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KHUSHAL KHEMGAR SHAH & ORS.

v.

KHORSHED BANU DADIBA BOATWALLA AND ANR.

February 12, 1970

B [J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.]

Partnership Act 1932—*Sections* 14, 39, 42, 46 *and* 55—*Goodwill—Nature of.*

Legal representatives of a partner—If entitled to share in good-will of a firm continuing after death of a partner.

C D who was one of eight partners in a firm, died on February 20, 1957. By virtue of a provision in the partnership deed, the business of the firm was continued by the surviving partners. The respondents, being the widow and son of D commenced an action for an account of the partnership between D and the surviving partners, praying for an order for the payment of the amount determined to be due to D at the time of his death. A single judge of the High Court passed a preliminary decree directing that an account be taken of the partnership as on February 20, 1957. A D Division Bench, in appeal, modified the decree holding that the respondents were entitled only to interest at 6% p.a. on the amount of D's share in the assets of the partnership, including good-will.

In appeal to this Court it was contended on behalf of the appellants that the respondents as legal representatives of D were not entitled to a share in the value of the good-will of the firm because good-will may be E taken into account only when there is a dissolution and not otherwise; and furthermore, because D had agreed that his interest in the good-will would cease after his death and the business shall be continued by the surviving partners.

HELD : Dismissing the appeal,

It could not be held that in interpreting a deed of partnership, business whereof, it is stipulated shall be continued by the surviving partners after F the death of a partner, the Court will not award to the legal representatives of the deceased partner a share in the goodwill in the absence of an express stipulation to the contrary. The good-will of a firm is an asset of the firm. In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share G of a partner in the assets devolves upon his legal representatives will apply to the good-will as well as to other assets. [693 F-H]

There is no indication in s. 55 of the Partnership Act that goodwill may be taken into account only when there is a general dissolution of the firm, and not when the reprensentatives of a partner claim his share in the firm, which by express stipulations is to continue not with standing the death of a partner. Nor do ss. 39, 42 and 46 of the Act support such a contention. H [691 F]

Hunter v. *Dowling*, [1895] 2 Ch. D. 233; *Smith* v. *Nelson* 96 Law Times Reports 313; *Bachubai and L. A. Watkins* v. *Shamji Jadowji*, I.L.R. 9 Bom. 536; referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1201 of 1966. A

Appeal by special leave from the judgment and order dated June 24, 1965 of the Bombay High Court in Appeal No. 79 of 1963.

F. S. Nariman, K. D. Mehta and *I. N. Shroff*, for the appellants. B

M. C. Chagla and *A. K. Verma*, for the respondents.

The Judgment of the Court was delivered by

Shah, J. Dadiba Hormusji Boatwalla was one of the eight partners of Messrs Meghji Thobhan & Company—a firm of *Muccadams* and cotton brokers. Boatwalla died on February 20, 1957. By virtue of cl. 8 of the deed of partnership the business of the firm was continued by the surviving partners. Khorshed and Nariman—widow and son respectively of Boatwalla—obtained letters of administration to the estate of Boatwalla and commenced an action in the High Court of Bombay for an account of the partnership between Boatwalla and the surviving partners and for an order paying to the plaintiffs the amount determined to be due to Boatwalla at the time of his death. The suit was resisted by the surviving partners—who will hereinafter be called 'the defendants'. Tarkunde, J., passed a preliminary decree declaring that *qua* Boatwalla the partnership stood dissolved on February 20, 1957, but not in respect of the surviving partners, and directed that an account be taken of the partnership upto February 20, 1957. Against that decree the defendants appealed under cl. 15 of the Letters Patent. In appeal the High Court modified the decree. The learned Judges held that the plaintiffs were not entitled to an account in the profits and losses of the firm after the death of Boatwalla, nor to exercise an option under s. 37 of the Partnership Act, but that the plaintiffs were entitled only to interest at six per cent. per annum on the amount found due as Boatwalla's share in the assets of the partnership including the goodwill. They further declared that the interest of Boatwalla in the firm ceased on February 20, 1957, and deleted the direction with regard to the dissolution of the firm as between Boatwalla and the defendants. With special leave, this appeal has been filed by the defendants.

The defendants contend that the plaintiffs as legal representatives of Boatwalla were not entitled to a share in the value of the goodwill of the firm because the goodwill of a firm may be taken into account only when there is a dissolution of the firm and in any event because Boatwalla had agreed that his interest in the goodwill shall cease on his death and the business shall

A be continued by the surviving partners. The defendants do not challenge the decree of the High Court awarding to the plaintiffs Boatwalla's share in the assets of the firm other than goodwill: they contend that in the goodwill of the firm the plaintiffs had no share.

B By section 14 of the Partnership Act, 1932, it is enacted that:

> "Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm or acquired, by purchase or otherwise, by
C 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."

Goodwill of the firm is expressly declared to be the property of the firm.

D Counsel for the defendants relied upon s. 55 of the Partnership Act which makes a provision with regard to sale of goodwill after dissolution. It is provided by sub-s. (1) of s. 55 that:

> "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
E either separately or along with other property of the firm."

But it is not enacted thereby that goodwill may be taken into account only when there is a general dissolution of the firm, and not when the representatives of a partner claim his share in the firm, which by express stipulation is to continue notwithstanding
F the death of a partner. Nor do ss. 39, 42 and 46 which were relied upon by counsel for the defendants support that contention. Under s. 39 the dissolution of partnership between all the partners of a firm is called the "dissolution of the firm"; and by s. 42 a firm is said to be dissolved subject to the contract between the partners on the happening of certain contingencies. Sec-
G tion 46 provides that on the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights. These provisions deal with the
H concept and consequences of dissolution of the firm: they do not either abrogate the terms of the contract between the partners relating to the consequences to ensue in the event of the death of a partner when the firm is not to stand dissolved by

such death, nor to the right which the partner has in the assets and property of the firm. The Partnership Act does not operate to extinguish the right in the assets of the firm of a partner who dies, when the partnership agreement provides that on death the partnership is to continue. In the absence of a term in the deed of partnership to that effect, it cannot be inferred that a term that the partnership shall continue notwithstanding the death of a partner, will operate to extinguish his proprietary right in the assets of the firm.

Clause 8 of the deed of partnership reads 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."

Mr. Nariman says that goodwill is nothing but the right to the name, the place of business and the reputation of the firm, and when all these components of the right by express agreement between the partners devolve upon the surviving partners, it follows that the share of the deceased partner in the goodwill of the firm devolves upon the surviving partners and not upon his legal representatives. The goodwill of a business is however an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connection durable. It is that componant of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features. An agreement between the partners that the name, the place of business and the reputation of the firm are to be utilised by the surviving partners will not necessarily warrant an inference that it was intended that the heirs of the deceased partner will not be entitled to a share in the goodwill.

Our attention was invited to *Hunter* v. *Dowling*(1); *Smith* v. *Nelson*(2); and *Bachubai* and *L. A. Watkins* v. *Shamji Jadowji*(3). The first two cases proceed upon the interpretation of certain clauses in partnership agreements It was inferred in those cases from the terms of the agreement that the right in the goodwill of a partner in a firm dying or retiring shall not survive to his legal representatives. *Bachubai and L. A. Watkin's* case(3) arose out of a case in which in the partnership agreement it was provided that

(1) [1895] 2'Ch. D. 223.
(2) 96 Law Times Reports 313.
(3) I. L. R. 9 Bom. 536.

A the firm shall be the agents of a company carrying on business as a manufacturer of cotton textiles so long as the firm carries on business in Bombay, or until the firm should resign. The firm were appointed the agents of the Company and continued to act as agents. One of the partners died, and a representative of the partner filed a suit, claiming a certain share in the assets of the B firm including the goodwill. It was observed by Sargent, C.J., in rejecting the claim of the plaintiff to a share in the goodwill of the business as an asset of the firm, that—

> "Assuming (which may well be doubted) that the term "good-will" is applicable to a business of this C nature, it is plain that it is attached to the name of the firm which, by the partnership agreement itself, is to be used by the surviving partners or partner for their own benefit. Such an arrangement between the partners must take away all value from the goodwill; even if it be not,—as Mr. Justice Lindley in his Treatise on Partnership, p. 887, (3rd ed.), considers it to be— D inconsistent with its being an asset at all"

The learned Chief Justice expressed a doubt—presumably relying upon old English decisions—that the goodwill of a firm may not be an asset at all. These observations do not set out any rule of interpretation of a deed of partnership. But the question E is now settled by statutory enactment. Under the Partnership Act, 1932, it is expressly declared that the goodwill of a business is an asset. Whether the goodwill has any substantial value may be determined on the facts of each case.

We are unable to agree with Mr. Nariman that in interpreting a deed of partnership, business whereof it is stipulated shall F be continued by the surviving partners after the death of a partner, the Court will not award to the legal representatives of the deceased partner a share in the goodwill in the absence of an express stipulation to the contrary. The goodwill of a firm is an asset. In interpreting the deed of partnership, the Court will insist upon some indication that the right to a share in the G assets is, by virtue of the agreement that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets.

H The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

R.K.P.S.