPELLANT

Vs

Controller of Estate Duty,
Bombay

RESPONDENT

Date of Decision: June 22, 1978

Acts Referred:

- Estate Duty Act, 1953 - Section 2, 2(15), 40, 5, 7

Citation: (1979) 9 CTR 81 : (1980) 122 ITR 958

Hon'ble Judges: R.M. Kantawala, J; Desai, J

Bench: Division Bench

Advocate: V. Rajagopal, for the Appellant; R.J. Joshi, for the Respondent

Judgement

Desai, J.

In this reference which is at the instance of the accountable person, the following two questions of law are referred to us for our opinion :

"(1) Whether the deceased's share in the goodwill of the three firms, (1) M/s. Natwarlal & Co., (2) M/s. Pannalal Bros., and (3) M/s. Kantilal Manilal & Co., was includible in the principal value of the property either u/s 5 or u/s 9 read with Explanation 2 to clause (15) of section 2 of the Estate Duty Act, 1953, as may be applicable ?

(2) Whether the goodwill of the three firms above was valued on correct legal principles ?"

2. The references arises out of the assessment to estate duty made on the accountable person in respect of the estate left by one Champaklal J. Shah, who died on August 11, 1960. At the time of his death, the said Champaklal was a partner in a firm called M/s. Natwarlal & Co., having a one-fourth share in the firm. The firm was dealing in medicines and operating under the partnership deed dated February 20,

1959. A copy of the said deed of partnership is annexed as annex. "A" to the statement of case. The deceased was also (though not at the time of his death) a partner earlier in two other firms, viz., (1) M/s. Kantilal Manilal & Co., and (2) Messrs. Pannalal Brothers. Both these firms were carrying on business as chemists and druggists, the former firm at Bombay and the latter firm at Calcutta. The deceased, however, retired from both these firms on January 9, 1959. In respect of M/s. Kantilal Manilal & Co., the partnership deed then in operation was one dated January 17, 1952, and under the same the deceased had a one-sixth share. The partnership deed in operation in respect of Messrs. Pannalal Brothers was one dated June 10, 1960, and in the said firm he had a six and half annas share out of a total of sixteen and half annas. Deeds of retirement were executed when the deceased retired from these firms, though the one in respect of M/s. Kantilal Manilal & Co., is dated February 20, 1959, while the others in respect of M/s. Pannalal Brothers is dated January 9, 1959. Copies of the operative partnership deeds for the two firms as also the two deeds of retirement have been annexed to the statement of case. We are specifically concerned with the two deeds of retirement which have been annexed as annex. "F" and annex. "G", respectively, to the statement of case. In computing the principal value of the property left by the deceased the Asst. CED included the deceased's share in the goodwill of all three firms. In respect of the share in the goodwill of M/s. Natwarlal & Co., it was held that the same had passed on the death within the meaning of s. 5 of the E.D. Act. Alternatively, it was held that even if it were to be considered that there was relinquishment of the right to the goodwill which occurred on the death of the deceased, the provisions of s. 9 read with Explanation 2 to cl. (15) of s. 2 of the Act applied. As regards the share of goodwill in the two other firms, the Asst. CED held that there was a relinquishment which was clearly hit by s. 9 read with Expl. 2 to clause (15) of s. 2 of the Act. Accordingly, he included the respective values of the share of goodwill in the three firms in the sums Rs. 22,500, Rs. 46,667 and Rs. 28,758, respectively, in the principal value of the property.

3. The accountable person carried the matter in appeal to the Appellate CED who upheld the assessment made by the Asst. Controller, rejecting the several contentions raised on behalf of the accountable person. The matter was then carried forward in second appeal to the Tribunal.

4. Several contentions were urged before the Tribunal. The three broad questions considered by the Tribunal were :

"(1) Whether any or all the three firms had a goodwill at the time of the death of the deceased or the retirement from the firm by the deceased, as the case may be ?

(2) Whether the share of the deceased in the goodwill, if any, Passed on his death u/s 5, or was relinquished, within the meaning of section 9 read with Explanation 2 to clause (15) of section 2 of the Act, as the case may be ? and

(3) Whether the value of the share in the goodwill, as computed by the authorities below, at three years' purchase price on the basis of average maintainable profit of five years, is reasonable?"

5. The Tribunal in its order, from which the reference arises, has considered the case in respect of each of the three firms separately, though it was conceded that the case in respect of the two firms, viz., Kantilal Manilal & Co., and Messrs. Pannalal Brothers, in which there had been retirement prior to the death, was identical. With respect to the contention that there was no goodwill in the firms at the time of death or retirement, the same was negatived by the Tribunal with reference to the clauses of the partnership deeds and the clauses of the deeds of retirement. It is unnecessary to go any deeper into this aspect of the case as it does not arise from the two questions on which our opinion is sought in this reference. The finding of the Tribunal, it may be briefly stated, on the question whether any or all three firms had a goodwill was against the assessee in respect of all the three firms.

6. The Tribunal next turned its attention to the question whether the share of the deceased in the goodwill passed on his death or was relinquished within the meaning of s. 9 read with Expln. 2 to clause (15) of s. 2. This question was first considered with reference to the share in the goodwill of the firm of M/s. Natwarlal & Co., and it was held that it indeed passed on his death and became liable to estate duty under s. 5 of the E.D. Act. As regards the deceased's share in the goodwill of the other two firms, it was argued on behalf of the accountable person that the case could not be properly said to fall within s. 9 of the Act inasmuch as there was no gift and reliance was placed on clause 4 of the deeds of retirement. In respect of such contention the Tribunal has observed as follows :

"Merely because of such a clause, it cannot be said that the relinquishment of the right to the goodwill was for a consideration. The existence of such a clause can equally be consistent with the consideration being separately offered for the relinquishment of a right to the goodwill. In any case, and if undoubtedly as we have held, the business of the firm had a goodwill, the alleged consideration for the relinquishment of the right in the goodwill could not be considered as a consideration offered by the continuing partners as in clause 4 of the deed."

7. Accordingly, the Tribunal was not impressed with this contention urged on behalf of the accountable person and rejected the same. The further arguments raised on behalf of the accountable person which were made with a view to show that s. 9 was inapplicable were also rejected by the Tribunal. As regards the valuation, it was urged before the Tribunal that the Asst. Controller had calculated or quantified the share in the goodwill or retired, which was not proper. It was further submitted that in quantifying or putting a value on the goodwill the returned profits were required to be considered as contradistinguished from assessed profits. Similar other submissions were made as regards the calculation of the deceased's share in the goodwill of the three firms. The first of the above contentions as accepted by the

Tribunal which gave a direction to exclude the year in which the death or retirement had occurred; the other contentions as to the method and manner of calculation of the goodwill were, however, rejected by the Tribunal.

8. As far as the share of the deceased in the goodwill of Messrs. Natwarlal & Co., is concerned, it was submitted by learned counsel on behalf of the accountable person before us that the Tribunal was in error in concluding that there was a passing of the property within the meaning of the provision contained in s. 5 of the E.D. Act. It was submitted that this was clearly a case of deemed passing of property as contemplated by the provisions contained in s. 7 inasmuch as on the death of the deceased his interest in the goodwill came to an end and to the extent of the cesser of his interest there was an enhancement in the shares in the goodwill of the continuing partners.

9. It was submitted that this was the view taken by a Division Bench of the Gujarat High Court in [Mrudula Nareshchandra Vs. Controller Estate of Duty](#) .

10. In order to consider the correctness of such submission, it will become necessary to set out the relevant provisions from the deed of partnership dated February 20, 1959, which was the operative deed governing the partnership of M/s. Natwarlal & Co. Our attention was drawn to cls. 12 and 13 of the deed of partnership which provides as under :

"12. All the assets including the goodwill, outstanding, import and export quota rights and other rights, benefits and privileges together with the liabilities of the said original firm of Messrs. Natwarlal & Co., constituted by the parties hereto of the first and second parts and the said Mansukhlal Jesinglal have been taken over by the party of the first part and the party of the second part who have brought the same subject to the said liabilities into the partnership hereby constituted. The import and export quota rights of the said original firm as constituted by the parties of the first and second parts and the said Mansukhlal Jesinglal shall belong to the partnership hereby reconstituted.

13. If a partner wants to retire from the partnership he can be so by giving to the others not less than three months" notice in writing of his intention to retire from the partnership. Death, retirement or insolvency of any of the partners shall not dissolve the partnership firm as to the surviving or continuing partners. The share of the partner dying, retiring or becoming insolvent or otherwise ceasing to be a partner shall accrue to the surviving partners or continuing partners in proportion to their respective shares subject only to payment to the legal representatives of the deceased partner or to the retiring partner or the assignee of the estate of the insolvent partner his share and interest at death or on the date of retirement or the day preceding the date on which he is declared insolvent as ascertained by a general account to be made as on date of death or retirement or the day preceding the insolvency with all proper valuation but without valuation or allowance or payment

for goodwill. In case of death or retirement of a partner the surviving partners or the continuing partners as the case may be shall be entitled to the goodwill of the partnership business without making any payment or compensation to the legal representatives of the deceased partner or to the retiring partner of goodwill and the intention is that the goodwill shall accrue to and belong to the surviving or continuing partners without any valuation of or allowance for goodwill.

The provision aforesaid shall apply mutatis mutandis to the case of insolvency of a partner and the partner becoming insolvent shall be deemed to have retired as on the day previous to the date he is declared an insolvent and the assignee of his estate and effects shall not be entitled to any payment or allowance in respect of goodwill which shall vest in the remaining or continuing partners."

11. When the judgment of the Division Bench of the Gujarat High Court is perused, it is found that it is based on the provision contained in clause 10 of the deed of partnership being considered by it, Which was in the following words :

"10. The firm shall not stand dissolved on death of any of the partners and the partner dying shall have no right whatsoever in the goodwill of the firm."

12. The Gujarat High Court considered the case before it and, thereafter, after setting out the relevant statutory provisions, proceeded to consider whether the share of interest which the deceased had in the goodwill of the firm either passed under s. 5 or is deemed to have passed under s. 7 of the Act in the following words (p. 307) :

"We shall first take up for our consideration the question whether section 5 applies to the facts of the case. As already noted above, a mere event of passing of property from one hand to the other is sufficient to attract the provisions of section 5. The use of the word "passes" signifies the movement of the property from one hand to the other by some legally recognised method of devolution. This passage or the movement of the property from one hand to the other should be the result of death of the person concerned. Therefore, in the case of a person, whose right or interest in the property ceases or comes to an end on his death, and somebody acquires fresh interest in that property in his own right, can it be said that the property has "passed" from the hands of the deceased to the hands of the other person, who acquires it on his death. In our opinion, the answer to this question must necessarily be in the negative, because the interest or the right, which has ceased to exist would obviously be incapable of "passing" or of having any "movement"."

13. The contention raised on behalf of the revenue that there was passing of the share of the deceased in the goodwill under s. 5 of the Act was negated, the Division Bench observing (p. 311) :

"We have already shown above that the word "passes" involves the concept of mobility and change of hands resulting from the continuity of the identity of rights

in the property. But, if the rights of the deceased cease to exist on the happening of a particular event giving rise to fresh rights in favour of those who do not derive their interest as the representatives of the deceased, it cannot be said that the property "passed" within the meaning of section 5. In the instant case, what has happened is that, by virtue of clause (10), the interest of the deceased in the firm's goodwill ceased without being inherited by his heirs. The right, therefore, lost its continuity, identity and mobility. We, Therefore, reject even this contention of Shri Kaji."

14. The Division Bench then considered whether this was the case of deemed passing contemplated by s. 7. It observed (p. 312) :

"In order that section 7 may apply to the facts of the given case, it should be shown that there is a cesser of interest resulting in some form of benefit. In our opinion, both these conditions, namely, (1) the cesser of interest, and (2) accrual or arising of benefit as a result of the said cesser, are satisfied in this case."

15. When these two requirements were considered with reference to the facts of the case, the Division Bench came to the conclusion that the interest of the deceased in the assets became extinguished on his death by virtue of clause 10 of the partnership agreement. In other words, there was cesser of his interest within the meaning of s. 7. It also found that there was an augmentation or enhancement in the interest in the goodwill of the remaining partners and this augmentation was the result of the cesser of the interest of the deceased on his death and hence both the conditions of s.7 were satisfied. However, one further argument was urged on behalf of the accountable person before the Division Bench which was based on the provisions contained in s. 40. The argument was that the benefit which is contemplated by s. 7 was one which is capable of being valued in terms of s. 40 of the E.D. Act. This argument was considered and upheld by the Division Bench in the following words (p. 315) :

"Section 40 thus clearly postulates that the property in which the interest has ceased must be capable of yielding income, because unless it is so capable, the interest, which has ceased, cannot be said to be extending either to the whole or to less than the hold of the income within the meaning of section 40. In other words, if the property in which the interest has ceased to exist has no inherent potentiality to yield any income, standing by itself, it would not be possible to evaluate the benefit accruing or arising from the said cesser under any of the provisions of the Act including section 40. To put it differently, the cesser of such interest is not made exigible to duty."

16. The Division Bench then proceeded to consider s. 40 and observed that the goodwill standing by itself could not earn any income; it, therefore, could not be measured in the manner contemplated by s. 40; and, if this was so, in the view of the Division Bench, the interest which had ceased was not the interest contemplated by

s. 7 of the Act and was accordingly not exigible to estate duty.

17. It may be mentioned that Mr. Rajagopal on behalf of the accountable person had very fairly drawn our attention to [Controller of Estate Duty Vs. Ibrahim Gulam Hussain Currimbhoy](#), in which a Division Bench of the Madras High Court in [Mrudula Nareshchandra Vs. Controller Estate of Duty](#). The clause in the deed of partnership which was being considered by the Division Bench of the Madras High Court was clause 14 which read as follows (p. 322) :

"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."

18. It was held by the Division Bench of the Madras High Court that the interest in the goodwill which the deceased possessed, which could be disposed of along with the entire interest in the firm at the time of his death, came to devolve on the surviving partners and their share or interest in the goodwill stood augmented to the extent of the share of the deceased as per clause 14 of the partnership deed, and this would straightaway attract s. 5 of the Act.

19. Considering clause 13 of the deed of partnership which was the operative deed governing the firm of M/s. Natwarlal & Co., at the time of the death of the deceased, we are unable to hold that there was any cesser of the right of the share of the deceased in the goodwill of the said firm on his death. It was strenuously contended by counsel for the accountable person that cesser must be presumed because the continuing partners are absolved of the obligation to pay for the share of the deceased in the goodwill. We are afraid that the provision instead of supporting Mr. Rajagopal and his case of cesser rather supports the case of the devolution of the goodwill on the continuing partners; and on the facts the provision in the partnership deed is substantially similar to the one before the Division Bench of the Madras High Court. In any case, it is impossible to hold on the provisions of clause 13 of the deed of partnership that there was any cesser, and hold further that the only provision which could be attracted was s. 7. In our view, clause 13 clearly contemplates devolution of the share of the deceased in all the assets including the goodwill on the continuing partners but providing that there is to be payment to the legal representatives for the share in the assets but excluding goodwill. This would clearly bring the case within the meaning of s. 5 and the points which appealed to the Gujarat High Court in [Mrudula Nareshchandra Vs. Controller Estate of Duty](#), do not arise for our consideration in the matter before us.

20. It may be pointed out that a Full Bench of the Punjab and Haryana High Court had occasion to consider both these decisions, viz., of the Gujarat High Court in [Mrudula Nareshchandra Vs. Controller Estate of Duty](#), and of the Madras High Court in [Controller of Estate Duty Vs. Ibrahim Gulam Hussain Currimbhoy](#), in [State Vs. Prem](#)

[Nath](#), It may be mentioned that the Full Bench became necessary in view of the earlier Division Bench decision of the very same High Court which had held in [Controller of Estate Duty Vs. Shri Ved Parkash Jain](#), that goodwill had no value in a going concern of a partnership and its quantification is not possible and as such of a firm could not be legally included in the principal value of the estate of the deceased. It was this view which was required to be reconsidered by the Full Bench which observed that [Controller of Estate Duty Vs. Shri Ved Parkash Jain](#), was wrongly decided. However, in the course of the Gujarat High Court, and it was rightly observed that actually the decision of the High Court proceeded principally on the construction of clause 10 of the deed of partnership, which we have extracted earlier. It may be mentioned that during the course of its judgment the Full Bench has cast a doubt on the correctness of the Gujarat decision (see page 450 of the report). It is unnecessary for us to consider the correctness or otherwise of the same inasmuch as we are of opinion that the clause to be considered by us is materially different from clause 10 which was considered by the Gujarat High Court, and when clause 13 is considered we do not find any cesser of the interest of the deceased in the assets of the firm or in its goodwill.

21. It now becomes necessary to consider the case of the two other firms, M/s. Kantilal Manilal & Co., and M/s. Pannalal Bros. In the case of the former firm, clause 2 of the deed of retirement provides that all the assets of the said firm including the goodwill, rights, benefits and privileges and outstanding together with all its liabilities have been taken over by the continuing partners. Clause 4 provides further that the continuing partners shall pay and discharge or keep indemnified the retiring partner against all costs, claims and demands in respect thereof. The provisions in the deed of retirement pertaining to M/s. Pannalal Bros., are identical. There is, however, one difference between the two firms, which is not material for the purpose of this judgment though the Tribunal found the difference material for the purpose of quantifying the share of goodwill which was to be included in the estate of the deceased. Mr. Rajagopal on behalf of the accountable person submitted that the Tribunal was clearly in error in concluding that there was a gift of the share of the goodwill by reason of clause 2 by the deceased to the continuing partners and invoking s. 9, as the alleged gift was within a period of two years of the death of the deceased. It was submitted that the view expressed by the Tribunal in para. 11 of its order, a portion of which the Tribunal has proceeded, viz, there should be a separate consideration for the share in the goodwill, is totally uncalled for. It was submitted that the retiring partners including the deceased had given up their share in the assets including the goodwill but at the same time had been relieved of their share in the liabilities of the firm as existing on the date of retirement. In other words, it was submitted that if a benefit had been secured by the provision to the continuing partners, viz., the obtaining of the share of the retiring partners in the assets including the goodwill this was accompanied by taking over of an obligation, viz., the entire liabilities of the firm and the further

obligation to indemnify or keep indemnified the retiring partners against claims made in respect of such liabilities. This appears to us to be a clear case of simultaneous taking over of rights and obligations; the benefit secured by each group will be supported by the consideration, viz., giving up of its claim. If the retiring partners have given up their share in the assets, they have been relieved of their share of the liabilities. It is impossible to hold that the share of assets in general have been or any asset in particular has been given up without consideration.

22. Section 9 seeks to rope in gifts made within a certain period before death. If we are unable to hold that there was any gift of the share in the goodwill, then the provision contained in s. 9 will not be attracted and it will become unnecessary to consider the section any further or read the same together with the definition of "property" to be found in Explan. 2 to clause (15) of s. 2 of the latter statutory provision. In our opinion, the view expressed by the Tribunal as to there being lack of consideration for the share in the goodwill was not in order and in this view of the matter we are of opinion that the share which the deceased had at the time of retirement in the two firms of M/s. Kantilal Manilal & Co., and M/s. Pannalal Brothers was not required to be added to his estate for purposes of estate duty.

23. As far as the quantification of goodwill is concerned, in the view that we have taken of the non-applicability of s. 9, we did not permit Mr. Rajagopal to urge two other contentions which were, (1) that at the highest this was not a case of an actual gift but only a deemed gift, and, further, (2) that this could not be said to be a gift not made bona fide. In the view that we have taken that was no gift, it is unnecessary to invite any attention on these arguments.

24. In the view that we have taken, we are concerned with the quantification of the share of goodwill only in the firm of M/s. Natwarlal & Co. In which the deceased continued to remain as a partner right up to his death. It was urged by Mr. Rajagopal that the Tribunal was in error in rejecting the contention adduced on behalf of the accountable person that for the purpose of quantifying the share in goodwill and determining the monetary value thereof, only the returned profits of the firm as distinguished from the assessed profits were required to be considered. The Tribunal has rejected this argument in para. 18 of the impugned order, and we are in agreement with the view expressed therein that, normally, it would be assessed income and not the returned income which would have to be considered as the proper basis. We are also in agreement with the Tribunal's view that the assessed income to be considered would be the one finally determined. The view taken by the Tribunal in para. 18 of its order appears to be correct and there is no reason to interfere with its conclusion on the quantification of the goodwill. No other point was urged before us.

25. In the result, the questions referred to us are answered as follows :

Question No. 1. - The share of the deceased in the goodwill of Messrs. Natwarlal & Co., was includible in the principle value of the property under s. 5 of the E.D. Act. The share of the deceased in the goodwill of Messrs. Kantilal Manilal & Co., and Messrs. Pannalal Brothers was not includible in the principle value of the property under s. 9 of the E.D. Act read with Explan. 2 to clause (15) of s. 2 of the said Act.

Question No. 2 - The goodwill of the firm of Messrs. Natwarlal & Co., was valued on correct legal principles.

26. The parties will bear their own costs of the reference.