

# KERALA HIGH COURT

P.T. Abdul Sattar

Vs

Controller of Estate Duty

(P S Poti, C.J. K Sukumaran, J.)

30.08.1983

## JUDGMENT

**Sukumaran, J.**

1. "The Cannanore Shop" was a prominent business concern, situate as it was, according to the finding of the Tribunal "at an important and ideal locality" engaged in business "over many years" and "with long standing business traditions". P. Abdurahimankutty was one of the partners from early times. He was a partner of the firm constituted under the deed of July 1, 1967. At the age of 84, he continued to be a partner, the first partner, of the firm, as reconstituted under annexure "A", partnership agreement dated August 2, 1968. He was the managing partner with extensive powers in the matter of administration of the firm and his share in the capital was 40%. The partnership was one at will. The deed contained many of the provisions usually seen in a partnership deed. The managing partner had even an unusual power "to expel any of the remaining partners if, in his opinion, the continuation of the partner is detrimental to the partnership business" (clause 16). Clause I 5 of the deed is of substantial significance as far as this case is concerned and it reads:

"In the event of death or retirement, such deceased or retiring partner shall not be entitled for any goodwill of the firm....."

2. Allied to this clause are Clauses 13 and 14, which read :

"13. If any partner shall die or voluntarily retire, an account shall be taken of his capital and profits in the firm or his losses and withdrawals up to the date of his death or retirement,

14. If during the continuance of the partnership any one partner shall die or become insolvent, the other partners can continue the partnership and the business shall be continued between the remaining partners unless all of them agree to dissolve the whole partnership".

3. Abdurahimankutty died on January 18, 1969.

4. Proceedings under the E.D. Act (hereinafter referred to as "the Act") were duly initiated. The son of the deceased, and an accountable person under the Act, Abdul Sattar, delivered the estate duty account declaring the value of the estate at Rs. 1,88,358. The net value, however, of the estate was computed under annexure "B" order dated April 30, 1971, at Rs. 2,54,204. We are not concerned in this reference with the various additions made in the assessment except the one in relation to the share of goodwill of the deceased in the firm. According to the Assistant Controller of Estate Duty, the firm enjoyed goodwill; the mere recital in the deed providing that no partner shall be entitled to claim any goodwill at the time of retirement or death would not

take away the right of the partner in the goodwill of the firm ; and the restrictions and prohibitions in the deed need not be considered in the notional market valuation of the goodwill. The value of the goodwill was computed at Rs. 98,190 and the share of the deceased therein at Rs. 39,276.

5. The accountable person appealed before the Appellate Controller of Estate Duty against the additions made including the one relating to the share of the deceased in the goodwill of the firm. Before the Appellate Controller the contention that the firm did not enjoy any goodwill at all was not pursued. However, it was contended that the deceased did not have any share in the goodwill of the firm, relying on the various clauses already referred to. This contention found acceptance by the Appellate Controller. After analysing the various provisions of the deed, the Appellate Controller observed :

"In such circumstances, the estate of the deceased partner does not have any claims of goodwill over the other partners. Therefore, there can be no passing of any property in so far as it relates to goodwill under Section 5 of the Act."

6. In that view of the matter, the inclusion of the value of share in goodwill made by the Assistant Controller to the value of the estate of the deceased was deleted.

7. Two appeals were preferred before the Appellate Tribunal, one by the accountable person and the other by the Department. The appeal by the accountable person was dismissed and that of the Department was allowed. The Tribunal did not accept the finding of the Appellate Controller on goodwill. According to the Tribunal, to bring the share of the goodwill under the charge, "all that is necessary is that a property must pass on the death of the deceased; it did not matter to whom it passed". According to it, Section 6 of the Act was not attracted. The addition was justified under the charging section, Section 5 of the Act. There was a goodwill for the firm and it continued to be enjoyed by someone. The mere fact that the goodwill did not pass to the legal heirs or to the accountable person did not justify a contention that "the goodwill just vanished into thin air". According to the Tribunal "it had an existence before his death and that it continued even thereafter". In that view of the matter, it was held that the goodwill did pass on the death of the deceased, attracting thereby the duty under the Act.

8. At the instance of the assessee, whose application for reference was dismissed by the Tribunal, the following question was directed to be referred to this court by the order passed by this court in O. P. No. 2758 of 1974 :

"Whether, on the facts and in the circumstances of the case, and particularly in view of Clause 15 of the partnership deed, did any property in goodwill pass on the death of Abdurahimankutty under Section 5 of the Estate Duty Act ?"

9. It is necessary at the outset to clarify that the Department did not place any reliance on Section 7 of the Act. A discussion on that section and the judicial thinking centering round it, therefore, does not arise for consideration in this case.

10. The Tribunal itself has found that Section 6 which provides for a deeming provision is not attracted to the case. What, therefore, does arise for consideration in this reference is the scope and amplitude of Section 5 of the Act, having regard to the factual matrix indicated earlier.

11. We are concerned with an essential mundane concept of property which passes on the death of a partner in a firm. Abstract philosophical notions are out of place in such a context. The point of time relevant is the time of death, not even a second earlier ; and not at all that "twilight between life and death, when perception is dimmed blurring the vision and softening the sorrow", as Lord Butler would put it.

12. To any serious student of law, what Salmond has stated in his celebrated book on "Jurisprudence", in the context of the death of a person, may present itself. He stated (p. 332) :

"Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as they are free from liabilities.....They do not even remain owners of their property until their successors enter upon their inheritance ....."

13. The estate of a deceased happened to be discussed in situations other than those arising under the E. D. Act, such as in *Ram Gelam Dobey v. Ayma Begum* [1869] 12 WR 177, *Veerasokkaraju v. Papiiah* [1903] ILR 26 Mad 792 and *Erava v. Sidramappa Pasare* [1897] ILR 21 Bom 424. Justice Varadachariar in *Kanchamalai Pathar v. Shahaji Rajah Sahib*, AIR 1936 Mad. 205 ; [1936] ILR 59 Mad 461 [F.B.], adverted to some of these aspects in a very erudite judgment, which was referred to by a Full Bench of the Travancore High Court in *Subramonya Iyer v. Mathevan Pillai Sreekrishna Pillai*, 1947 Travancore Law Reports 24. Varadachariar J.'s observations contains the following passage (p. 215 of 1936 AIR Mad):

"The so-called estate of a deceased person is a very convenient legal fiction, but as a matter of fact, there is in Hindu law at least no such objective reality as the estate of a deceased person. At the moment of Nagappa's death, the property owned by him ceased to be his, and became the property of his heirs subject, of course, to the liabilities and obligations created by him." (Emphasis\* supplied)

14. We have extracted these passages only to demonstrate how the "liabilities and obligations" created by a person will have impact on his "property" at the moment of death.

15. At one time it was considered that the goodwill in a firm survived to the benefit of the surviving partner. [See *Hammond v. Douglas* [1800] 5 Ves 539]. That view has been rejected for ever by the turn of that century. Romer, Lord Justice, observed in 1899, that it was by then "well-settled" that "the goodwill will be an asset and might well be the most valuable asset of the partnership" and that "the executors, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of division". See *David and Mathews, In re* [1899] 1 Ch. 378. The legal position is stated in the following passage in *Dymond on Death Duties*, fourteenth edition, volume 1, page 79 :

"The deceased's share of a partnership business is normally an asset of his estate, but as partnership agreements often contain provisions relating to the death of a partner, special considerations may arise, especially as regards his share of the goodwill."

16. The same idea is also expressed, at page 473, in *Green's Death Duties*, seventh edition, in the passage reading :

"The goodwill, if any, of the deceased's business is a taxable asset, and the goodwill of a partnership business is part of the firm's assets. Subject to any express provision to the contrary, the representatives of a deceased partner can compel the surviving partners to sell the goodwill, and in the event of a sale the partners will be debarred from using the firm name or representing themselves as continuing the same business or canvassing former customers. Frequently, however, articles of partnership specifically provide for the treatment of goodwill on the death of a partner. Such a case must be dealt with on its merits, regard being had primarily to the exact nature of the dutiable asset."

17. Section 5, the charging section of the Act, levies estate duty on property which passes on the death of a person. Soon after the corresponding duty was imposed in England, the scope and amplitude of the term "property passing on death" had been the subject-matter of judicial thought and discussion. The way to a clear and a correct view was by no means an easy one. Ours, however, is not an unlighted path. Even the very section of the Indian enactment had been subjected to exhaustive discussions in the judicial decisions rendered by the various High Courts

in India, Gujarat, Bombay, Madras and the Punjab, (vide *Mrudula Naresh-chandra v. CED* [1975] 100 ITR 297 (Guj), *CED v. Fakirchand Fatechand Sachdev* [1982] 134 ITR 268 (Bom), *CED v. Ibrahim Gulam Hussain Currim-bhoy* [1975] 100 ITR 320 (Mad), *State v. Prem Nath* [1977] 106 ITR 44 (P & H) and *Surumbayi Ammal v. CED* [1976] 103 ITR 358 (Mad). We would treat these decisions as "the lantern by which we could see our way on the dark road", as Froude would put it.

18. *Mrudula Nareshchandra v. CED* [1975] 100 ITR 297 (Guj), considered the very question, in respect of share of a partner in a firm, the partnership deed of which contained similar clauses as the one in our case. Clause 10 of the partnership deed in the Gujarat case read as follows:

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

19. The statutory scheme of the Act was examined by the Gujarat High Court. The decisions in *Attorney-General v. Boden* [1912] 1 KB 539, and *Perpetual Executors and Trustees Association of Australia Ltd. v. Commissioner of Taxes of the Commonwealth of Australia* [1954] AC 114; [1954] 25 ITR (ED) 47 (PC), were considered at length in that decision. The opinion of the court is expressed in the following passage (p. 307):

".....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'. It is evident that the simplest case of passing of a property on death of a person is its acquisition by inheritance. In case of inheritance we find a continuity of rights, which devolve, according to the law of succession, only on those who can inherit the estate of the deceased. The heirs, who get the property, represent the deceased himself. There is, therefore, a continuity of interest resulting in passing of property from one hand to the other and such a passage of property obviously attracts liability for the payment of duty as contemplated by Section 5 of the Act. Therefore, if in the present case, it is found that the heirs of the deceased inherited the interest in the goodwill of the firm along with his interest in the rest of the partnership assets, there would be no difficulty in holding that the provisions of Section 5 of the Act are attracted".

20. Thereafter the provisions of the partnership deed were considered by the High Court with particular reference to the Clause referred to above. The High Court observed (p. 309):

"If a reference is made to this clause, it will be found that, according to it, the interest of a dying partner automatically comes to an end on his death. Thus, if an interest in a property comes to an end at a particular point of time, nothing survives which can be inherited by the heirs of that partner, after the interest has ceased to exist. Therefore, on a bare reading of Clause (10), it is not possible to contend successfully that it leaves any scope for the passing of that interest from the hands of the deceased to the hands of his legal representatives".

21. We are in agreement with the view so taken by the Gujarat High Court. (It is for that reason that we have extracted long passages from that judgment which deals with the rationale of the decision).

22. At page 310 of the judgment, the decision in *Perpetual Executors' case* [1954] 25 ITR (ED)

47 (PC), was distinguished by that court in the following words:

"It should be noticed that while in the instant case the interest of the deceased in the goodwill of the firm instantly ceases to exist on the death of the deceased, in the Perpetual Executors' case [1954] 25 ITR (ED) 47 (PC) the said interest subsisted till the surviving co-partners preferred to exercise their option to purchase the capital of the deceased partner. There was, therefore, in the Privy Council case, a gap of time between the death of the deceased and exercise of option which resulted in the devolution of interest of the deceased, on his legal representatives".

23. Similarly, it was noted that in the Boden's case [1912] 1 KB 539, the interest of the deceased directly passed to his legal representatives immediately after his death, because his share was to accrue to his partners, who were his sons, subject only to their paying out to his legal representatives the value of his share, as on the date of his death ascertained by a proper valuation without taking into account any valuation of, or allowance for, goodwill. In the case before them, the judges of the Gujarat High Court felt that, unlike in Boden's case, the interest of the deceased was stipulated to come to an end the moment the deceased died (See the observations at page 311). Ultimately, the court came to the conclusion that in view of Clause 10 in the partnership deed, "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.

24. The Supreme Court had made observations on the word "passes" occurring in Section 5 of the Act, in two cases CED v. Hussainbhai Mohamedbhai Badri [1973] 90 ITR 148 and CED v. Aloke Mitra [1980] 126 ITR 599. In the former case, the Supreme Court observed at page 152, "The word 'passes' means 'changes hands'." This observation, however, occurred in a case where there was no dispute about the factum of passing of property. Whether the property which passed on the death of the deceased was only 1/3rd of the trust properties as contended by the accountable person, or whether the entirety of the property, as contended by the Department, was the question which arose for consideration. It was observed in the latter case that the real question there was whether the property had passed on the death of the deceased, the ultimate destination being irrelevant. We are, however, of the view that the general observations contained in the aforesaid decisions of the Supreme Court do not militate against the reasoning of the Gujarat High Court in relation to the interpretation of the term 'passes'. In Aloke Mitra's case [1980] 126 ITR 599 (SC), the deceased was the real owner of certain shares though they were held in the name of his wife, sons and others benami. The Supreme Court posed the main question as (p. 605):

".....whether in the case of a benami transaction, the value of the property held by a benamidar passes upon the death of the real owner and is includible in the estate of the deceased under Section 5 of the Act, or being so held by the benamidar, it cannot be deemed to pass on his death because of Section 6 of the Act....."

25. It was in that background that the effect of Sections 5(1) and 6 of the Act was examined. The Supreme Court later observed (p. 606):

"Whenever property changes hands on death, the State is entitled to step in and take a toll of the property as it passed without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding".

26. Their Lordships concluded that the liability to pay estate duty under Section 5 is of the real owner and not of the benamidar, who was merely an ostensible owner. We are not concerned with a case of passing of property of the real owner when that property is held benami by somebody else. We are of the view that the general observations of the Supreme Court do not in any way affect the analysis of the legal concept of passing of property in the context of a firm with a provision in the partnership deed providing for the extinction of the right to goodwill of

the partner, on his death. The decision of the Gujarat High Court had not been considered by the Supreme Court. The Supreme Court has not expressed any disapproval of the views expressed by the Gujarat High Court.

27. Essentially based on the observations of the Supreme Court in the aforesaid cases, the Bombay High Court in *CED v. Fakirchand Fatehchand Sachdev* [1982] 134 ITR 268, dissented from the Gujarat view. For reasons mentioned above, we are not inclined to hold that the view taken by the Gujarat High Court is erroneous.

28. The decision of the Madras High Court reported in *CED v. Ibrahim Gulam Hussain Currimbhoy* [1975] 100 ITR 320, also expressed views disagreeing with the Gujarat High Court. The discussion by the Gujarat High Court is seen at pages 327 and 328. The Gujarat view has been distinguished on the basis of the decision of the Supreme Court in *Khushal Khemgar Shah v. Khorshed Banu, Dadiba Boatwalla*, AIR 1970 SC 1147. The Supreme Court in that case observed that the partnership Act did not operate to extinguish the right in the assets of the firm of a partner who dies when the partnership agreement provided that on death the partnership is to continue. It was then observed (p. 328):

"Therefore, the interest in the goodwill which the deceased possessed and could dispose of along with his entire interest in the firm at the time of his death came to devolve on the surviving partners and their share in the interest of the goodwill is augmented to the extent of the share of the deceased as per Clause 14 of the partnership deed."

29. Clause (8) of the partnership deed considered by the Supreme Court in the above case is substantially different from the relevant clauses in the case before us. The effect of the absence of such provisions regarding goodwill in the deed of partnership has been noted to be a distinguishing feature, by the Bombay High Court also in *CED v. Fakirchand Fatehchand Sachdev* [1982] 134 ITR 268 at 284. We are of the view that the assumption that there was an interest in the goodwill which the deceased possessed and could dispose of, was unjustified. If there exists a provision like Clauses 14 and 15 in the present case and Clause 10 in the Gujarat case, it could not be posited that at the time of his death the deceased had a share in the interest of the goodwill or any right which he could dispose of at that time.

30. A later decision of the Punjab High Court followed the Madras decision (see *State v. Prem Nath* [1977] 106 ITR 446 [FB]). That, however, is a case where the partnership did not contain a provision similar to those present in the case before us or in the Gujarat case.

31. A still later decision of the Madras High Court in *Smt. Swumbayi Ammal v. CED* [1976] 103 ITR 358, merely followed the decision in *CED v. Ibrahim Gulam Hussain Currimbhoy* [1975] 100 ITR 320 (Mad) and did not contribute to the discussion in the earlier case. It may, however, be noted that in this case also there was no clause in the partnership deed providing as to what would happen to the goodwill on the death of any partner.

32. In a sense, for the purpose of the present case, it may not matter whether the Bombay or the Gujarat view is the correct one. Even if the Bombay view is held to be correct, the share of the deceased in the goodwill of the firm could not be subjected to any levy of estate duty in the light of the conclusions expressed in paragraphs (9) and (11) (see pp. 308, 309 of 134 ITR) and the ultimate answer made to the reference by that court in relation to a partner similar to the one in our case. The controversy on this aspect has been adverted to at page 287 of the Bombay decision where reference is made to the conjoint effect of Sections 5, 6, 7, 36 and 40 of the Act. At page 290, it was observed that the computation of the value of property which passes under Section 5 is to be made under Section 40, and that "if such computation cannot be made, then such property was never intended by the Legislature to be made the subject-matter of the charge". The (9th) and (11th) paragraphs of the conclusion (See pp. 308-309 of 134 ITR) which

are relevant for our purpose read :

"(9) Where under the provisions of a deed of partnership, a partnership is not dissolved by the retirement or death of a partner but the surviving partners become entitled to carry it on, and the deed of partnership provides for payment to the retiring partner or to the legal representatives of the deceased partner of a certain amount, which usually is the value of his share in the partnership, all that the retiring partner or the legal representatives of the deceased partner become entitled to is to receive from the continuing partners the money value of such share in accordance with the provisions of the deed of partnership, which may or may not include any amount for the goodwill of the firm, depending upon what the deed of partnership provides.....

(11) The right of a partner during the subsistence of a partnership and his right on dissolution of the firm or his right to receive from the surviving partners the amount of the value of his share in a firm where the firm is not dissolved by retirement or death, each is a separate right and constitutes property within the meaning of that term as used in the E.D. Act, 1953. These rights became vested in and were owned by a partner when the partnership came into existence. It is not correct to say that the right of a partner in the case of dissolution of the firm or his right or the right of his legal representatives as representing his estate to receive the amount of the value of the deceased partner's share from the surviving partners came into being for the first time on the death of the partner. Such a right existed in the partner himself at the time the partnership came into existence, and on the death of the partner it is this right which passes."

33. And the answer to question No. 1 in respect of the firm, M/s. Ratnaji Raghunath, is given at page 310 in the following words :

"The deceased did not have any defined share in the goodwill of the firm of M/s. Ratnaji Raghunath in which he was a partner and, therefore, such so-called share could not be property passing on his death or liable to be included in his estate under Section 5 of the E.D. Act 1953."

34. In view of the aforesaid discussion, we are of the view that there is no justification in the addition made to the value of the estate of the deceased, in respect of the sum alleged to be attributable to the share of the deceased in the goodwill of the firm, as such an addition is unjustified having regard to the nature of the partnership deed and the effect of Clauses 14 and 15 referred to above.

35. In the light of the aforesaid discussion, we answer the question referred to us in the negative, that is, in favour of the assessee and against the Department. The parties are directed to bear their respective costs.