BOMBAY HIGH COURT

Controller of Estate Duty

Vs

Fakirchand Fatehchand Sachdev

(D Madan, J. S.V Manohar, JJ.)

18.08.1981

JUDGMENT

Madon, J.

1. The above three cases have been stated by the Income-tax Appellate Tribunal under s. 64 of the E.D. Act, 1953, at the instance of the Controller of Estate Duty. Estate Duty, References Nos. 2 of 1973 and 2 of 1974 being under sub-s. (1) of that section and Estate Duty Reference No. 9 of 1979 being under sub-s. (3) of that section. In Estate Duty Reference Nos. 2 of 1973 and 9 of 1979 one question each has been submitted to this court for its determination, while in Estate Duty Reference No. 2 of 1974 four questions have been submitted. The questions referred to this court in Estate Duty References Nos. 2 of 1973 and 9 of 1979 and the first question in Estate Duty Reference No. 2 of 1974 involve the determination by the court of the same point in its different facets. Accordingly, we have heard these three references together and are disposing of them by a common judgment.

2. It will be convenient to set out, first, the facts which have given rise to each of these three references. Estate Duty Reference No. 2 of 1973 arises out of the valuation to estate duty of the estate of one Fatehchand Nathumal Sachdev. The deceased carried on business as a stockist and distributor of the Imperial Chemical Industries (India) Private Ltd., and in the purchase and sale of colours, dyes, chemicals, etc., as a sole proprietor. By a deed of partnership dated October 14, 1957, he took his son, Fakirchand, as a partner along with him in the said business which was thereafter to be carried on under the firm name and style of M/s. Shorimal Fakirchand. The shares of the two partners in the profits and losses of the said partnership firm were to be equal. This deed of partnership was substituted by a new deed of partnership dated November 3, 1967, under which the duration of the said partnership was to be at will, the share of the deceased being 25 per cent. while that of his son, Fakirchand, being 75 per cent. The deceased died on October 27, 1968, and the firm thereupon stood dissolved. In the valuation to estate duty the Asst.

Controller of Estate Duty included a sum of Rs. 33,750 as being the one-half share of the deceased in the goodwill of the said firm. The Asst. Controller held that the one-fourth share of the deceased in the goodwill of the said firm passed under s. 5 of the Estate duty Act, 1953 (hereinafter referred to as "the Act"), and the other one-fourth share passed under s. 9 of the Act. On appeal, the Appellate Controller upheld the order of the Asst. Controller, but reduced the quantum of the share of the deceased in the goodwill to Rs. 6,750. On further appeal, the Tribunal, basing its decision upon the judgment of the Supreme Court in *Addanki Narayanappa v. Bhaskara Krishnappa,* , held that no partner had any specified share in any of the assets of the firm and that since goodwill was one of the assets of the firm, it could not be said that the deceased had nay specified share in the goodwill of the firm. The Tribunal, therefore, allowed the appeal and ordered the amount of goodwill to be deleted from the assessment. In view of this finding the Tribunal, therefore, allowed the appeal and ordered the amount of goodwill to be deleted from the assessment. In view of this finding the Tribunal did not consider it necessary to decide whether 25 per cent of the share of the deceased in the goodwill of the firm was to be included in the assessment or 50 per cent. nor did the Tribunal think it necessary to adjudicate upon the valuation of his share in the goodwill. The question submitted to us in Estate Duty Reference No. 2 of 1973 is:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the goodwill of the firm in which the deceased was a partner, to the extent of his interest in the partnership business, did not constitute 'property' passing on his death under the Estate Duty Act, 1953, and as such not includible in the principal value of the estate of the deceased ?"

3. So far as Estate Duty Reference No. 2 of 1974 is concerned, the deceased, Ratnaji Raghunath, was originally carrying on two business, one of money-lending and the other in timber. From the commencement of S.Y. 2002 he took two outsiders as partners in the said timber business. This partnership continued until the end of S.Y. 2012. In the beginning of S.Y. 2013, the outsiders went out of the firm and the deceased's son, Rikabchand, joined his father as a partner, the said partnership being carried on at Poona under the firm name and style of M/s. Ratnaji Raghunathji and Company. In the said partnership business the deceased had a 9 annas share and his son had a 7 annas share. The terms upon which the said partnership was to be carried on were reduced to writing in a deed of partnership dated February 16, 1957. A copy of this deed of partnership which was not on the record has by consent been taken on the record at the hearing of this reference. Clause 5 of the said deed of partnership provided as follows"

> "5. That the business shall be carried on as long as possible and should one of the partners die during the continuance of the partnership business, the surviving partners will be

entitled to carry on the business entirely on their own risk and liability and the heirs of the deceased partner will be entitled to get the profits and will be liable for the losses, if any, up to the time of the deceased partner."

4. Though the said cl. 5 uses the phrase "the surviving partners", it is obvious that since the partnership consisted of only two partners, what was meant was the surviving partner, and there is no dispute between the parties with respect to this point.

5. The deceased died on August 12, 1965. He had also in 1957 made a gift of a sum of Rs. 71,000 to his other son, Onkarmal. This sum was initially kept by the said Onkarmal in fixed deposit with a bank. As Onkarmal was at that time a minor, the deceased was shown as his guardian. Ultimately, this sum was withdrawn from the bank and deposited with the said firm of M/s. Ratnaji Raghunath. Out of this deposit of Rs. 71,000 made with the said firm, a sum of Rs. 27,000 was withdrawn and in July, 1973, kept as deposit with another firm with which the deceased had no connection. At the time of the death of the deceased a sum of Rs. 44,000 out of the said sum of Rs. 71,000 gifted to Onkarmal remained in deposit with the said firm. The deceased had also made gifts of cash at different times to the said Rikabchand between the years 1954 to 1957, aggregating in all to Rs. 1,05, 001. These amounts were kept deposited by the said Rikabchand with the said firm and remained so deposited until the date of the death of the deceased. At the time of his death, the balance of the said deposit was Rs. 82,640. The deceased had also made a gift in the year 1957, to his wife, Tikubai, of a sum of Rs. 31,000 and of a house situate at 196, Bhavani Peth, Poona. The said sum of Rs. 31,000 was kept by Tikubai in fixed deposit in her own name in a bank. The interest earned on this deposit, however, was being credited to her account in the books of the said firm. Similarly, the net rents of the said house were being credited to her account in the books of the said firm.

6. In the assessment to estate duty of the estate of the said deceased, both the Asst. Controller and the Appellate Controller held that the share of the deceased in the goodwill of the said firm passed under s. 5 of the Act, while the 7 annas share therein, which was held to be the share of the said Rikabchand in the goodwill of the said firm, passed under s. 10, and, accordingly, the entire amount of the goodwill, valued at Rs. 30,000, was included in the valuation of the said estate. Similarly, the amounts of the said deposits made by the said Onkarmal and the said Rikabchand as also the balance of the amounts of the interest from the fixed deposit and the rents deposited by Tikubai with the said firm as also the said house were all held to pass under s. 10 of the Act. On appeal to the Tribunal, relying upon the decision of the Supreme Court in *Addanki Narayanappa v. Bhaskara Krishnappa ,* referred t above, and some other decisions, the Tribunal held that the department was not entitled to treat the goodwill of the said firm as an item in which any of the partners had a specified share, and, accordingly, deleted the value of the goodwill from

the valuation of the said estate. It also held that the amounts of the said deposits were not hit by s. 10, and deleted these amounts from the principal value of the estate. The four questions which have been submitted to this court in this reference are:

> "(1) Whether, on the facts and in the circumstances of the case, the value of 9 annas share of the deceased in the goodwill of the partnership firm of M/s. Ratnaji Raghunath in which the deceased was a partner was property which passed on his death and as such was includible in his estate under section 5 of the Estate Duty Act, 1953 ? (2) Whether, on the facts and in the circumstances of the case, the value of 7 annas share of the deceased's son in the goodwill of the partnership firm of M/s. Ratnaji Raghunath in which the son was a partner was property which must be deemed to have passed under section 10 of the Estate Duty Act, 1953 ?
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> (3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the amounts of Rs. 44,000 and Rs. 82,640 standing to the credit of the deceased's two sons in the firm of M/s. Ratnaji Raghunath at the date of death of the deceased did not pass on the death of the deceased under section 10 of the Estate Duty Act, 1953 ?
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> (4) Whether, on the facts and in the circumstances of the case, the tribunal was justified in law in holding that the amount of Rs. 31,000 and the house property valued at Rs. 17,200, both of which were gifted by the deceased to his wife, did not pass on the death of the deceased under section 10 of the Estate Duty Act, 1953 ?"

7. So far as Estate Duty Reference No. 9 of 1979 is concerned, the deceased, Kashinath Janardan Sawant, was a partner in the firm of M/s. Bharat Glass Works along with three other persons. The deceased's share in the profits and losses of the said firm was 25 per cent. There was also a minor admitted to the benefits of the said partnership. The duration of the said partnership was to be at will and any one of the partners could retire from the said firm by giving three months' notice in writing, of his intention to do so. The terms upon which the said partnership was being carried on have been recorded in a deed of partnership dated January 15, 1968. A copy of this deed of partnership has been by consent of parties made part of the record before us. Clauses 17 and 18 of the said deed of partnership provided as follows:

> "17. In case of death or retirement of any partner, the goodwill shall be considered as belonging to the surviving partners, and the retiring partner or heirs, representatives or attorneys of the deceased partner, as the case may be, will have no right or claim on it.
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> 18. The death or retirement of any of the partners shall not dissolve the partnership and

> the surviving or continuing partners shall be entitled to continue the business."

8. The deceased died on October 30,1969. In arriving at the the value of the estate of the deceased the Asst. Controller included a sum of Rs. 83,250 as being the value of the one-fourth share of the deceased in the goodwill of the said firm. This inclusion was upheld by the Appellate Controller. On further appeal to the Tribunal, the Tribunal ordered this amount to be deleted on the same grounds as in the other two references. An application made by the Controller to state a case to the High Court under s. 64(1) was rejected by the Tribunal, but the High Court under s. 64(3) directed the Tribunal to state a case, which the Tribunal accordingly has done. The following question has been submitted to us in this reference:

> "Whether, on the facts and in the circumstances of this case, the Tribunal was right in holding that the share of the deceased in the goodwill of the firm was not to be included in the principal value of the estate of the deceased ?"

9. Before proceeding to consider the main question which falls for determination in these references it will be convenient to deal with questions Nos. 2,3 and 4 in Estate Duty Reference No. 2 of 1974. Both the learned counsel are agreed that in view of the decision of this High Court in CED v. Kantilal Nemchand , question No. 2 must be answered in favour of the accountable person. The parties are also agreed that in view of the decision of the Supreme Court in CED v. Kamlavati , and the decision of this High Court in Khatijabai Abdulla Soomar v. CED , question No. 3 must be answered in favor of the accountable person. So far as question No. 4 is concerned, there is no dispute that the gifts of moneys and house property were made eight years prior to the date of death of the deceased. The deceased had reserved no right or interest in himself after the gifts were made. Thus, neither s. 9 nor s. 10 of the Act was attracted in respect of the properties which were gifted. The income from these properties belonged to the donee, and it was open to the donee to do with it as she wanted. Whether she kept the interest received from the moneys gifted to her which she had kept in fixed deposit with a bank or the rents received from the said immovable property with herself or in a bank account or in fixed deposit with a bank or in deposit with the said firm made no difference whatever, and by reason of that it cannot be said that s. 10 was attracted. In CED v. Prahlad Rai [FB], a partner in a firm by making entries in the books of account of the firm transferred to his four grand-daughters certain sums of money out of the amount standing to his credit in the books of the firm. On his death a question arose whether s. 10 was attracted to these amounts. It was held that s. 10 applied to the corpus of these gifts, but as what was gifted by the deceased was a certain amount, the further right to earn interest on that amount did not form part of the property gifted and the interest earned by the donees did not pass or cannot be deemed to pass on his death. Though the judgment of the Full Bench of the Delhi High Court with respect to the application of s. 10 to the corpus of gifts in

such circumstances can no more be said to be good law in view of the decision of the Supreme Court in Kamlavati's case , referred to earlier, its conclusion with respect to the income earned from the subject-matter of the gift would still be good law in a case where s. 10 was attracted to the corpus of the gift. Of course, in our case, if s. 10 does not apply to the corpus, the question of applying it to the income earned by the corpus of the gift cannot possibly arise. This question, therefore, too would have to be answered in favour of the accountable person.

10. We will now take up the real point of controversy in these references. On behalf of the respondents the matter was argued principally by, Mr. Dastur, learned counsel for the respondents in Estate Duty References Nos. 2 of 1973 and 2 of 1974, Mr. Patil, learned counsel for the respondent in Estate Duty Reference No. 9 of 1979, supplementing the arguments with certain additional points. Industry of counsel on both sides have resulted in a large number of decisions being cited to us and our attention being drawn to passages from various standard text books. Before, however, getting lost in this maze of citations we would prefer to consider the matter independently by ourselves on first principles and on interpretation of the relevant sections of the Act with the assistance of such authorities as are binding upon us and such others as furnish a direct guidance in determining the questions which arise before us, and thereafter discuss the various authorities which have been cited. The point which we have to consider is whether a partner has a specified share in the goodwill of the firm in which he is a partner and, if so, whether such share passes on his death for the purposes of estate duty, and if it passes, whether it passes under s. 5 or s. 7 of the Act. Mr. Joshi contended that each partner had a joint or common interest in all the partnership properties. Goodwill is a property belonging to a partnership and forms part of its assets. Therefore, a partner's share in the goodwill was in the proportions of his share in the firm and accordingly, on the partner's death, passes under s. 5 of the Act. Mr. Joshi further submitted that whether a partner's share in the goodwill passed under s. 5 or s. 7, made no difference because in Mr. Joshi's submission it was fallacious to say that, where s. 7 applies, a computation of the market value of such share could not be made. Mr. Joshi's further submission was that out of the group of sections in the Act relating to the computation of the principal value it was open to the department to select any section which was applicable. Mr. Dastur, learned counsel for the respondents in Estate Duty References Nos. 2 of 1973 and 2 of 1974, advanced the following five submissions before us:

(1) A partner's interest in a firm does not pass on his death either under s. 5 or s. 7(1) of the Act.

(2) A partner has an interest in all the partnership properties. That interest is subject to the properties being made available for discharge of the liabilities of the firm and, therefore, it cannot be said that a partner has a specified share in any asset or any property belonging to the firm and consequently it follows that a partner does not have a specified share in the goodwill. A partner's

share in the goodwill does not pass under section 5 of the Act.

(3) For the same reasons that s. 5 does not apply, s. 7(1) does not apply and a partner's share in the goodwill of a firm does not pass under s. 7(1) of the Act.

(4) Assuming s. 7(1) applies, goodwill cannot be subjected to estate duty because the computation provision in s. 40 of the Act is inapplicable in the case of goodwill because the benefit which arises from goodwill cannot be determined.

(5) It is not open to the department to pick up just one item out of the aggregate of properties and assets which belong to a firm and make a separate valuation for it.

11. Mr. Patil, learned counsel for the respondent in Estate Duty Reference No. 9 of 1979, raised the following three contentions before us:

(1) A partner's interest in the firm passes under s. 7(1) of the Act applies, computation of income or benefit arising out of goodwill is impossible and as the value of the benefit cannot be computed, the charging section cannot apply.

(3) Where a partner's share in the goodwill passes to the surviving partner by the terms of a deed of partnership, the case fell under section 26 of the Act and the value of such partner's share in the goodwill is not liable to be included in the principal value of his estate.

12. With respect to his contention under s. 26 of the Act Mr. Patil stated that he had raised this point before the Tribunal, but in view of the conclusions which it arrived at, the Tribunal did not think it necessary to consider that point. Accordingly, Mr. Patil submitted that it should, therefore, be open to him to argue this point before the Tribunal if an occasion arose. This is the position in law, and Mr. Joshi, learned counsel for the applicants, did not contest it. Accordingly, if occasion arises, it would be open to Mr. Patil to argue the point based on s. 26 of the Act before the Tribunal.

13. In order to test the correctness of the rival submissions the first inquiry which is required to be made is as to the nature of a partner's interest in the firm of which he is a partner. We have three types of partnerships before us. In Estate Duty Reference No. 2 of 1973, the partnership is of the usual type and stood dissolved on death. Though there were only two partners in this case, even where the number of partners were more it would have made no difference, because unless there is a contract to the contrary a partnership is dissolved on the death of a partner, and s. 42 of the India Partnership Act, 1932, expressly so provides. Of course, when there are only two partners and one dies, there can be no question of the partnership subsisting because a

partnership is a consensual relationship in which the minimum number of persons must be two. In the second case, namely, Estate Duty Reference No. 2 of 1974, there were only two partners, but on the death of one of them the business was to be carried on by the surviving partner. There are partnerships consisting of more than two partners which contain a similar provision, namely, that the death of any one of the partners will not dissolve the partnership, but the surviving partners would be entitled to carry on the partnership business. In the third case, namely, Estate Duty Reference No. 9 of 1979, the partnership consisted of four partners, and under the terms of the deed of partnership, in the case of death or retirement of a partner, the goodwill was to belong to the surviving partners, and the legal representatives of the deceased partner or the retiring partner were not to have any right or claim over it. Further, under. 18 of the deed of partnership, in this case, the partnership was not to stand dissolved on the death or retirement of any partner and the surviving partners were entitled to carry on the business. While the deed of partnership in Estate Duty Reference No. 2 of 1974 expressly provided that the heirs of the deceased partner would be entitled to get the profits and would be liable for the losses up to the time of the death of the deceased partner, there is no provision to that effect in the deed of partnership in Estate Duty Reference No. 9 of 1979. Further, neither of these two deeds of partnership make any provision for any payment to the legal representatives of a deceased partner in respect of the share of the deceased in the partnership firm.

14. The three classes of partnership which are before us fairly exhaust between them all types of partnerships normally met with except when by the terms of the deed of partnership a retiring partner or the legal representatives of a deceased partner are to receive a specified amount or a sum calculated in a particular manner in respect of the interest or share of the retiring or deceased partner in the firm.

15. In order to determine the legal incidents of a partner in the firm and the rights of his legal representatives in the case of his death, we must examine the provisions of the Indian Partnership Act, 1932. Under s. 11 of the said Act subject to the provisions of the said Act, the mutual rights and duties of the partners of a firm are to be determined by contract between the partners. Section 14 of the said Act defines what is property of the firm. Under that section, subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm and includes also the goodwill of the business. Further, unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. Under s. 15 subject to contract between the partners, the property of the firm is to be held and used by the partners exclusively for the purposes of the business. Goodwill,

therefore, is a property of the firm, it is one of its assets and belongs to the firm, and under s. 15 like any other property of the firm, is to be "held and used" by the partners exclusively for the purposes of the business of the firm. Under s. 29, the transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitled the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee is to accept the account of profits agreed to by the partners. Further, if the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purposes of ascertaining that share, to an account as from the date of the dissolution. It is pertinent to note that what s. 29 speaks of is a transfer by a partner of his interest in the firm. It does not speak of a transfer by a partner of his interest in any particular property or asset of the firm. This is for the simple reason that partners do not hold each separate item of property which belongs to the firm as tenants-in-common or joint tenants. They are owners of the totality of the partnership property and not merely of a specific or individual item thereof. This is abundantly clear when we examine what is to happen on the dissolution of a firm. Under s. 47, after the dissolution of a firm, the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. Under cl. (b) of s. 48 the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital are to be applied in the following manner and order:

> "(1) in paying the debts of the firm to third parties, (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital, (iii) in paying to each partner rateably what is due to him on account of capital, and (iv) the residue, if any, is to be divided among the partners in the proportions in which they were entitled to share profits."

16. The first point to notice about this particular statutory provision is that it speaks of the manner in which the assets of the firm are to be applied. Thus, the partnership property is considered as property of the firm and not as property held by individuals having specific or specified shares therein. The first charge, in a manner of speaking, on the assets of the firm is of the outside creditors. Therefore, before a partner can look to the property of the firm, even for return of the loans made by him to the firm, he would have to wait till the outside creditors are paid. It is only when the outside creditors have been paid and loans advanced by the partners

have been returned that the partners can look forward to the return of the amounts they have invested as capital in the firm, and it is only when all the amount of capital is returned that if any residue remains, it is to be divided among the partners according to the proportions in which they were entitled to the profits. This position is obvious and well settled in the law of partnership profits. This positions is obvious and well settled in the law of partnership and would hardly require to be stated but for the fact that at times what is obvious is overlooked. *In Addanki Narayanappa v. Bhaskara Krishnappa , the* question of the nature of a partner's interest in the firm fell for determination by the Supreme Court. After referring to various sections of the Indian Partnership Act, the Supreme Court held as follows, at p. 1303:

> "From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership, to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in cl.; (a) and sub- clauses. (i), (ii) and (iii) of cl. (b) of s. 48. It has been stated in Lindley on Partnership, 12th Edn., at p. 375:
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> ' What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share... and which on his bankruptcy passes to his trustee."

(The emphasis has been supplied by us.)

17. In the Full Bench decision of the Gujarat High Court in Velo Industries v. Collector, Bhavnagar , after referring to the Supreme Court decision in Addanki Narayanappa's case, , Bhagwati C.J. (as he then was), who spoke for the court, observed at pp. 295-296:

"It is clear that the interest of a partner in the partnership is not an interest in a specific item of the partnership property, but, as pointed out by the Supreme Court, it is a right to obtain his share of profits from time to time during the subsistence of the partnership and on dissolution of the partnership or his retirement from the partnership, to get the value of his share in the net partnership assets which remain after satisfying the liabilities set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) of section 48. When, therefore, a partner retires from the partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on the footing of a notional sale of the partnership assets and given to him, what he receives is his share in the partnership and not any price for sale of his interest in the partnership. His share in the partnership is worked out by taking accounts in the manner prescribed by relevant provisions of the partnership law and it is this and this only, namely, his share in the partnership which he receives in terms of money."

18. In *Reddi Veerraju v. Chittori Lakshminarasamma,* , the Andhra Pradesh High Court held that a mortgage created by some of the partners in respect of their rights and interests in certain items of property owned by the partnership as if these properties belonged to them and the other partners as co-owners was not valid and not binding on the ground that the right that a partner possesses in the partnership property is his right as a member of the partnership and not a right which he can claim as an individual.

19. We have seen that on dissolution of the firm a partner has a right to have the affairs of the firm would up and its assets sold and to apply for settling accounts and discharging liabilities in the manner provided in s. 48 of the Indian Partnership Act. Section 55(1) of the said Act provides as follows:

"55. Sale of goodwill after dissolution - (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm."

20. To use the words of Romer J. in In re An Arbitration between David and Matthews [1899] 1 Ch D 378, 382: "The goodwill of the business would be an asset, and might well be the most valuable asset of the partnership."

21. It was felt, when the Indian Partnership Act, 1932, came to be drafted, that a special provision should be made with respect to goodwill. After all, generally, goodwill is the one intangible asset of the firm, while the other assets are tangible assets; and just as any tangible asset of a firm can be sold separately in the winding up of the affairs of the firm, this provision

has been made in the said Act to make it expressly clear that the intangible asset of the firm, namely, goodwill, can also be so sold. From this, however, it does not follow that when goodwill is sold separately, the price fetched belongs to the partners in specific shares in the proportions in which they were entitled to share the profits of the firm. In this respect the price realized by a separate sale of the goodwill stands on the same footing as the prize realized on the separate sale of any tangible asset of the firm. In both cases, the price realized must be brought into the hotch-potch for the purpose of applying it in the manner provided in cl. (b) of s. 48 of the Indian Partnership Act.

22. We will now ascertain the position where the retirement or death of a partner does not bring about the dissolution of a firm. This position can only arise because of a term in the contract of partnership, and such contract may, and at times does, provide for the adjustment of the rights of the partner retiring or the legal representatives of the deceased partner. Some deeds of partnership provide that the retiring partner or the legal representatives of the deceased partner are not entitled to receive anything beyond the amount standing to the credit of such partner in the books of the firm, and sometimes some deeds of partnership further expressly provide that the retiring partner or the legal representatives of the deceased partner shall not be entitled to receive any amount for such partner's share or interest in the assets of the firm, including goodwill. A partnership deed at times provides that the retiring partner or the legal representatives of the deceased partner will receive the money value of such partner's share or interest in the assets of the firm. A specific provision need not be made with respect to goodwill, and in such a case goodwill would be included in the assets in respect of which the retiring partner or the legal representatives of the deceased partner are entitled to receive their share. Some deeds of partnership, however, specifically provide that goodwill shall belong to the surviving partners and that the retiring partner or the legal representatives of the deceased partner shall have no right or claim in respect thereof and will not be entitled to receive anything in respect thereof. In such an event the surviving partner or the legal representatives of the deceased partner would be entitled to their share in the assets of the firm excluding goodwill. When we have used the phrase "assets of the firm" we should not be understood to have meant the assets of the firm without having any regard to the liabilities thereof. In the context what we have meant when we have used this expression is the net assets of the firm, that is, the value of all the assets of the firm less the total liabilities of the firm. Unless it is expressly provided that a retiring partner or the legal representatives of a deceased partner will not be entitled to receive anything in respect of such partner's share of the assets of the firm, they would be entitled to receive its proportionate value. In this connection, we may refer to the decision of the Supreme Court *in Khusal Khemgar Shah v. Mrs. Khorshed Banu Dadiba Boatwalla* . As we have found that at times this judgment has been misunderstood to have laid down that the legal representatives of the deceased partner are

entitled to a specific share in the goodwill of the firm, it would be better to set out the facts in some detail and then to state what was the point which arose for determination. In that case the deceased Dadiba Hormusji Boatwalla was one of the eight partners of M/s. Meghji Thobhan and Company carrying on the business of muccadams and cotton brokers. Clause 8 of the deed of partnership provided that the surviving partners would be entitled to carry on the business of the firm. The widow and son of the deceased partner commenced an action in this High Court for an account of the partnership between Boatwalla and the surviving partners and for an order for payment to them of the amount determined to be due to the said Dadiba at the time of his death. The surviving partners resisted the suit. A learned single judge of this High Court, however, passed a preliminary decree declaring that qua the said Dadiba, the partnership stood dissolved on February 20, 1957, being the date of death of the said Dadiba, but not in respect of the surviving partners and directed an account to be taken of the partnership up to February 20, 1957. Against that decree an appeal was filed under cl. 15 of the Letters Patent. The appeal court held that the widow and son were not entitled to an account in the profits and losses of the firm after the death of the said Dadiba, nor to exercise an option under s. 37 of the Indian Partnership Act but that they were entitled only to interest at the rate of 6 per cent per annum on the amount found due as the said Dabiba's share in the assets of the partnership including the goodwill. The appeal court further declared that the interest of the said Dabiba ceased on February 20, 1957, and deleted the direction with regard to the dissolution of the firm as between the said Dadiba and the surviving partners. An appeal with special leave was preferred to the Supreme Court. Before the Supreme Court, the surviving partners did not challenge the decree of the High Court awarding to the widow and son of the said Dadiba the share of Dadiba in the assets of the firm, but they contended that goodwill should be excluded from the assets in determining such share. This contention was based upon cl. 8 of the deed of partnership which ran as follows:

> "This partnership shall not be dissolved or determined by the death of any of the parties hereto but the same shall be continued as between the surviving partners on the same terms and conditions but with such shares as shall then be determined."

23. Rejecting the contention of the surviving partners the Supreme Court held that under the Indian Partnership Act it is expressly declared that the goodwill of a partnership business is an asset, and whether that goodwill of a firm is to be considered separately or can be taken into account separately. The contention was that the share in the assets, the value of which the legal representatives of the deceased partner were entitled to receive, was the share in the assets of the firm minus goodwill. The point, therefore, which the Supreme Court had to decide was whether the value of the goodwill was to be taken alongwith all the other assets of the firm in order to determine the amount which was payable to the legal representatives of the deceased partner,

Dadiba. From this decision, it is clear that where no express provision is made in the deed of partnership about goodwill or about the share of the deceased partner but the deed of partnership states that the surviving partners will be entitled to carry on the business, it follows that there will be no dissolution of the firm but the surviving partners will be entitled to carry on the business of the firm. Carrying on the business of the firm must imply carrying it to on with the existing assets of the firm. They would thus be entitled to carry on the business with the assets of the firm, but they do not thereby just take over these assets. They are bound to pay to the legal representatives of a deceased partner the value of his share in these assets after deducting from the total value of the assets, the total liabilities.

24. Having ascertained the nature of a partner's interest in a firm of which he is a partner and the rights of his legal representatives in both cases, namely, where the firm is dissolved on account of death, and where the firm is not dissolved out the surviving partners are entitled to carry on the business, the question which arises is, what happens on the death of a partner qua his interest in the firm so far as the valuation to estate duty of his estate is concerned. Under the Act, estate duty is levied on property passing on the death of a person as also on property which is deemed to pass on his death. The term "property" is defined by cl. (15) of s. 2 of the Act as follows:

> "(15) 'Property' includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method."

25. There are two Explanations to this clause which are not material for our purposes. Clause (16) of s. 2 defines the expression "Property passing on the death". It states:

> "(16) 'Property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and 'on the death' includes ' at a period ascertainable only by reference to the death'."

26. Section 3 is headed 'Interpretation'. Sub-section (3) of s. 3 provides as follows:

> "(3) For the avoidance of doubt, it is hereby declared that references in this Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person."

27. Though at the first blush it may appear that the expression "property passing on the death" would mean only property which in the eye of the law actually passes on the death of a person,

by reason of the statutory rule of interpretation laid down in sub-s. (3) of s. 3 even in cases where as a consequence of the legal fiction enacted in various sections of the Act, property is deemed to pass on the death of a person, such deemed passing will also be property passing on death. Part II of the Act is headed "IMPOSITION OF ESTATE DUTY". This part is divided into three groups of sections, each with a separate sub-heading of its own. The first group consists of sections 5 and 5(A), and is headed "Extent of charge". We are concerned with sub-s. (1) of s. 5. This sub-section reads as follows:

> "5. Levy of estate duty - (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the territories which immediately before the November1, 1956, were comprised in the States specified in the First Schedule to this Act, and in the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry which passes on the death of such person, a duty called 'estate duty' at the rates fixed in accordance with section 35."

28. The next group of sections consists of ss. 6 to 16 and is headed "Property which is deemed to pass". The only sections out of this group which require to be reproduced are s. 6 and sub-s. (1) of s. 7. They run as follows:

> "6. Property within disposing capacity-Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death."

> "7. Interest ceasing on death - (1) Subject to the provisions of this section, property in which the deceased, or any other person had an interest ceasing on the death of the deceased, shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law..."

29. The controversy before us has centered upon whether either s. 5 or s. 7 applies to the cases before us or any of them and whether there was any property which passed on the death of the concerned deceased. One may wonder why this controversy arises, since the property is deemed to pass on the death of the deceased by reason of the statutory rule of interpretation laid down in s. 3(3) and it is to be construed as property passing on the death of the deceased. The importance of this controversy, however, lies in ss. 36 and 40 of the Act, which sections occur in Part V of the Act, which Part is headed "Value Chargeable". This Part deals with computing the principal

value of the estate of a deceased person for the purposes of subjecting it to estate duty. Sections 36 and 40 provide as follows:

> "36. Principal value how to be estimated - (1) The principal value of any property shall be estimated to be the price which, in the opinion of the Controller, it would fetch if sold in the open market at the time of the deceased's death.
>
> (2) In estimating the principal value under this section the Controller shall fix the price of the property according to the market price at the time of the deceased's death and shall not make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time:
>
> Provided that where it is proved to the satisfaction of the Controller that the value of the property has depreciated by reason of the death of the deceased, the depreciation shall be taken into account in fixing the price."
>
> "40. Valuation of benefits from interests ceasing on death - The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall -
>
> (a) if the interest extended to the whole income of the property, be the principal value of that property; and (b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

30. The contention of the respondents is that assuming for the sake of argument that goodwill passes separately, where the firm is not dissolved by death and on death the goodwill belongs to the surviving partners, it is a property of which the income cannot be ascertained under clause (b) of s. 40 of the Act. That s. 40 refers to a case provided for in s. 7(1) is not disputed. It was, however, the contention of Mr. Joshi, learned counsel for the applicants, that it was open to the department to select either s. 36 or s. 40, and if the valuation of benefit from interest ceasing on death could not be made under s. 40, it is open to the department to value it under s. 36. We are unable to accept this submission. The principle of taxation is clear and has been expressed by the Supreme Court in CIT v. B. C. Srinivasa Setty . In that case, the question was whether on the sale of a business including its goodwill, the goodwill could be made liable to capital gains tax under s. 45 of the I.T. Act, 1961. After examining the scheme of the I.T. Act, 1961. After examining the scheme of the I.T. Act, the Supreme Court held as follows at pp 299-300:Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be

one which falls within the contemplation of the section. It must bear that quality which brings s. 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head 'Capital gains'. Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I.T. Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of the provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."

31. Thus, according to the Supreme Court, the charging section and the computation provisions together constitute an integrated code, and where there is a case to which the computation provisions cannot apply at all, such a case was not intended to fall within the charging section. Just as in the case of the I.T. Act, the Act also contains a statutory scheme which is an integrated one. It provides for the extent of the charge, the circumstances in which this charge is attracted and the mode of valuation of the property which this charge is attracted and the mode of valuation of the property which becomes eligible to this charge. A glance at the various sections in Part V would clearly show that while s. 36 is the general section, ss. 37, 38, 39, and 40 are sections which provide for the mode of computation in special cases. Thus, s. 37 deals with computing the value of shares in a private company where alienation is restricted. Section 38 deals with valuation of interest in expectancy, s. 39 with valuation of interest in coparcenary property ceasing on death, and s. 40 with valuation of benefits from interests ceasing on death. In

such a case, the rule of interpretation is well settled. This question had arisen for consideration before a Division Bench of this High Court, of which one of us (Madon J) was a Member, in Municipal Corporation of Greater Bombay v. Durgadas Shankarrao Rego . The Division Bench held at p. 98(1):

"So far as the first question is concerned, the rule of interpretation is well settled. It was thus stated by Romilly M. R. in *Pretty v. Solly*[1] 'The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.' This rule of interpretation was also enunciated by a Full Bench of this High Court in *Mulji Tribhovan Sevak v. Dakor Municipality*[2] The part of the above passage from the judgment of Romilly M. R. which sets out the rule of interpretation, was cited with approval by the Supreme Court in *J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh* . In that case, the Supreme Court further observed at p. 1174(1):'In the interpretation of statutes the court always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.' This is known as the rule of harmonious interpretation."

32. This rule of harmonious interpretation would require that s. 36 must operate in the fields other than those covered by ss. 37 to 40 of the Act. To accept the submission made on behalf of the department, that it is open to the department to pick and choose any mode of computation just as it pleases, would be to place an interpretation upon these provisions which would result in arbitrary discrimination between one person liable to pay duty under the Act and another (not liable) though they may be similarly circumstanced, and thus infringe art. 14 of the Constitution. Mr. Joshi, learned counsel for the department, however, submitted that this court while hearing a tax reference is exercising advisory jurisdiction and has, therefore, no power to declare any statute or any part thereof to be void or ultra vires but must take the statute as it finds it. Though this may be the correct position, we are not here being asked by any party to declare either s. 36 or s. 40 or any other section of the Act to be unconstitutional. What we are asked to do on behalf of the respondents is to repel a construction suggested by the department which, were it to be accepted, would make another court having jurisdiction in that behalf to declare the particular provision to be unconstitutional as being violative of art. 14 of the Constitution of India. An equally well-settled principle of statutory interpretation is that where two interpretations of a statutory provision are possible, according to one of which the particular provision would be constitutionally valid while according to the other it would be tainted with vice of

unconstitutionality, the court must put on the particular statutory provision the interpretation which ensures its constitutionality. This principle applies to interpretation of all statutes including taxing statutes. See Ramkrishan Kulwantrai v. Commissioner of Sales Tax [1979] 44 STC 117, 120 (Bom). Therefore, it must be held that in a case which falls under s. 7(1) the computation of value can be done only under s. 40 of the Act and not by any other mode of valuation. Mr. Joshi, however, submitted that the charging section is only s. 5, and by reason of s. 3(3) where a property is deemed to pass on death, it is brought under s. 5, and once that is done, it is not s. 40 which applies for the purposes of computation of value but only s. 36 of the Act. In support of this submission, Mr. Joshi relief upon the decision of the Supreme Court in CED v. Aloke Mitra . That was a case under s. 6 of the Act. It was argued that s. 76 and s. 5 stood in sharp opposition and contrast to each other. The Supreme Court rejected this contention and held that by no rule of construction could the operation of s. 5(1) be curtailed by the operation of s. 6, for, s. 6 was in addition to, or supplemental of, the provisions of s. 5(1). The Supreme Court further held that s. 5(1) alone was the charging section, and where both s. 5(1) and s. 6 apply, the property would still be dutiable under both concurrently, because s. 6 was merely subsidiary and supplementary. It further held that when s. 6 had brought property within the charge of duty either alone, as in the case of a competency to dispose of under s. 6, which could not be supposed to pass on death, or concurrently with s. 5, its function is at an end, for, the object of s. 6 is to catch properties in the net of s. 5(1) which did not really pass on the death of a person. What applies to property deemed to pass on death under s. 6 would equally apply to property which is deemed to pass on death under another deeming provision in the group of sections under the sub-heading "Property which is deemed to pass", and, therefore, it would apply to property which is deemed to pass on death under s. 7(1) of the Act. What the Supreme Court has laid down in that decision is that once a property is deemed to pass, it becomes chargeable to duty under s. 5. The provision for levy of duty and the rates at which it is to be levied are to be found in s. 5 and not in any one of the deeming provisions in Part II of the Act. To say that the value of property which is deemed to pass under s. 7(1) and, therefore, chargeable to duty under s. 5(1) is to be computed only under s. 36(1) is to make redundant on the statute book the existence of s. 40 of the Act, because, since all other cases of deemed passing of property would also be chargeable to duty under s. 5(1) and if s. 36 alone were to apply, one wonders why Parliament ever thought of enacting ss. 37 to 40. Applying the principles laid down by the Supreme Court in Aloke Mitra's case , the correct position would be that when property is deemed to pass under s. 7(1) it becomes chargeable to duty under s. 5, but the computation of the value of such property is to be made under s. 40, and if such computation cannot be made, then such property was never intended by the Legislature to be made the subject matter of the charge.

33. The next question which falls for consideration is whether any property passes on the death

of a partner. It was the submission of Mr. Dastur that what passes on the death of a partner is something different from the interest in the firm which he had during his lifetime, and, therefore, it is not the same property, and unless the property which passes on death is the same property which the deceased was possessed at the time of his death, it cannot be said that property actually passed, and, therefore, s. 5 would not apply. This argument of Mr. Dastur was confined to the case of an actual passing of property and not to a case of a deemed passing of property under s. 7(1) of the Act.

34. The above contention overlooks the real nature of a partner's right in the firm. The nature of this right has been elaborately discussed and defined by the Supreme Court in Addanki Narayanappa's case, referred to earlier. As held by the Supreme Court in that case, a partner's right during the subsistence of the partnership is to obtain such profits, if any, as fall to his share from time to time by the application of the property of the firm, and upon the dissolution of the firm, to a share in the assets of the firm which remain after satisfying the liabilities set out in cl. (a), and sub- cls. (i),(ii) and (iii) of cl. (b) of s. 48 of the Indian Partnership Act. In substance, therefore, a partner enjoys two rights or rather two sets of rights - one which he enjoys during the subsistence of the partnership and the other when he ceases to be a partner either by dissolution of the firm or retirement from the firm or otherwise. Each of these rights, however, became vested in him from the time when he became a partner. The incidence of these two rights are those which would be contained in the deed of partnership or where the deed of partnership is silent or where the Indian Partnership Act expressly makes any agreement between the partners subject to the provisions of that Act, the rights contained in the Act. The definition of the term "property" in cl. (15) of s. 2 of the Act is an extensive one, because it uses the word "includes" and is not a restrictive one or an exhaustive one, since it does not use the word "means". (See Craies on Statute Law, 7th Edn., p. 213). This definition, therefore, comprehends in its scope all that is understood by the term "property" as also the various things to which that term is extended by the said cl. (15). "Property" is a generic term, and includes within it different rights, each of which would itself be a species of property. Thus, in the sense in which the term "property" is used in the Act and in s. 5, a partner would, on his becoming a partner, have two kinds of property, one which enjoys during the subsistence of the partnership and the other which will operate on his ceasing to be a partner, each of which, as mentioned earlier, was possessed by him or became vested in him at the time of his becoming a partner. Both these rights are commonly referred to as his share or interest in the firm. This position is forcibly emphasized in s. 29 of the Indian Partnership Act which relates to the rights of the transferee of a partner's interest. Under that section a transferee of a partners interest in the firm, either absolutely or by way of mortgage, or by the creation of a charge in his favour of the interest of a partner in the firm, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the

business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only "to receive the share of profits of the transferring partner", he being bound to accept the account of profits agreed to by the partners, and if "the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled and, for the purpose of ascertaining that share, to an account as from the date of dissolution". Thus, on the death of a partner resulting in the dissolution of the firm, though the right which he had during the subsistence of the partnership ceases to exist and would not be property passing on his death, the right which he had on the dissolution of the firm continues to subsist and would be property passing on his death. In a case, where the death of a partner does not dissolve the partnership but the surviving partners have the right to carry on the business of the partnership, what would pass would be the two sets of rights or both the rights which the deceased possessed as a partner, namely, his right during the subsistence of the partnership and the right which he would have on the dissolution of the firm. In a case of dissolution brought about by a partner's death the property would pass to his legal representatives, that is, to his heirs on intestacy in case he has died intestate, or if he has died testate, to the person or persons to whom he has willed it away. In a case, where the partnership is continued by the surviving partners by reason of the provisions in the deed of partnership, the deceased's rights as a partner would pass on his death to the surviving partners. Where the surviving partners are bound by the terms of the deed of partnership to pay to the legal representatives of the deceased partner the value of his share in the estate, such right would pass to the surviving partners burdened with the liability to make payment of the value of the deceased partner's share in the firm. The rights of the legal representatives vis-a-vis the surviving partners would be to enforce that liability by asking from them the money value of the share of the deceased partner as was done in the case of *Khushal Khemgar Shah v. Mrs. Khorshed Banu Dadiba Boatwalla* . Whether in paying to the legal representative the money value of the deceased's share, the surviving partners are to take into account the goodwill of the firm or not would depend upon the provisions of the deed of partnership, but even if goodwill is not to be taken into account, it does not mean that goodwill is to excluded from the assets in which the deceased's share passes. In this connection, we may usefully refer to a decision of the Judicial Committee of the Privy Council in Perpetual Executors and Trustees Association of Australia Ltd. v. Commissioner of Taxes of the *Commonwealth of Australia*[3] In that case, under the deed of partnership an option was conferred upon the surviving partners to purchase the deceased partner's share on his death. The deed of partnership further provided that in computing the amount of purchase money payable on the exercise of any option no sum was to be added or taken into account for goodwill. It was contended that in arriving at the value of the property which passed on the death of the partner, goodwill was not to be taken into account in arriving at the value of the assets. This contention was rejected by the Judicial Committee, the Judicial

Committee holding that the interest of the deceased partner in the patnership property, including goodwill, vested in his legal representatives, though they were bound, if the option were exercised, to transfer that interest to the surviving partners at the price fixed in accordance with the deed of partnership. It may be noted that the Judicial Committee held that the interest of the deceased partner in the property of the firm, including goodwill, passed to his legal representatives because under the deed of partnership in that case the surviving partners had an option to purchase the deceased partner's share, which option they might or might not exercise.

35. In support of his submission, Mr. Dastur relief upon certain authorities to which we will now refer. The first authority relied upon by Mr. Dastur was the decision of the Jammu and Kashmir High Court in CED v. Kasturi Lal Jain . In that case, the deceased died in an air crash and his heirs got compensation of Rs. 42,000 from the Indian Airlines Corporation. It was contended on behalf of the revenue that the said sum of Rs. 42,000 was property passing on the death of the deceased and was accordingly chargeable to estate duty. The court repelled this contention holding that the deceased neither had any interest in the property nor was he in possession of the property either actually or constructively and in such a case the property did not and could not have come into existence during the lifetime of the deceased but accrued for the first time after his death, and that too because his death took place in a certain mode. This case stands on a very different footing from the one before us. In the case of a partnership, as mentioned earlier, both the rights, the one as a partner during the subsistence of a partnership and the other on the dissolution of the firm, are vested in the partner at the time the partnership came into existence. Subject to the provisions of the deed of partnership he could have during his lifetime dissolved the partnership and exercised the rights exercisable by him on the dissolution of the firm. That right, therefore, existed and could have been exercised by him during his lifetime, and on his death it was property which passed to his legal representatives.

36. The next decision relied upon by Mr. Dastur was a decision of the Andhra Pradesh High Court in Smt. Lakshmisagar Reddy v. CED . In that case, the deceased, who was a pilot working in the Indian Airlines Corporation, died in a plane crash, and under r. 73 of the Indian Airlines Corporation Employees' Service Rules and Establishment Orders, the Corporation paid a sum of Rs. 74,960 as compensation to the pilot's widow. The court held that under the said rule the payment of compensation was discretionary and was dependent on satisfaction of certain conditions, namely, that the loss on accident must not have occurred due to the negligence of the deceased, etc., and it, therefore, could not be said that the deceased had any beneficial interest in the compensation amount during his lifetime which was capable of being disposed of by the deceased. The court further pointed out that the amount was payable to the legal heirs only after the death of the deceased and though the employee had the right or power to nominate the person

who could receive compensation, such a right to nominate could not be equated to a power or right, if any, of the deceased to dispose of the property. For these reasons, the court held, that the amount of such compensation was not included in the estate of the deceased. In the case of a partner, we have seen that he has a right to transfer, mortgage or charge his interest in the firm, the rights of such transferee being defined by s. 29 of the Indian Partnership Act. Further, a partner's right to receive the value of his share in the net assets of the firm is not dependent upon the discretion of the surviving partners. It is an incidence of the contract of partnership. This authority too, therefore, cannot help the respondent's case.

37. The next decision relied upon by Mr. Dastur was that of the Supreme Court in Mrs. Khorshed Shapoor Chenai v. Asst. CED . In that case, certain lands were acquired under the Land Acquisition Act, 1894, and certain compensation was received by the deceased during his lifetime. The matter, however, went in reference and additional compensation was granted by the civil court. The department claimed to include the amount of such additional compensation in the dutiable estate of the deceased. The Supreme Court held that when lands were compulsorily acquired by the Government during the lifetime of the deceased they did not form part of his estate, but what formed part of his estate was the right to receive compensation therefor at the market value as at the date of the notification and it is such value which would be property that would pass on the death of the deceased. The court further held that this did not mean that the evaluation of this right done by a civil court subsequently would be the valuation as at the relevant date under either the Act or the W.T. Act, for, it was the duty of the assessing authority under either of those two enactments to evaluate the property, namely, the right to receive compensation at the market value, as at the relevant date, namely, the date of death under the Act or the valuation date under the W.T. Act. The real question, therefore, before the Supreme Court in that case was whether having once made a valuation as to the market value of lands acquired by the Government under the Land Acquisition Act, it was open to the assessing authorities subsequently to change that valuation on the basis of the valuation determined by a civil court in a reference under the Land Acquisition Act. This authority, therefore, is not relevant for our purpose.

38. The last decision relied upon by Mr. Dastur on this part of the case was a decision of the Madhya Pradesh high Court in CED v. Smt. Usha Devi Patankar . The question there was whether a cash muafi which was being given to the deceased during his lifetime in lieu of a jagir which was held by his ancestors passed on his death to his legal representatives. The court held that a jagir was normally for the lifetime of the holder and lapsed on his death and, therefore, the burden was on the revenue to produce material to show that the grant was heritable. The court further held that there was no material before it to give rise to an inference of heritability and that

although the grant was continued in favor of the successor, it was varied and reduced which led to the conclusion that the successor of the last holder did not acquire the right by inheritance but by a new grant from the Government and, therefore, the muafi being paid to the deceased lapsed on his death and did not pass as a part of his estate. The bare recital of the facts of that case are sufficient to show that this decision has no relevance to the point before us.

39. Mr. Dastur also relied upon a decision of the Judicial Committee of the Privy Council in *Attorney-General of Ceylon v. Ar. Arunachalam Chettiar*[4] The Estate Duty Ordinance, 1919, of Ceylon did not contain in the section corresponding to our s. 7(1) as provision that benefit arising by the cesser of interest on the death of the deceased would include a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law nor any provision corresponding to our s. 40. After considering the nature of a coparcenary, the Judicial Committee came to the conclusion that the interest of a coparcener in coparcenary property did not pass on his death. It is unnecessary to refer to this decision further, because the incidence of a coparcenary does not bear any resemblance to the incidence of a partnership. There are basic and fundamental differences between a coparcenary and a partnership which are elementary and too well known to be catalogued here, and this decision cannot be taken to be an authority for the proposition that on a partner's death his interest in the partnership property does not pass to his legal representatives.

40. Mr. Patil, learned counsel for the respondent in Estate Duty Reference No. 9 of 1979, contended that whatever may be the position with respect to a partner's share or interest in the firm when his death dissolves the firm, where, under the terms of a deed of partnership, the surviving partners acquired the right to carry on the partnership business, no property can be said to pass on the death of a partner, but what happens is that his interest in the partnership ceases on his death, and, as a result hereof a benefit accrues or arises to his surviving partners, and the case, therefore, falls under s. 7(1) and not under s. 5 of the Act. Mr. Patil's further submission was that to such a case the provisions of s. 40 would be attracted, but from the nature of things it is not possible to compute the value of the property in which such interest ceased. We are unable to accept these submissions. In CED v. Aloke Mitra , referred to earlier, the Supreme Court has further elaborated that the word "passes" in. 5 means "changing hands on death" regardless of the destination of the property and that whenever property changes hands on death, the State is entitled to step in and take a toll of the property as it passes 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. On the ratio of these two decisions what we have, therefore, to see is whether on the death of a partner his interest in the firm changes hands, it being immaterial whether on the deceased partner or to his surviving partners. In either event there is a passing of

property, and such passing of property would be the actual passing under s. 5 of the Act. The question of interest ceasing on death and such cesser resulting in the accrual or arising of a benefit to somebody else can only arise if there is no passing of property in the sense defined above from one hand to another. Where there is such a passing or changing of hands, s. 7(1) of the Act cannot apply. The ordinary illustrations of cases to which s. 7(1) applies would be those of annuities and life interests. The interest of a partner in a firm does not stand on the same footing as an annuity or a life interest. A partner's interest in a firm does not cease on his death. Either his legal representatives become entitled to his share on a dissolution of the firm or if the partnership deed so provides, his surviving partners become entitled to it subject to the liability to pay to the legal representatives the value of such share, whether for the purpose of computation of such valuation they are to take into account all the assets of the firm or not being dependent upon the terms of the deed of partnership, but this fact has no relevance as to whether the property passes to the surviving partners or not. Assuming for the sake of argument that in a case where the surviving partners become entitled to carry on the business the deceased partner's interest passes under s. 7(1), in our opinion, it would not be correct to say that the value of such interest cannot be computed under s. 40. Clause (a) of s. 40 obviously does not apply to the case, because, for it to apply, the interest ceasing on death must extend to the whole income of the property, while in the case of a partnership the partner's share or interest does not extend to the whole income of the property. What, therefore, may apply is cl. (b) under which if the interest extends to less than the whole income of the property, the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased is to be the principal value of an addition to the property equal to the income to which the interest extends. The language of cl. (b) is clumsy, but it is clear that what is meant is that it is the proportionate part of the value of the property which is equal to the income to which the interest ceasing on death extends. If a partner's share is to be taken in the light of an interest in the partnership property which ceases on death, then the principal value which is required to be taken would be the value of the entire partnership property, that is, of all the assets of the partnership less its total liabilities, and it would be the part of that value proportionate to the partner's share therein which would be the value of the property passing on his death. Therefore, if a partner had one-fourth share in the firm, the principal value of the partner's interest in that firm, which would pass on his death, would be one-fourth share of the value of the net partnership assets. It was submitted by Mr. Dastur that the word "property" in s. 7(1) and s. 40 must refer to a specific and ascertained property and it can not refer to something intangible like a partner's interest in the partnership or the property of the firm. We see no warrant for restricting the meaning of the term "property" occurring in s. 7(1) or in cl. (b) of s. 40 of the Act to a tangible asset or property only. The word "property" in this connection, in the absence of there being anything contrary to the context, must bear the same meaning throughout the Act. We are unable to see anything either contrary or

repugnant to the context in which the word "property" is used in s. 7(1) and cl. (b) of s. 40 so as to make the definition of the term "property" contained in cl. (15) of s. 2 inapplicable thereto.

41. The next point now to consider is whether the department was justified in proceeding in the manner in which it has done in these three references. What the department has done in all these references is not to valued the deceased partner's share. It has chosen to pick up one or two items of the assets and to value them, one of such items being the goodwill. The question which has been referred to us in all these references is also whether the share of the deceased in the goodwill of the firm is to be included in the principal value of the estate of the deceased. We were told that of late the department values a partner's share on the analogy of the mode of valuation set out in r. 2(1) of the W.T. Rules, 1957, and that it takes first the market value of the tangible assets of the firm. It deducts from it the capital account, then the deceased partner's capital account is taken separately and is deducted, and then from the total so arrived at, the total liabilities of the firm excluding reserve are deducted, and the net total is apportioned, and the principal value of the deceased partner's share is then arrived at by adding to the proportionate share of the deceased his share in the capital of the firm plus his share in the goodwill. Briefly put, by this method what the department appears to be doing is to take the total assets of the firm less the total liabilities, and, after making adjustments for the amount of the capital brought in by the deceased partner, arrive at the net assets and then apportion them amongst the partners in order to arrive at the value of the deceased partner's share. For the sake of convenience we will call it the break-up method. In Mr. Dastur's submission, the correct method for valuation would be not this break- up method but a method based upon capitalization of income for a particular number of years. In CED v. Annaraj Mehta and Deoraj Mehta , the Calcutta High Court, following its earlier decision in Surajmall Gouti v. CED , held that the valuation of the interest of a deceased partner had to be made under s. 36 of the Act read with r. 7(c) of the E.D. Rules, 1953. The reference to r. 7(c) in both these decisions appears to be by an oversight. This is a rule made under s. 21(2) by the CBDT for the purpose of regulating the manner in which the nature and locality of different classes of assets is to be determined for the purposes of s. 21 which relates to foreign property. Omitting, therefore, the reference to this rule, according to the Calcutta High Court the value of the partner's interest is to be determined by its market value. We are not concerned in any of these references with what is the correct method of valuing a deceased partner's interest in the firm. What we are concerned with is whether it is open to the department to pick up any particular asset of the partnership, value that asset, and take a part of the value of such asset proportionate to the share of the partner in the profits of the firm, and consider it as property passing on the death of the deceased partner. From the nature of the interest of a partner in the partnership which we have discussed above, it is obvious hat it is not open to the department to do so. For the department to do so would be to ignore the basic

fundamental principles of the law of partnership, disregard the essentials of a partnership, overlook the nature of a partner's interest in the firm, lose sight of the fact that goodwill is only one of the several items which together constitute the property of the firm, and to proceed upon the basis that every partner has a defined, specific share in each item which forms only a part of the property of the firm. In Addanki Narayanappa's case, , the Supreme Court has laid down that no partner can deal with any portion of the partnership property as his own nor can he assign his interest in any specific item of the partnership property as if it were his own property. This is also clear from the decision of the Andhra Pradesh High Court in Reddi Veerraju v. Chittori Lakshminarasamma . In support of the action taken by the department reliance was placed on the Supreme Court case of *Khushal Khemgar Shah v. Mr. Khorshed Banu Dadiba Boatwalla, .* We have already set out in detail the facts of that case. The Supreme Court did not in that case lay down that goodwill could be valued separately apart from the other assets of the firm. The question before the Supreme Court was whether by reason of a particular clause in the deed of partnership in that case goodwill was not to be included in arriving at the value of the deceased partner's share, and the Supreme Court, rejecting the construction canvassed by the surviving partners, held that in the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets of the firm devolved upon his legal representatives applied to goodwill as well as to the other assets of the firm and, therefore, goodwill was to be taken into account while valuing the assets of the firm. In CGT v. P. Gheevarghese, Travancore Timbers and Products , the assessee was desirous of introducing in his business his two daughters as partners. He first gifted a sum of Rs. 25,000 to each of his two daughters. The gifts were effected by transfer of Rs. 25,000 from the assessee's account to the account of each of his daughters. The amounts so transferred were treated as capital contribution of the two daughters to the partnership. The assessee, who was the sole proprietor of the said business, conveyed and assigned it unto the partners of the firm, namely, himself and his two daughters, together with all properties, including the goodwill of the said business. In assessing to gift-tax the gifts to the daughters, the GTO picked up only one of the assets of the said business of the assessee, namely, the goodwill, for treating it as a gift, apart from the amount of Rs. 60,000 which had admittedly been gifted to the daughters. The Supreme Court held that goodwill was part of the properties and assets of the business which the assessee had been running as a sole proprietor and that as the entire property of the said proprietary business was transferred to the new partnership, this approach of the department was wholly incomprehensible and the assessment could not be sustained and no gift-tax was payable on the goodwill of the assessee's business. This decision of the Supreme Court is a clear authority for the proposition that it is not open to the department, in a case such as the one we have, to pick up only one item of the partnership property for valuing it for the purposes of estate duty.

42. We will now turn to the other authorities which have been cited before us to see whether any of them militate against the conclusions we have reached. In Smt. Mrudula Nareshchandra v. CED , the relevant clause in the deed of partnership provided that the firm was not to stand dissolved on the death of any of the partners and the partner dying was not to have any right whatsoever in the goodwill of the firm. Relying upon this clause, the accountable person contended that since on the death of the deceased his heirs had no right in the goodwill of the firm, the value of the said goodwill did not pass under the provisions of the Act and was, therefore, not liable to any estate duty. Three questions were referred to the High Court. The first was whether the interest of the deceased in the firm was property within the meaning of the provisions of the Act, the second was whether having regard to the deceased in the said partnership would include the goodwill of the partnership firm, and the third was whether the value of the interest of the deceased in the said partnership would include the goodwill of the partnership firm, and the third was whether the value of the goodwill was exempt under the provisions of s. 26(1) of the Act. The third question was not pressed before the High Court, and, accordingly, the High Court did not answer it. So far as the first question was concerned, the High Court answered it in the affirmative and so far as the second question was concerned, it answered it in the negative. After examining the nature of a partner's interest in the firm, the Gujarat High Court held that it was property for the purposes of the Act. It further held that the value of the goodwill, if any, was to be taken into account not as a separate or individual asset but for the purpose of considering the value of the totality of the interest which the deceased partner possessed. The argument, however, before the Gujarat High Court, proceeded upon the basis that on the death of the deceased, by reason of the aforesaid clause in the deed of partnership his right to claim any share in the goodwill came to an end and did not pass to his legal representatives. The Gujarat High Court held that the deceased's interest in the goodwill ceased and there was, therefore, no question of it being property passing under s. 5 of the Act. The ground for so holding was that according to the Gujarat High Court the word "passes" signified the movement of the property from one hand to the other by some legally recognized method of devolution and that such devolution would be acquisition by inheritance or succession. With respect to the learned judges of the Gujarat High Court, we are unable to accept this construction placed upon s. 5 of the Act. It is contrary to the interpretation of the word "passes" given by the Supreme Court in CED v. Hussainbhai Mohamedbhai Badri and CED v. Aloke Mitra . Proceeding upon this erroneous assumption, the Gujarat High Court then held that the interest of the deceased partner in the goodwill ceased in the event of his death and a corresponding benefit accrued or arose to the surviving partners and that s. 7(1) of the Act applied to the facts of that case. It further held that goodwill alone could earn no income, and, therefore, the value of such interest could not be computed under s. 40 of the Act. We are unable to agree with any of these conclusions too. It was first of all erroneous to consider that the deceased partner had a share in

the goodwill. He had a share in all the assets of the firm, including the goodwill, less the liabilities of the firm. The fact that the goodwill belonged to the surviving partners and that they were not bound to make any payment to the legal representatives of the deceased partner made no difference. The question was whether property had passed on the death of the deceased, its ultimate destination being irrelevant as pointed out by the Supreme Court in Aloke Mitra's case . If one picked up any one asset of a partnership, it would be impossible to attribute any income to it, and the error lay in considering goodwill as a separate item. In CED v. Ibrahim Gulam Hussain Currimbhoy , before the Madras High Court, the relevant clause in the deed of partnership was very similar to the one before the Gujarat High Court. Though the question was considered separately with reference to goodwill, the court held that 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 there share in the interest of the goodwill was augmented to the extent of the share of the deceased, which attracted s. 5 of the Act. Though we ourselves have held that in such a case the entire interest of the deceased partner in the assets of the firm, including goodwill, after deducting liabilities of the firm would pass under s. 5, we have held so for reasons different than those which found favour with the Madras High Court. In our opinion, it would not be right to consider goodwill separately except where in the valuation of the assets there is a dispute with respect to the value placed on goodwill. Such a dispute can arise not only with respect to the value to be placed upon goodwill but also with respect to the value to be placed upon any tangible asset of the firm. The question then would not be of the deceased's share in that particular asset, but it would be with respect to the mode of valuing the total assets of the partnership for the purpose of arriving ultimately at the value of the partnership for the purpose of arriving ultimately at the value of the deceased's share in the firm. In Smt. Surumbayi Ammal v. CED , the Madras High Court merely followed its earlier decision in Ibrahim Gulam Hussain Currimbhoy's case . This authority, therefore, need not detain us further. In State v. Prem Nath , a Full Bench of the Bench of the Punjab and Haryana High Court held that the goodwill of a firm is an asset of the firm and that the share of the deceased partner in it devolved along with his share in the other assets of the firm, upon his legal representatives for the purposes of estate duty notwithstanding any clause in the deed of partnership to the effect that the death of a partner is not to dissolve the firm and that the surviving partners are entitled to carry on the business on the death of the partner. In the course of its judgment, the Full Bench said at p. 451:

> "The observations of the Supreme Court, that is, in Addanki Narayanappa's case, , throw no light on the question whether the share of a partner in the goodwill of a firm passes or does not pass on the death of the partner. If the share of a partner in goodwill does not pass because no partner can deal with any portion of the property as his own during the

> subsistence of the partnership, the same argument may be made to apply to share of the partner in the other assets of the firm also. We do not think that we can accept such an argument."

43. With great respect to the learned judges who decided that case, they appear to have misread the observations of the Supreme Court in Addanki Narayanappa's case, . It is clear from what has been stated in that case that no partner can deal with his so-called share in any particular item of partnership property as if it were his own, the reason being that no partner can claim that he has a defined or an ascertained share in any particular asset of the firm. His only share is in the totality of the assets of a firm including goodwill or rather in the totality of the net assets of a firm. In Smt. Kamlawati Raizada v. CED , the first question before the Allahabad High Court was whether goodwill should be taken into consideration in computing the value of a deceased partner's share, and the second question was with respect to computing the value of goodwill. The questions which we have to consider were not before the court and were not considered by it.

44. Turning now to the decisions of the Calcutta High Court in CED v. John Gregory Apcar , the deed of partnership provided that on the death of a partner the surviving partners would be entitled to carry on the business but would be liable to pay to the legal representatives of the deceased partner his share in the capital and property of the partnership as ascertained by the last annual account taken prior to his death and his share of undrawn current profits up to the date of his death and that for the purpose of ascertaining the amount payable to the legal representatives of the deceased partner his share in the goodwill of the business the value of the goodwill was to be taken as Rs. 1,00,000 which was to be added to the sum payable as aforesaid in respect of his share in the capital and property of the partnership. The Calcutta High Court held that upon the death of the deceased the property, namely, the share of the deceased in the partnership, including goodwill, passed to his legal representatives and the value of such share should be determined in the manner provided in the deed of partnership, but so far as the other surviving partners were concerned, due to the cesser of interest a corresponding benefit also accrued to them, and for determining the value of such benefit the market value of the goodwill less the said sum of Rs. 1,00,000, being the value specified in the deed of partnership, should be taken into account. The question before the Calcutta High Court was, therefore, whether the market value of the goodwill should be taken while calculating the amount of the deceased partner's share or the said sum of Rs. 1,00,000 as provided in the deed of partnership. The terms of the deed of partnership in that case were very different from the terms of the deeds of partnership before us. According to us, in such a case, the deceased partner's share would pass not to his legal representatives but to the surviving partners who will take it subject to the liability to make payment to the legal

representatives of the deceased partner in the manner provided in the said deed of partnership. In Surajmall Gouti v. CED , the real question was as to the valuation of a deceased partner's share, and the court held that the market value of the share of a partner in a firm cannot be correctly determined by adding up the break-up value of each and every asset of the firm as in the liquidation of a firm where on the death of a partner the partnership did not stand dissolved but the surviving partners were entitled to carry on the business. The same was the position in CED v. Annaraj Mehta and Deoraj Mehta , and the Calcutta High Court, following its earlier decision in Surajmall Gouti's case, arrived at the same conclusion.

45. In Smt. Urmila v. CED , it was contended on behalf of the accountable person before a Division Bench of this High Court that as under the deed of partnership on the death of a partner his legal representatives had no interest in the goodwill and the surviving partners were entitled to carry on the business of the partnership subject only to payment to the legal representatives of the deceased partner his share and interest at death but without valuation or allowance for payment of goodwill, this was a case of deemed passing of property as contemplated by s. 7, because on the death of the deceased his interest in the goodwill came to an end, and to the extent of the share of his interest therein was an enhancement of the goodwill in the continuing partners. In support of this contention, the decision of the Gujarat High Court in *Smt. Mrudula Nareshchandra's case*[5] was relied upon. This High Court rejected the contention holding that the relevant cause of the deed of partnership contemplated devolution of the share of the deceased partner in all the assets of the firm, including goodwill, on the continuing partners. It did not consider the correctness of the decision of the Gujarat High Court, but distinguished that case on the ground that the clause in the deed of partnership before the Gujarat High Court was very different from the one before it. It also held that s. 7 of the Act did not apply and s. 5 applied to the case. In a later Bombay case, CED v. N. H. Kotak (see p. 256 supra), the deed of partnership provided that the goodwill and the name of the firm were to belong absolutely to the surviving partners, who would be entitled to carry on the business. A peculiar provision in the deed of partnership in that case was that the name, style and goodwill of the firm were at all times to be at the disposal of the head partner for the time being who was to have the right at any time, whether during the partnership or at its dissolution, "to close the name and style" of the firm or to transfer the name, style and goodwill of the firm to any one or more of the partners as he might think fit in his absolute discretion without any consideration. In view of this provision, the Tribunal held that the deceased partner had no interest in the goodwill immediately before his death. In the opinion of the High Court, having regard to the provisions of s. 5 or s. 7 of the Act, the deceased's share in the goodwill of the firm passed to the surviving partners, and the value of the deceased's share in the goodwill of the firm was to be included in the dutiable estate having regard to the provisions of s. 5 and s. 7 of the Act. The question whether in view of the nature of

a partner's interest in a firm a partner can ever be said to have a share in the goodwill of the firm never arose and was not before the court in either of these cases. Both of them were argued on the basis that the partners had specific shares in the goodwill, and, therefore, it did not fall for the court to determine whether a partner could ever have a specific share in any asset of the firm, leave aside goodwill.

46. In CED v. Kanta Devi Taneja , there were two partners in a firm. They died one after the other, leaving their widows as their only legal representatives. In order to compute the share of the two deceased in the said firm the Estate Duty Officer included the capital standing to the account of the deceased in the said firm as also the value of their share in the goodwill of the firm. The Gauhati High Court held that the interest of a partner in a partnership firm is property within the meaning of s. 2(15) of the Act and such interest extended to his share in all partnership assets including goodwill. It further held that the deceased's share in the goodwill could be included in the estate of the deceased as property passing on his death. It was argued before the Gauhati High Court that it was not open to the department to pick out only one of the assets of the said firm, namely, its goodwill, and to include the deceased's share therein in the principal value of the estate. The High Court rejected this argument on the ground that in the case before it what the department had done was to take into account not only the goodwill but also the interest in the capital of the firm of the deceased partner. From the facts reproduced in the judgment it is not clear whether there were any assets of the firm other than capital and goodwill or whether the department had deducted from the amount of capital and the share of the goodwill the liabilities of the firm. It might have been that the amount of capital exceeded the liabilities, and, therefore, if there were no assets other than the goodwill, goodwill was the only asset left out. If, however, such was not the case, it would not be correct, in our opinion, to speak of any partner having a share in the goodwill, just as it would not be correct to speak of any partner having a share in any of the other assets of the firm. As pointed out earlier, what a partner has is his share in the totality of the assets of the firm less its liabilities. In S. Devaraj v. CWT and Estate of T. R. Narayanaswami Naidu v. CED , the deed of partnership provided that the partnership should not be determined by reason of death, retirement, etc., so long as the business of the firm was continued by at least two partners. The accountable persons included in the estate duty return the amount standing to the credit of the deceased in the capital of the firm and the deceased's share of profit and interest in the firm, but did not include the value of the share of the deceased in the goodwill of the firm. The accountable persons had not received from the surviving partners any amount towards goodwill. The firm was a managing agency firm, and it was contended that a managing agency firm had no goodwill. This contention was negatived. The Madras High Court held that the accountable persons as the legal representatives of the deceased partner were entitled to the deceased's share in all the partnership assets including the goodwill and that ss. 39,

42 and 46 of the Indian Partnership Act, dealing with the concept and consequences of the dissolution of the firm cannot be said to extinguish the proprietary right of the deceased partner in the assets of the firm including the goodwill. This case is, however, not an authority for the proposition that the revenue can pick up goodwill as an item by itself, ascertain its value and include a part thereof as representing the share of the deceased partner in the goodwill. In CED v. Smt. Laxmi Bai , the Allahabad High Court, after referring to some of the decisions on the subject, held as follows (at pp. 78-79):

> "In our opinion, these decisions have proceeded on their own facts. Goodwill may sometimes exist as an asset in the balance-sheet of a business but often it does not so exist and has to be brought into account by proper valuation. For the purpose of estate duty the goodwill of a business has to be valued at the date of death and included in the valuation of the estate passing. This is, however, subject to an important rider. Goodwill goes with the business and has no existence apart from the business itself. If goodwill is to be included as an asset of the business passing on the death by valuing it, it can be done only by the valuing of the assets and liabilities of the business and working out of the net assets valued. Alternatively, even though goodwill may have a positive value worked out for it, based on the annual income of the business, if the overall assets of the business have for some reason been completely depleted in value, no prudent person will purchase the business merely because its goodwill has been worked out at a positive figure. As a general rule, therefore, goodwill as an asset can be included in the estate passing either when all the assets and liabilities of the business have been evaluated or when prima facie they are proved to have a good positive value even without the goodwill. In the instant case, no such controversy is involved, for, there is nothing to show that there was any stipulation between the partners of the firm that on the death of any of the partners, the partnership shall not stand dissolved and the heirs of the deceased partner shall have no right to claim any share in the goodwill of the firm. There is also nothing on the record to show that the overall assets of the business have been completely depleted so that even for the positive value of the goodwill no prudent person will purchase the business. Goodwill being an asset and property within the meaning of s. 2(15) of the Act, in the normal course will devolve upon the legal representatives and its value as calculated on established commercial principles will be included in the principal value of the estate of the deceased."

47. It is pertinent to note that the Allahabad High Court proceeded upon the basis that the overall assets of the firm exceeded the liabilities. It also held that goodwill is to be taken into account in arriving at the valuation of the assets of the firm and that the liabilities are to be deducted

therefrom and that thereafter the deceased's share in the balance determined as his share in the firm. It is in the context of this that when it was sought to be urged that in valuing the assets goodwill should not be taken into account that the Allahabad High Court, bearing in mind the fact that the other assets exceeded the liabilities, came to the conclusion that, in the facts of that case, in the goodwill of the firm, the partners had a defined share. This decision, if at all, is in favour of the accountable persons before us.

48. A survey of the above authorities shows that most of the authorities have not applied the ratio of the Supreme Court decision in Addanki Narayanappa's case, , because the attention of the court was not drawn to it. Further, the point was not presented and argued as it has been before us, but the entire approach was on a totally different line. A few of the cases have also misread the judgment of the Supreme Court in Khushal Khemgar Shah's case, , as laying down that in a deed of partnership each partner has a defined share in the goodwill. Further, in none of these cases was the attention of the court drawn to the decision of the Supreme Court in CGT v. P. Gheevarghese, Travancore Timbers and Products . We, therefore, do not find anything in any of these authorities to militate against the conclusions we have reached.

49. To summarize our conclusions:

(1) The expression "passes" in s. 5 of the E.D. Act, 1953, means "changes hands". It does not mean "devolves", for devolution of property is confined to succession or inheritance.

(2) Where property does not actually pass but the facts of the case attract one of the deeming provisions in the group of sections in Part II of the E.D. Act, 1953, headed "Extent of charge", property is deemed to pass, and by reason of sub-s. (3) of s. 3 of the Act such deemed passing is to be construed or interpreted as property passing on death.

(3) The only charging section in the E.D. Act, 1953, is s. 5, and where under one of the deeming provisions property is deemed to pass, estate duty becomes chargeable on its value under s. 5.

(4) The charging provisions and the computation provisions in the E.D. Act, 1953, constitute an integrated scheme, and if in a given case it is not possible to compute the value of a particular property passing on death, then that property does not become exigible to the charge of estate duty.

(5) Where property is deemed to pass under s. 7(1) of the E.D. Act, 1953, estate duty thereon will be chargeable under s. 5, but the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased will have to be computed under s. 40 of the Act, and if it cannot be computed, then such benefit is not liable to the charge of estate duty.

(6) The definition of the term "property" in cl. (15) of s. 2 of the E.D. Act, 1953, is not a restrictive definition but is an extensive one. It comprehends within it not only the particular interests mentioned in the said cl. (15) but also all that is generally understood in law by the terms "property". There is no warrant for holding that in s. 7(1) of the Act the word "property" is used in a narrow sense and refers only to such property which is a defined and specific property or, in other words, to a tangible property.

(7) During the subsistence of a partnership the right of a partner is to obtain such profits as fall to his share from time to time.

(8) Upon the dissolution of a firm, the right of a partner in the dissolved firm is to a share in the assets of the firm which remain after satisfying the liabilities set out in cl. (a) and sub-cls. (i), (ii) and (iii) of cl. (b) of s. 48 of the Indian Partnership Act, 1932. Where under the provisions of a deed of partnership, a partnership is not dissolved by the death or retirement of a partner but the surviving partners become entitled to carry on the partnership, the right of the retiring partner or the legal representatives of the deceased partner are governed by the deed of partnership.

(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.

(10) The goodwill of a firm is one of the properties or assets of a firm. Merely because it is an intangible asset, it does not stand on a different footing from the tangible assets of the firm, but in making up the final accounts it is to be taken together with the other assets of the firm in arriving at the value of the total assets and for deducting therefrom the liabilities as provided by law and in paying to the partners their share in the balance so arrived at.

(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 a 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.

(12) For the purposes of the E.D. Act, 1953, what is to be seen is whether property has changed hands, irrespective of the destination of that property. The value of such property is liable to be included in the value of the estate of the deceased.

(13) Where a partnership is dissolved by the death of a partner, his share in the firm passes on his death to his legal representatives. Where a partnership is not dissolved on the death of a partner but the surviving partners become entitled to continue the partnership business, the deceased partner's share passes to his surviving partners subject to their making payment to the legal representatives of the deceased partner of the amount of the value of his share in accordance with the provisions of the deed of partnership.

(14) Whether the share of a deceased partner passes on his death to his legal representatives or to his surviving partners, the property actually passes under s. 5 and cannot be said to be deemed to pass under s. 7(1) of the E.D. Act, 1953.

(15) Assuming for the sake of argument that in a case where the surviving partners are entitled to continue the partnership business the property is deemed to pass under s. 7(1), it would not be correct to say that its value cannot be computed under cl. (b) of s. 40 the E.D. Act, 1953.

(16) In the valuation of a deceased partner's share for the purposes of the E.D. Act, 1953, it is not open to the department to pick up only one item out of the partnership properties or the assets of the firm and proceed upon the basis that the deceased had a specified share in it, because no partner has a defined share in the individual assets or properties of the firm. His share is in the totality of the properties of the firm less the liabilities thereof. If for the purpose of valuing a partner's share in the firm the department picks up just one or two items out of the total assets or properties upon the basis that the deceased had a defined share in it or them, ignoring the other assets and the liabilities of the firm, the valuation made is unjustified and unsustainable in law.

(17) It is not necessary for the purposes of the present references to decide which would be the proper method for computing the value of a deceased partner's share in the firm.

(18) In each of the three references before us the department has proceeded upon the aforesaid wrong basis, and, therefore, the valuation made by it cannot be sustained.

50. In the light of the reasons given above, we will now proceed to answer the questions which have been referred to us, with this prefatory remark that these questions have concentrated solely upon the goodwill of the firm as constituting a separate property by itself with the deceased having a share in it. In Estate Duty Reference No. 2 of 1973, we answer the question referred to us in the affirmative, that is, in favour of the accountable person and against the department. In Estate Duty Reference No. 2 of 1974, we answer the questions as follows:

Question No. 1: 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 s. 5 of the E.D. Act, 1953.

Question No. 2: In the negative, that is, in favour of the accountable person and against the department.

Question No. 3: In the affirmative, that is, in favour of the accountable person and against the department.

Question No. 4: In the affirmative, that is, in favour of the accountable person and against the department.

51. In Estate Duty Reference No. 9 of 1979, we answer the question referred to us in the affirmative, that is, in favour of the accountable person and against the department.

52. In each of these references, the applicant will pay to the respondent the costs of the reference which, bearing in mind the length of time which the hearing of these references took, we fix at Rs. 1,000.

Cases Referred.

1[1859] 26 Beav 606, 610; [1859] 53 ER 1032
2AIR 1922 Bom 247, 251(2)
3[1954] 25 ITR (ED) 47 (PC)
4[1958] 34 ITR (ED) 20; [1957] AC 513 (PC)
5[1975] 100 ITR 297