**CALCUTTA HIGH COURT**

Commissioner of Income-Tax

Vs

Mugneeram Bangur

(G.K. Mitter J.)

13.12.1961

**JUDGMENT**

**G. K. Mitter J.**

1. In this matter four questions of law have been referred to this court by the Income-tax Appellate Tribunal. The first relates to the competency of an appeal filed by the Income-tax Officer, Central Circle XIV, Calcutta, against the order of the Appellate Assistant Commissioner of Income-tax, Range-A, Calcutta, on the ground that he was not the proper officer to do so. Before us the point was not pressed and it is covered by a judgment of a Division Bench of this court in Matter No. 105 of 1952 (Commissioner of Income-tax v. Sarkar & Co.). The other questions are inter-dependent and arise out of the transfer of the business of a firm known as Mugneeram Bangur & Co., Land Department, to a public limited company by the name of Amalgamated Land Development Company Ltd., the central question being whether the partners of the firm made a profit in the transaction which is assessable to income-tax.The assessee firm, Mugneeram Bangur & Co., Land Department had been carrying on the business of land development for many years. Its business was to buy large blocks of land in the suburbs of Calcutta, develop the same and parcel out in small plots and sell at a profit. Originally it had seven partners, six of them being Bangurs and the seventh being one Charu Chandra Chatterjee. Two of the partners, namely, Mugneeram Bangur and Charu Chatterjee, retired from the firm on July 11, 1945. The remaining partners were not willing to carry on the business with unlimited liability and decided to float a limited company which would take over the business of the firm. Accordingly, a new company was formed in the name mentioned above and incorporated as a public company on April 8, 1948. The five remaining of the firm were also the promoters of the new company which had four directors, two of them Bangurs and two being outsiders, namely, one Walter Robert Elliot and the late Sir Bejoy Prasad Singha Roy. The capital of the company was Rs. 34,99,300 divided into shares of Rs. 100 each. Out of these all but seven shares were allotted to the five partners. Rs. 34,99,300 was the consideration for which the firm transferred its

business and its assets to the company. The sum was made up as shown below in the agreement for sale dated July 7, 1948.

Rs. A. P.

1. Land 12,68,628-7-7

2. Goodwill 2,50,000-0-0

3. Motor car & lorries 26,866-8-5

4. Furniture, Fixtures, etc. 5,244-5-6

5. Mortgage secured 17,62,367-6-0

6. Deposits for purchase of land 53,500-0-0

7. Advances paid to pleaders, solicitors, contractors staff and other outstandings 1,83,622-3-3

8. Cash in bank 71,800-1-8 36,21,029-0-9 Less liabilities 1,21,729-0-9 34,99,300-0-0 The value of the land shown above was the cost of acquiring the same form time to time. Items Nos. 3 and 4 give the written down values of the assets mentioned in the books of account of the company. Items Nos. 5, 6, 7 and 8 represent transactions in cash about which there is no dispute. The controversy in this case centers round the item of goodwill valued at Rs. 2,50,000. The case of the department was that there was and could no goodwill in respect of the transaction effected and by the inclusion of this item the partners were seeking to get something from the company which really represented the increase in the value of the land. There is no dispute that shown in the agreement for sale and that land was the stick-in-trade of the firm which was taken over by the company. The departments contention that the assessee firm had no goodwill or that the value of the goodwill was negligible in the circumstances of the case is based on the following :

(1) Mugneeram Bangur & Co., Land Department, was a firm insisting of the same partners as those constituting another firm by the name of Mugneeram Bangur & Co., the only difference being that the partners had difference shares in the two firms. Mugneeram Bangur & Co., also carried on business in lands and buildings and some of the conveyances purported to have been executed by the assessee firm of Mugneeram Bangur & Co., Land Department, were as a matter of fact executed in the name of Mugneeram Bangur & Co. From this it is sought to be inferred that the name of the firm in which the business was carried on was not a matter of any moment.

(2) The name of the assessee firm is completely different form the name of the new company, there being nothing common between the two names.

(3) The assessee firm carried on business at an address different from that of the company, the firms address being No. 65, Sir Hariram Goenka Street, Calcutta, while the companys office was situated at No. 9, Clive Row, Calcutta.

(4) There was no undertaking given by the members of the assessee firm not to carry on a business in land development in the old name and style and if they chose to carry on business in that name and style a transfer of the goodwill to the company was meaningless.

(5) In the prospectus issued by the new company disclosing the balance-sheet of the vendor firm no value had been assigned to the goodwill.

It was further argued on behalf of the department that as the partners had stated in the prospectus issued by the company that the properties which were being taken over at cost were according to market value well above the said cost price and as the value of the items Nos. 3 to 8 were fixed the appreciation could only be ascribed to the rise in value of the land which was measured by Rs. 2,50,000, wrongly given as the value of the goodwill. Consequently, it was contended that this excess of Rs. 2,50,000 over the cost price showed the profit which was being made by the firm in the transaction.

According to the assessee it was not the case of the department nor the finding of the Appellate Tribunal that its goodwill had no value at all and it was argued that if there had been a transfer of the goodwill at an over-valuation the transaction could not be impeached unless characterised as fraudulent. The main contention of the assessee was and is that the transaction was in substance at transfer by the members of the firm to themselves as a company and consequently it was not a business transaction which could result in profit as man cannot make a profit out of himself. It was also argued that the transaction was in reality a slump transaction entered into merely for the purpose of carrying on business more conveniently and the case was therefore covered by the well-known judgment of the Judicial Committee in Doughtys case.

Now, if the transaction is not a business transaction resulting in any profit the question of liability to taxation does not arise. The sheet anchor of the assessees case is Doughty v. Commissioner of Taxes. In this case the appellant and one Arthur John George carried on business at Wellington as wholesale soft goods merchants and drapers in partnership. In 1920 they converted their business into a private limited company, of which embodied in an agreement dated June 25, 1920, was that the partners as vendors should sell to the company and the latter should purchase as from January 20 then past, the goodwill of the business, the leasehold, plant, machinery, book debts,

the benefit of pending contracts, all cash bill and notes and generally all property to which the vendors were entitled in connection with the business. Part the consideration for the sale was the allotment of shares both ordinary and preference to the two persons the residue of the consideration being the undertaking by the company to satisfy all the liabilities and engagements of the firm. The vendor contracted not to carry on the business of a draper independently of the company and further stated that they had subscribed to the memorandum of association for all the shares in the company in certain proportions, each of the partners rendering himself liable to that extent for the debts of the company. The nominal value of the shares being more than the sum to the credit of the capital account of the partnership in its last balance-sheet, a new balance-sheet was prepared showing a large value for the stock-in-trade. The Commissioner of Taxes claimed that the increase in value was a profit arising on the sale of the stock-in trade on which income-tax was leviable. Before the Judicial Committee it was argued by the appellant that, if the transaction was to be treated as a sale, there was no separate sale of the stock and no valuation of the stock as an item forming part of the aggregate which was sold and, secondly, that there was no sale at all but merely merely a re-adjustment of the business position of the two partners, the conversion of the business into a private limited company being for the convenience of carrying it on. In delivering the judgment of the Judicial Committee Lord Phillimore pointed out that "where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization and a realisation sale, the object in either case being to dispose of goods at a higher price for them, and thus to make a profit out of the business. The fact that large blocks of stocks of are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. But, upon the evidence in this case, it would appear that no such separate sale was effected. It was a transfer of all assets of the partnership for 76,000 shares, some preference, some ordinary, all taken at their face value of Pound 1 each, with an obligation, measured by a number of shares not paid up, to discharge the liabilities of the partnership." Their Lordships then examined various cases cited at the bar to show the distinction to be drawn between capital sales and sales and sales producing income and held that if the business be one of purely buying and selling, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income-tax; but on the facts they agreed with Stout C.J. that this was a slump a slump transaction. They also accepted the appellants contention that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners and that they made no money by the mere process of having their stock-in-trade valued at a high rate in transferring the same to a company consisting of their two selves.

The principle that a man cannot make a profit in a transaction in which he figures both as a vendor and as a purchaser has been acted upon in India in many cases. Thus in Kikabhai

Premchand v. Commissioner of Income-tax, the Supreme Court by a majority of four to one held that "it was wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact was non-consistent". In this case the assessee was person dealing in silver and shares and a substantial part of his holding was kept in silver bullion and shares. He was thus sole owner of the business and his accounts were maintained according to the mercantile system under which stocks could be valued from year to year on the basis of their cost price both at the beginning and at the end of a particular year. In the course of the year 1942 the assessee withdrew some bars of silver and shares from the business and business and settled them on certain trusts. He was one of the beneficiaries in all the three trusts and retained to himself a reversionary life-interest after the death of his wife who was given the first life-interest. After certain other life-interests the ultimate beneficiaries were charities. In his books of account the appellant credited the business with the cost price of the bars and shares so withdrawn. The assessee claimed that this transaction did not behalf of the department it was argued that the withdrawal of the bars and shares from the business must be dealt with according to ordinary and well known business principles, namely, that if a person withdraws an asset from a business he must account for it to the business at the market rate prevailing at the date of the withdrawal. It was further argued that the mere fact that the appellant was the sole owner of the business could make no difference, for, under the Income-tax Act, income was assessable under distinct heads and when working out the income of a business the rules applicable to business income must be applied whoever was the owner. It was also candid that if the withdrawal took place at a time when the market price was higher than the cost price, the State would be deprived of a potential profit. This contention was rejected off-hand and with regard to the first the Supreme Court held by a majority that the withdrawal was not a business transaction and by that act the business made no profit or gain nor did it sustain a loss and the appellant derived no income from it. It was observed that the assessee might store up a future advantage for himself but as he derived no immediate pecuniary gain, the State could not tax it. The Supreme Court said : "It is well recognised that in revenue cases regard must be had to the substance of the transaction rated than to its mere form. In the present case, disregarding technicalities it; is impossible to get away from the fact that the business is owned and run by the assessee himself.... Cut away the fictions and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income-tax law. And worse. He may keep it and not show a profit. He may sell it to another at a loss and cannot be taxed because he cannot be compelled to sell at a profit. But in this purely fictional sale to himself he is compelled to sell at a fictional profit when the market rises in order that he may be compelled to pay to Government a tax which is any thing but fictional."

The principle again came up for consideration in Commissioner of Income-tax v. Sir Homi Mehtas Executors. Sir Homi Mehta owned large blocks of shares in various joint stock companies, both public and private and dealt in them both ready and forward. The cost price of these shares was Rs. 30,45,017. These shares were transferred by him to a private limited company for Rs. 40,97,000 being the market value of the shares at the date of transfer. The assets of the company included not only the shares formerly belonging to Sir Homi Mehta but also several businesses carried on by him. In return for the assets transferred, 5,600 shares out of 6,000 shares (the total number of shares issued by the company) were allotted to the assessee, the remaining 400 shares being given to his four sons at his instance. The Income-tax Officer valued the excess of the excess of the market price of the shares over their cost price at the date of the transfer as profit made by Sir Homi Mehta in the transaction. The stand taken by the department was negatived by Bombay High court and Chagla C.J. observed that for the purpose of income-tax a transaction must be looked at from a commercial point of view and in trying to determine whether a certain transaction resulted in profits, we must come to a conclusion that the transaction resulted in real profit, profits which from the commercial point of view meant a gain to the person who entered into the transaction, not profits from any narrow, technical or legalistic point of view. The learned Chief Justice further held that in transferring the shares to the limited company the assessee was not undertaking any business activity and said : "The important test of a business activity must always be that an activity is undertaken with the object of making profit. The object may not be realised but a businessman ordinarily and normally enters into a business transaction or undertakes a business activity with the object of making profit." Further on, he observed : "It is well established both in English courts and in our own courts that there can be no profit subject to tax when there is a sale by a verdure to himself. A vendor cannot make profit out of himself, and therefore the transaction relied upon by the department is not a transaction capable of assaulting in any profits." It was also pointed out it was a transfer in which both as vendor cannot make profit out of himself, and therefore the transaction relied upon by the department is not a transaction capable of resulting in any profit." It was also pointed out that it was a transfer in which both as vendor and as vendee only the assessee and his sons were interested and the shares transferred to the assessee represented all the shares which were transferred or sold by the assessee to the limited company and the case was not, therefore, one where shares or stock constituting stock-in-trade of the assessee were converted into different shares. The learned Chief Justice found his reasoning fortified by the decision in Doughtys case.

The above decision was followed by the Bombay High Court in the case of Rogers & Co. v. Commissioner of Income-tax. In this case eleven persons carried on business under the name and style of Rogers & Co. The firm converted itself into a private limited company and the shares thereof allotted to the members were in the same proportion as the shares held by them in the partnership, there being a very slight difference due to rounding off to a specific number. The

written down value of the block assets of the firm in their books was Rs. 3,81,848. The assets transferred to the company were valued at the original cost price of Rs. 4,85,354 and the department contended that the difference between the two figures was liable to tax by reason of the second proviso to section 10(2) (vii) of the Income-tax Act. Chagla C.J. again held that from a commercial point of view the vendor and the vendee being the same there was no sale and the transaction in substance was "only a re-adjustment made by certain persons so as to carry on business in one form rather than in another..... No change he taken place except the legal change of a company taking the place of a firm." Accordingly, the court came to the conclusion "the entries made in the books of account do not represent the real nature of the transaction as far as the sale is concerned; and if they do not represent the real nature of the transaction in that sense, they equally do not represent the real transaction from the point of view of the price fixed for this transaction."

As against this proposition it was contended on behalf of the department mainly on the strength of a judgment of the House of Lords in Sharkey v. Wernher, that the withdrawal of the stock-in-trade, i.e., the land from the firm of Mugneeram Bangur & Co., Land Department, must be accounted for in the books of the firm at their market value at date of the withdrawal as in Sharkeys case were as follows :

Lady Zia Wernher carried on a stud farm and owned besides racing stables. At her farm she bred horses for her farm she bred horses for here racing stables and from time to tie transferred horses from here farm to here stables. In the year ended December, 31, 1948, the transferred five horses from here stud farm to are stables. The cost of breeding these horses had been debited in the stud farm accounts and it was common ground between the parties that, consequent upon such transfer, for income-tax purposes, some figures in respect of the transferred horses had to be brought in the stud farm accounts as a receipt. Her activity in the farm was husbandry" which was taxable under Schedule D to the Finance Act, but the activity in maintaining the racing stables gave rise to liability to tax as it was a recreational enterprise. The market value of the horses transferred (if they were to be treated as sold) was considerably in excess of their cost and the sole ground of appeal against the assessment put forward on behalf of the assessee was that the proper figure to be brought into the accounts as aforesaid was the cost of breeding the transferred horses and not the market value on an assumes scale. The House of Lords by a majority of four to one allowed the appeal of the department. Viscount Simonds and Lord Radcliffe gave opinions in favor of the department and Lord Oaksey gave dissenting judgment. Vesicate Simonds referred to the judgments in Watson Brothers v. Hornby and Inland Revenue Commissioner v. William Ransom & Son Ltd. In the former case, the taxpayers carried on a business of poultry dealers and breeders of poultry at a hatchery belonging to them which was conceded to be an enterprise chargeable as a trade under Case I of schedule D of the Income Tax

Act, 1918. The business of the hatchery was to produce and sell day-old chicks. They also carried on farming activities which were conceded to be, for income-tax purposes, an enterprises separate from the hatchery business and, as the law them stood, was an income-tax source chargeable under Schedule B of the Income Tax Act, 1918. Most of the produce of the Hatchery was sold, but a substantial number of day-old chicks were from time to time transferred to the farm and become part of the stock of poultry of the stock of poultry of the farm. The question in the appeal was whether, in computing the profits of the hatchery business, the day-old chicks transferred to the farm should be brought in at cost or market value. The market value was at the material time much below cost, viz., 4d. as against 7d. per chick. It was contended for the taxpayers that market price and for the Crown that cost of production should be adopted as the appropriate figure in the accounts. Macnaghten J. upheld the contention of the taxpayers. Viscount Simonds noted that this decision had every since been adopted as the basis of assessment by the revenue in similar cases and observed "that the taxpayer may in certain cases be subject to a sort of dichotomy for income tax purposes and be regard as selling to himself in open capacity what he was produced in another, and secondly, that he is regarded as selling what he sells at market price". With regard to the second case, viscount Simonds noted that it recognized that for tax purposes two parts of an enterprises carried on by a taxpayer should be valid distinction between a trader crediting himself with a price (market value) which produces a profit or with a price (production cost) which strikes a balance or reduces his loss. According to the two cases "something has to be brought into account where the legislature recognises a sort of artificial dichotomy and a taxpayer regarded as carrying on more than one taxable activity". His Lordship recognised that this principle conflicted with the proposition taken in its broadest sense that a man could not trade with himself and went on to observe "yet it seems to me that it is a necessary qualification of the broad proposition. For if there are commodities which are the subject of a mans trade but may also be the subject of his use and enjoyment, I do not know how his account as a trader can properly be made up so as to ascertain his annual profits and gains unless his trading account is credited with receipt in respect of those goods which he has diverted to his own use and enjoyment. I think, therefore that the admission was rightly made that some sum must be brought into the stud farm accounts a receipt though nothing was received and so far at least the taxpayer must be regarded as having trade with himself. But still the question remains, what is that sum to be ? I suppose that in the generality of cases in which the question arises in a farming or any other business, e.g., where the farmer supplies his own horse with milk, or a market gardener with vegetables an arbitrary or conventional sum is agreed. The House was not given any information as to the prevailing practice.... But it appears to me that, when it has been admitted or determined that an article forms part of the stock-in-trade of the trader and that upon his parting with it so that it no longer forms part of his stock-in-trade some sum must appear in his trading account as having been received in respect of it, the only logical

way to treat it is to regard it as having been disposed of by way of trade. If so, I see no reason for ascribing to it any other sum than that which would normally have received for it in the due course of trade, that is to say, the market value... The unreality of this alternative would be plan to the tax-payer, if, as well might happen, very large service fee had been paid so that the cost of production was high and the market value did not equal it."

According to Lord Radcliffe "the composite proposition that a man cannot make taxable profit out of trading with himself is of unquestioned validity when it is applied to the two kinds activity with which it is habitually associated in income tax history, mutual issues and certain public utilities financed by rates.... The situation presented to us is a different one. for we are required to assume... that the activities to which the accounts relate do constitute a trade for income tax purposes; and our problem is to determine what upon that basis are the proper entire to make in those trading accounts in relation to certain transactions with trade stock... all things considered, I do not think that we ought to treat the respondents general proposition as precluding the possibility that the income tax scheme may be found to require that in certain citations a taxpayer should be treated as if he had dealt with himself on commercial terms." His Lordship went on to say that when a horse was transferred from the stud farm to the owners personal account, there was unquestionably a disposition of trading stock. The three methods suggested in argument for recording the result in the stud farms trading accounts were : (1) There might be no entry of a receipt at all; (2) the figure brought in as receipt might be costal and (3) the figure might be on the basis of the market value. With regard to the first method his Lordship said that although theoretically a trader could astray or let waste or give his stock, he did not do so in practice and a tax system which allowed business losses to be set off against taxable income from other sources was bound to reject such a method because of the absurd anomalies that it would produce as between one taxpayer and another. It would give the self-supplier a quite unfair tax advantage. With regard to the second method his Lordship said that "no sale in the legal sense has taken place nor has there been any actual receipt : the cost basis, therefore, treats the matter as though there had been some sort of deal between the taxpayer and himself but maintains that in principle he can only break even on such a deal.... The fact that an item of stock is disposed of not by way of sale does not mean that it was any the less part of the trading stock at the moment of disposal..... In a situation where everything is to some extent fictions, I think that we should prefers the third alternative of entering as a receipt a figure equivalent to the current realizable value of the stock item transferred.... The reliable value figure is neither more nor less real than the cost figure, and in my opinion it is to be preferred, for two reasons. First, it gives a fairer measure of assessable trading profit as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayers decision as to what proportion of his total product he will supply to himself. A formula which achieves this makes for a more equitable distribution of the burden of tax, and is to be preferred on that account. Secondly, it

seems to be better economics to credit the trading owner with the current realizable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses in respect of that stock."

To me it seems that the principles laid down in Sharkeys case run counter those in Kikabhais case. It should be noted that the reasoning of Bhagwati J., in his dissenting judgment, was in line with that in Sharkeys case. However that may be, we are bound by the principles laid down in Kikabhais case.

Reliance was also placed on the judgment of the Bombay High Court in Commissioner of Income-tax V. Bai Shrinbai K. Kooka. This judgment has since been affirmed by the Supreme Court : In this case the assessee had first purchased shares for investment which she converted into here stock-in-trade for the purposes of carrying on a business in shares as from April 1, 1945. She thereafter sold some of the shares in the assessment year 1947-48 and the prices obtained by here were much higher than those at which she acquired the shares or those prevailing on April 1, 1945, when they were brought into her business in shares. The question arose as to what was the value of the shares to be taken for the purpose of ascertaining the profit. Chagla C.J. took the view that the difference between the price realised at the sales took the view that the difference between the price realised at the sales and the market value of the shares on April 1, 1945, represented the profits. On behalf of the department it was contended on to basis of Kikabhais case, that as the assessee could not have done business with herself she could not have sold the shares to the business as on April 1, 1945, and therefore the difference between the price realised and the cost price should be assessable as profits. This was negatived by the learned chief Justice who said that the observation of the Supreme Court did not mean that "even for the purpose of accountancy and ascertainment of commercial profits it was no to open to the court to value the shares belong to the same person who started the business and who had purchased them at a higher price..... A commercial man would be horrified if it was suggested that from the business or commercial point of view the profit made by a business a valuable assets which he had obtained free was profit on the basis of treating the valuable asset as of no value at all", in case there was a gift of the shares.

With respect, it seems to me that when a man starts a business with some stock-in-trade no matter how as when the stock-in-trade was acquired, for accounting purposes it should be valued on the basis of the market price prevailing on the day when the business was started. Ordinarily, anybody wishing to start a new business has to purchase stock-in-trade and the fair value therefor should be the market value at the commencement of the business. It may be that he has receive a portion of the stock-in trade by way of gift; it may be that a portion of it had been acquired at a price much higher than the market price ruling on the day when it started his business. The fair

and equitable thing to do would be to take the value of the stock-in-trade at zero hour irrespective of the method of acquisition or the price paid therefor.

Reference was made on behalf of the department to the case of Californian copper Syndicate v. Harris, and it was argued that the case before us is covered by this authority. I do not agree. The facts in this case were as follows :

The company was incorporated with the object, inter alia, of acquiring copper and other mines, mining rights in California or elsewhere and any interest their and in particular to acquire the several mines mentioned in the object clause and to sell, lease, charter or otherwise dispose of absolutely or conditionally the whole or any part of the undertaking, property rights, concessions or privileges of the company for such consideration in cash, shares otherwise as the company might think fit. The company acquired copper boring land in the country of Fresno, extending over 480 acres at the price of Pounds 24,000 and expended the paid up capital of the company in the purchase and development of the property. Its total capital was Pounds 28,332 divided into as many shares of Pounds 1 each. The accounts showed that the cash capital of Pounds 4,332 was span in development, preliminary and head-office expenses. The company at first sold 80 acres of its property to the Fresno Copper Co. Ltd. at the price of Pounds 105,000 payable wholly in fully paid up share of the Fresno Copper Co. Ltd. and sold the remaining 400 acres of its property to the same company at the price of Pounds 195,000 payable like wise within a few months after the first transaction. At an extraordinary general meeting of the Californian copper Syndicate Ltd., a resolution was passed reducing the capital from Pounds 30,000 divided into thirty thousands shares of (pounds) 1 each to (pounds) 3,320-14s. divided into 28,332 shares of the syndicate, ratably 283,320 shares of (pounds) 1 each fully paid up of the Fresno Copper Co. Ltd. and by reducing the nominal amount of 28,332 shares of the syndicate from Pounds 1 to IS. 2nd each. The resolution was unanimously confirmed and a petition for confirmation of reduction was presented to the court. On these facts, it was held that the difference between the price and the value of the shares for which the property was exchanged was the profit assessable to income-tax. The agreement that the profit was not realised profit and, as such not taxable was not accepted. Lord Justice Clerk observed that although where the owner of an ordinary investment choose to realise it and obtain a greater price for it than he originally acquired it at, the enhanced price was not profit in the sense of Schedule D of the Income Tax Act, 1942, but it was equally well established that the enhanced values obtained from the realisation or conversion of securities might be so assessable, where what was done was not merely a realisation or change of investment, but an act done in what was truly the carrying on or carrying out of business. His Lordship paid that "although that was a sale, the price to be paid in shares, I feel compelled to hold that this company was in its inception a company endeavouring to make profit by a trade or business, and that the profitable sale of its property was not truly a substitution of one form of

investment for another. It is manifest that it never did intend to work this mineral field with the capital at tits disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing other to take it up on such terms as would bring substantial gain to themselves."

I do not see how the fact of the case before us can be identified with californian syndicates case. There the object of the company was to purchase land, develop the same and sell at a profit. There was a real sale in that the vendor and the purchaser were entirely different legal entities not only from the strictly legal point of view but also from the commercial point of view. In the present case, there may be a sale from the legal point of view, but no sale from the commercial point of view.

It was argued by the learned standing counsel appearing on behalf of the assessee that the case before us could be distinguished from Sharkeys case, in that it does not relate to the withdrawal of a portion of the assets of a business but is a case where the business in transfer to new channel or given a new look. It is not for me to speculate as to whether the Supreme Court would have applied the reasoning in Wernhers case, to Kikabhais case. Doughtys case are strictly applicable to the facts before us and are conclusive on the point.

In my opinion, the answer to question No. 4 must be that there was no profit in the transaction by which the entire stock-in-trade and the business of the firm were transferred the the limited liability company. Again the fact that two outsiders were brought in as directors with seven shares allotted to them out of 39,300 shares makes no difference. In Sir Homi Mehtas case, 400 shares out of 6,000 shares allotted to Sir Homi Mehtas sons. Nor again can I see any difference in principle between the case of conversion of business into a private limited company and one in which it is converted into a public limited company, if in the latter company outsiders are not allotted any sizable proportion of the shares issued.

This is enough to dispose of the matter but as questions Nos. 2 and 3 have been referred, I propose to answer the same.

So far as the good will of the firm of Mugneeram Bangur and Co., Land Development, is concerned, it would appear that the public company did not attribute much importance to it. I do not propose to attempt to lay down any general definition of the word "goodwill". The various ways in which this expression has been interpreted by learned judges has been very ably collected, if I may say so with respect in Box V. Commissioner of Taxation. According to Lord Lindley in Inland Revenue Commissioners v. Muller & Companys Margarine Ltd. "Goodwill regarded as property has no meaning in connection with some trade, business or calling. In that connection I under stand the word to include whatever adds value to a business by reason of

situation name and reputation, connection, introduction to old customers, and agreed absence from competition or any of these things, and there may be others which do not occur to me." According to the Full Bench of the High Court of Australia in Boxs case "Goodwill includes whatever adds value to a business, and different business derive their value from different consideration. The goodwill of some business is derived almost entirely from the place where they are carried on, some goodwills are purely personal, and some goodwills derive their value partly from the reputation built up around the name of the individual or firm or company under which it has previously been carried on."

In this case, the company was neither using the name nor the place of business of the firm nor was nay agreement entered in to whereby the members of the firm undertook not to carry on a similar business. Indeed, so long as Mugneeram Bangur and Co. carried on a similar business no such undertaking could be given. In a business of this type, in my opinion, goodwill would be limited to the reputation of the persona carrying it on, for, I cannot imagine any customer approaching the firm on any other consideration. A person desiring to buy land would naturally ascribe importance to the reputation of the person who was selling it specially where the vendors business is to sell land. If the Bangurs had acquired by reputation in the manner of developing lands, it would be personal to themselves. So looked at, the transfer of the business to a company, the name of which did not suggest that the Bangurs were in it, would be meaningless so far as the transfer of goodwill was concerned.

But it was argued on behalf of the assessee that the Bangurs who had been carrying on business in land development had certainly acquired some goodwill in the said business and if it was not suggested by the income-tax department that the transaction was a sham one or that the goodwill had no value at all the department could not challenge the valuation put on the goodwill by the partners. The would be the position but for two considerations. If there cannot be a sale by a person to himself for income-tax purposes there could equally be no transfer of goodwill by a person to himself. Secondly, as already pointed out, the members of the firm were not giving up the right to carry on business in land development and, therefore, the transfer of goodwill by them in the absence of an undertaking not to compete meant nothing. As the assets of the firm transferred to the company have been itemised and as there can be no question of variation of the figures given in items Nos. 3 to 8 in the agreement for sale, it must be held that Rs. 2,50,000 shown as the value of the goodwill must be represented by surplus on the sale of lands which was the stock-in-trade of the assessee company.

So far as question No. 3 is concerned, even if the value of the stock-in-trade taken over by the company was greater than the figure shown therefore in the agreement for sale, in view of the answer to question No. 4, there was no profit which could be taxed.

RAY J. - I agree.

Order accordingly.