

(1967) 11 CAL CK 0010

In the Calcutta High Court

Case No : Wealth-tax Reference No. 134 of 1962

COMMISSIONER OF WEALTH-TAX

APPELLANT

Vs

MRS. DOROTHY MARTIN.

RESPONDENT

Date of Decision : 15-11-1967

Acts Referred:

Succession Act, 1925 — Section 173

Wealth Tax Act, 1957 — Section 2(e)(iv), 27(1)

Citation : (1968) 69 ITR 586

Hon'ble Judges : Masud, J; Banerjee, J

Bench : Full Bench

Judgement

BANERJEE J. - This reference, u/s 27(1) of the Wealth-tax Act, has been made in circumstances hereinafter related.

The assessee, Mrs. Dorothy Martin, is the daughter of one Arratoon Stephen, now deceased. By his will, dated August 15, 1925, the deceased settled certain properties in several trusts and appointed three gentlemen as trustees. He appointed his wife, Ella, as the guardian of his infant children during her lifetime and after her death the trustees were to be the guardians of the said children. The settlement in trust, which the deceased made in favour of his wife and children, is recited in paragraphs 7, 8, 9 and 10 of the will, which are quoted below :

"(7) I give all my property of every description whether movable or immovable not hereby otherwise disposed of unto my trustees upon trust at such time and in such manner as they shall in their absolute discretion think fit to sell and realise such part thereof as shall not consist of money and out of the net proceeds of sale and any other money belonging to my estate to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and to stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called "the residuary trust funds"). Upon the trusts following (that is

to say) : In trust either to purchase investment of the nature hereinafter authorised of the market value exclusive of all expense of investment at the date of such investment of rupees seven lakhs or to set aside out of my residuary estate securities or property of the value in the opinion of my trustees at the date of such setting aside if rupees seven lakhs but so that such securities or property shall yield at least an income of six per cent. per annum and to pay the income arising therefrom to my wife so long as she shall remain my widow and if she shall marry again then from and after her second marriage in trust to set aside out of the said fund of rupees seven lakhs investments sufficient at the time to produce by the annual income thereof the yearly sum of rupees six thousands and to apply such income and if necessary the corpus of the fund so appointed in payment to my said wife during the remainder of her life of the monthly sum of rupees five hundred as from the date of her marriage and I declare that the remainder of the investments representing the said fund of rupees seven lakhs shall on such remarriage and also the said fund so set aside to meet the said monthly payment of rupees five hundred or so much thereof as shall then remain shall on the death of my said wife fall into and form part of the remainder of the residuary trust funds and be held upon the trusts hereinafter declared concerning the same.

(8) I declare that my trustees shall stand possessed of the remainder of the residuary trust funds upon the following trusts (that is to say) : Upon trust to divide the same into as many equal as shall leave children surviving me and so that for the purpose of such division all the children of each deceased child of mine shall represent and be entitled to one of such equal shares only.

(9) I direct that my trustee shall hold such equal shares of and in my residuary trust funds upon trust to apply the income or so much thereof as may be necessary one such shares for the supports and maintenance of each of my children until such child shall attain the age of twenty-one years or if a daughter marry under that age and on the happening of either event to pay the said income to him or her for his\\her life but so that during coverture no daughter of mine shall have power to anticipate her share of income and subject also as such shares to the power of revocation and appointment and settlement hereinafter given to my said wife and my trustees respectively, and from and after the decease of each of my children I direct my trustees to stand possessed of one of each equal share both original and accruing in trust for the children of such deceased child of mine in such shares (if more than one) and in such manner as such deceased child of mine by any deed or by his or her last will or any codicil thereto shall appoint and in default of such appointment and so far as any such appointment shall not extend in trust for the children of such deceased child who being male shall attain the age of eighteen years or being female shall attain that age or marry in equal share and if there shall be one such child the whole shall take a share under any such appointment shall (in the absence of appointment to the contrary) take any part of the trust funds remaining unappointed without bringing the share appointed to him or her into hotchpot and accounting for the

same accordingly and in case there shall be no child who being male shall attain the age of eighteen years or being female shall attain that age or marry in trust for my other children living at my death and the children of my deceased child of mine per stirpes and not per capita in equal shares upon the trusts and subject to the powers and provisions herein declared in their favour and so that such shares shall be added to their respective original shares in the residuary trust funds and shall follow the destination of such original share.

(10) Provided always and I hereby that in case any of my children shall act in such manner that my said wife or after her death my trustees shall consider it advisable or expedient to cut off and deprive such child of his her life interest in a share of my residuary trust funds or any part thereof then and in every such case it shall be lawful for and I hereby authorise and empower my said wife the approval and consent of my trustees and after her death I authorise my trustees alone by any deed or writing recoverable or irrecoverable (revocable or irrevocable ?) attested by not less then one witness to revoke in whole or in part the trusted (trust ?) hereinbefore declared in favour of such child of or consigning such share original as well as accrued or accruing and either as to the whole or any part of such life interest and in lieu thereof during the remainder of the lifetime of such child of mine to pay or the income that arises from such shares for or towards the maintenance during minority of any of the children of any such child of mine and after minority to pay the same to any of such children in such shares as my trustees may think fit or to appoint the whole or any part of such income during such lifetime as aforesaid to any of my other children who shall not have so misbehaved in such shares if more than one and in such manner as my said wife or any said trustees respectively shall by such deed or writing appoint."

The share of the residuary trust fund, held by the trustees for the benefit of the assessee, consisted of securities, debentures and cash. For the assessment years 1957-58, 1958-59 and 1959-60 (the respective valuation dates being March 31, 1957, March 31, 1958 and March 31, 1959), the value of share of the assessee in the said trust fund aggregated Rs. 7,29,241, Rs. 7,35,211 and Rs. 7,35,666 respectively.

Although the assessee was entitled to receive the annual interest only, accruing upon her share in the trust fund, the Wealth-tax Officer included the entire value of the said share in the assessable wealth of the assessee and subjected the same to tax u/s 16(3) of the Wealth-tax Act.

Aggrieved by the order, the assessee appealed before the Appellate Assistant Commissioner and contended that :

"(1) She was not the owner of any part of the trust fund and no tax was, therefore, chargeable on the value thereof.

(2) She had only a right to an annuity for the term of her life and the terms and conditions relating thereto precluded the commutation of any portion thereof into

a lump sum grant and as such she was entitled to claim exemption of the annuity from the net value of the wealth, u/s 2(e)(iv) of the Wealth-tax Act."

The Appellate Assistant Commissioner negated the contention with the following observation :

"Now, on reading the terms of clause 9 of the said will, it would be clear that appellant had a power of appointment vested in her to bequeath the appropriate share in the trust funds to any of her children. This alone would negative the appellants contention that her interest in the said trust funds was merely in the nature of annuity or life interest. When a person has a power of appointment in respect of certain trust properties, it could not be said that she had only a life interest in the income of the trust or that she had an annuity for life. She could by will dispose of the said share in the trust funds to any of any of her children and as such her rights in the property of the trust were co-extensive with the legal and equitable ownership of the appropriate funds."

In the view that he took, the Appellate Assistant Commissioner dismissed the appeal.

The assessee thereupon appealed before the Appellate Tribunal. The Tribunal allowed the appeal with the following observation :

"In view of the fact that the appellant was restrained by the terms of the will to anticipate her income, she was, obviously, precluded from the commutation of any portion thereof into a lump sum grant and alienate the same. It is, therefore, manifest that her life interest in the annuity had no marketable value and is clearly covered by the exemption provided for u/s 2(e)(iv) of the Wealth-tax Act."

"The Appellate Assistant Commissioner held that as under the terms of paragraph 9 of the will, the appellant had a power of appointment to nominate any of her children to succeed her to the trust funds as the beneficiary, she had not merely a life interest in the income of the funds but she had a power of disposition and her rights were "co-extensive with the legal and equitable ownership of appropriate funds." We are unable to agree. The legal ownership of funds vests in the trustees and not in the appellant. The appellant has only an equitable interest thereon. That right, too, is not of an absolute character."

"It is a life interest with restraint on anticipation. The power of appointment is restricted to the children. In the present case, the appellant has no issues whatever. She was, we are informed, born in 1898, and she was round about 60 years on the material dates. She could not therefore appoint any of her nominees to succeed her."

In the view taken, the Appellate Tribunal cancelled the assessment.

Thereupon, the revenue induced the Tribunal to refer the following question of law to this court :

"Whether, on the facts and in the circumstances of the case, the sums of Rs.

7,29,241, Rs, 7,35,211 and Rs, 7,35,666 were assessable as the net wealth of the assessee on the respective valuation dates, March 31, 1957, March 31, 1958, and March 31, 1959 ?"

Mr. B.L. Pal, learned counsel for the revenue, submitted :

"(a) The sum receivable by the assessee was not an annuity, because it was not a fixed sum payable annually but a variable sum representing the income from investments in trust.

(b) The power of appointment vested in the assessee to bequeath her share in the trust fund to any of her children negated the claim of the assessee that she had only a right to annuity or life interest in the trust fund."

In order to appreciate the argument of Mr. Pal, it is necessary to refer to certain provisions of the Wealth-tax Act first of all.

Under section 2(c) :

"assessee means a person by whom wealth-tax or any other sum of money is payable under this Act."

"Assets" have not been defined comprehensively under the Act but, u/s 2(e) : "assets includes property of every description, movable or immovable but does not include..."

(iv) a right to any annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into lump sum grant;....."

"Net wealth", u/s 2(m) means

"the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that the date under this Act, is in excess of the aggregate value of all the debts owned by the assessee on the valuation date other than -

(i) debts which u/s 6 are not to be taken into account;

(ii) debts which are secured on or which have been incurred in relation to, any property in respect of which wealth-tax is not chargeable under this Act; and

(iii) the amount of any tax, penalty or interest payable in consequence of any order passed under or in pursuance of this Act or any law relating to taxation of income or profits....."

Section 3, the charging section, runs as follows :

"Subject to the other provisions contained in this Act, there shall be charged for every assessment year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the

corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule."

Under section 4, in computing the net wealth of an individual there shall be included as belonging to that individual, the value of the assets which on the valuation date are held by a person or association of persons to whom such assets have been transferred by the individual otherwise than for adequate consideration for the immediate or deferred benefit of the individual, his or her spouse or minor child - the expression "transfer" including any disposition, trust, covenant, agreement, or arrangement. u/s 5(1), wealth-tax is not payable by an assessee on the following assets and such assets shall not be included in the net wealth of the assessee :

"(vii) the right of the assessee to receive a pension or other life annuity in respect of past services under an employer;....."

Under section 7(1), the value of any asset, other than cash, for the purposes of this Act shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

Now, regard being had to the scheme of section 2(e)(iv) read with sections 4 and 5(1)(vii) all "annuities" are not excluded from the computation of wealth-tax but some only are as in section 2(e)(iv) or in 5(1)(vii).

We need, therefore, see what is the real character of an annuity. According to Shorter Oxford Dictionary, "annuity", means (1) a yearly allowance or income, (2) (law) the grant of an annual sum for a term of years, for life or in perpetuity, chargeable primarily upon the grantors person or heirs if named. According to Halsburys Laws of England (2nd edition), volume 28, article 312 :

"the right created by an instrument (whether deed, codicil or statute) to receive a definite annual sum of money is an interest which may be strictly speaking either a rent, charge or an annuity."

Also in the same volume in article 321, it appears :

"An annuity is a sum of money payable yearly or at any rate periodically, from a source which is exclusively or at any rate primarily personal estate."

Thus, in legal parlance annuity means a fixed sum of money payable yearly or periodically while in popular sense it may also mean a yearly or periodical allowance which need not be a fixed sum.

We have next to see in which of the two sense, the word "annuity" has been used in the Wealth-tax Act. According to Craies on Statute Law (5th edition), at page 153 :

"There are two rules as to the way in which terms and expressions are to be construed when used in an Act of Parliament. The first rule is that general statutes should prima facie be presumed to use words in their popular sense."

At page 155, the learned author further says :

"The second rule is that if the statute is one passed with reference to be particular trade, business or transaction, words are used therein which everybody conversant with that trade, business or transaction known and understand to have a particular meaning in it, the words are to be constructed as having that particular meaning which may differ from the ordinary or popular sense."

As regards "legal terms" the learned author observes at page 158 :

"There is a well-known principle of construction, that where the legislature uses in an Act a legal term which has received judicial interpretation. it must be assumed that the term is used in the sense in which it has been judicially interpreted..... The same rule applied to words with well-known legal meanings, even though they have not been subject of judicial interpretation."

Now, "annuity" is a well-known legal term. Instances of annuity appear in the illustration to section 173 of the Indian succession act and it is interesting to notice that in each a specified sum is mentioned. Thus, it is possible to hold that the word "annuity", a well-known legal term, has been used in the Wealth-tax Act, in its well-known legal meaning, namely, a fixed money payable annually or periodically.

Then again, where a beneficiary become entitled to an aliquot share in the general income of a trust estate, that is different from mere "annuity". This aspect of the matter has been death with by this court in Wealth-tax Reference No. 69 of 1963 (Ahmed G.H. Ariff v. Commissioner of Wealth-tax). What happened in that case was that one Golam Hossain Cassim Ariff, a Mohammedan, created a wakf on November 19, 1928, of certain lands, hereditaments and premises whereby he appointed himself the sole mutawalli of the wakf property during his life; after his death his sons and his widow were to be mutawallis, jointly. The mutawalli or mutawllis were to retain a proper establishment to look after the wakf property and keep proper accounts thereof. After payment of all necessary outgoings, including revenue, taxes, repair charges, etc. the mutawallis were to divide the income of the wakf property in the manner stated, that is to say pay the wakf Rs. 700 per month, Ibrahim Golam Hossain Ariff Rs. 600 per month for his life, a similar sum to each of his the sons and the sum of Rs. 400 or month to his wife. On the death of any of the beneficiaries, the money payable to him was to be paid to and distributed amongst persons entitled to the same accordancing to the Mohammedan law as heirs to the beneficiaries so dying. there was a deed of recitification of the wakf executed on July 5, 1930, by which the payment to the wakif and the first mutawalli, as also to the other beneficiaries was to be made in a different manner. The wakif was to get for the term of his life 1/5th of the net income for the property by monthly instalments, his sons were each to get 1/6th of the net income for their lives respectively and the wife was to get 1/10th of the net

income.

The question arose whether wealth-tax could be levied in respect of the assessee's right to receive a definite share in the net income of the wakf property. In answering the question against the assessee, G.K. Mitter, J. (Masud J. agreeing) observed :

"The right of the assessee in this case is to receive an aliquot share of the net income of the properties which were made subject-matter of the wakf. That there is clear distinction between an aliquot share of income and an annuity is illustrated by the observations of the Court of Appeal in England in the case of *In re Duke of Norfolk : Public Trustee v. Inland Revenue Commissioners*, where a question arose in respect of estate duty payable in the case of grant of an annuity to A and after his death, to B. Referring to the cases of *In re Northcliffe* and *Christie v. Lord Advocate*, Evershed M. R. said :

Both the two last mentioned cases were instance of dispositions of aliquot shares of the general income of an estate to be enjoyed in succession, as distinct from an annuity or yearly sum which, even though variable..... is in no way dependent upon related to the general income of the estate. Instances of annuity are given in the illustration to section 173 of the Indian. Succession Act, and it will be noticed that in each a specified sum is mentioned. So far as the English law is concerned an annuity is a right to receive *de anno in annum*, a certain sum that may be given for life, or for a series, of years; it may be given during any particular period, or in perpetuity : Per Kindersley V.C. in *Bignold v. Giles*. Where the sum mentioned was Pounds 100, Lord Cottenham C.J. said in *Blewitt v. Roberts*, that it is the gift of an annual sum of Pounds 100; that is of as many sums of Pounds 100 as the donee shall live years. This meaning of the word annuity was adverted upon in *Commissioner of Wealth-tax v. E.D. Anklesaria*.

The further contented that even if the right of the assessee in this case was an asset within the meaning of section 2(e) of the Act, it could not be taken into account in computing net wealth as defined in section 2(m) because the property out of which the right to receive the income arose did not belong to the assessee, is of no substance. If the right to receive the income is an asset, it belongs to the assessee no matter whether the right is of no substance. If the right to receive the income is an asset, it belongs to the assessee no matter whether the right is dependent on the existence of some property and spring out of it. It is the asset of the assessee which has got to be taken into account. If the asset disappears by reason of the non-existence of something to which it is attached or appurtenant, it may cease to belong to the assessee when the tangible property out of which it arises cease to exist. Consequently, the fact that the ownership of the property rested or vested in God is a matter of no moment. It is not the partnership of the wakf properties which can be made taxable for the Wealth-tax Act; it is only the right of the assessee to receive some benefit out of the income of the property which is exigible."

We have therefore to see if the assessee became entitled to an annuity or to an aliquot share in the general income of a residuary trust fund. Under clause (7) of the will, there was a residuary trust fund established by the testament consisting of his properties, not otherwise "disposed of" or bequeathed under the will, with direction to the trustees to invest rupees seven lakhs out of that in securities and pay the income therefrom to his widow so long as she did not marry again and thereafter to set aside so much out of the said securities as would yield an income of Rs. 6,000 annually and to pay Rs. 500 per month to her for the remainder of her life. The remainder of the residuary trust fund, including the balance of the securities hereinbefore mentioned, if any, were directed to be held upon trust to divide the same into as many equal shares as the testator had children serving him so that for the purpose of such division all the children of each deceased child of the testator shall represent and be entitled to one such equal share. There were the following further directions upon the trustees of the funds. :

(a) to apply the income or so much thereof as may be necessary of one of such shares for the support and maintenance of each of the children of the testator until such child would attain the age of twenty one years one if a daughter would marry under that age;

(b) on the happening of either event to pay the said income to him or her for his or her life but so that during the coverture no daughter of the testator shall have power to anticipate her share of income.

(c) from and after the decease of each of the testators children to stand possessed of one of equal shares both original and accruing in trust for the children of the deceased child of the testator in such shares (if more than one) and in such manner as the deceased child of the testator, by any deed or deeds or by his or her last will or any codicil thereto shall appoint and so far as any such appointment shall not extend in the test for the children of such deceased child who being male shall attain the age of eighteen years or being female shall attain that age or marry, in equal shares.

The above clauses go to show that the assessee, as a daughter of the testator, was clearly entitled to an aliquot share in the general income of the residuary trust funds and not to a fixed sum payable periodically as annuity. Thus, on both the grounds (1) that the assessee was not entitled to a fixed sum periodically, and (2) that what was bequeathed to her was an aliquot shares in the general income of the trust fund, the assessee is not entitled to exemption.

There is another aspect of the question which we need consider in this context. Mr. Pal invited our attention to the Supreme Court decision in *Mahendra Rambhai Patel v. Controller of Estate Duty*. In that case the Supreme Court had to consider a deed of trust by which one Rambhai Patel settled 80 shares in a certain limited company for the advancement and maintenance of his son, Manubhai, and an equal number of shares for the benefit of his son. Mahendra. Manubhai died

when he was a minor and unmarried. the Deputy controller of Estate Duty brought the interest of Manubhai in the settlement to tax in the hands of his brother, Mahendra, on the footing that it was vested in possession Manubhai. The relevant clauses of the trust deed which came up for consideration of the Supreme Court were;

"2. The trustees shall stand possessed of the said shares until each of the said beneficiaries shall complete the age of 25 years and until the said time, out of the profits arising therefrom to apply either the whole or part thereof as the said trustees may deem fit and proper in the maintenance and advancement of the said beneficiaries. The trustees are hereby authorised to invest such unused or accumulated funds from the profits in any security or concern as they may deem fit and proper.....

4. If and when each of the said beneficiaries completes the age of 25 years the trustees shall transfer out of the said 160 shares his portion of the shares and the accumulation thereof or any other investment in lieu thereof.....

5. The said beneficiaries shall not have any right to mortgage or create any incumbrance of any description or sell the same until each of them completes the age of twenty five years.....

7. In the event of the said beneficiaries or any of them shall die before completing the age of twenty-five years without leaving any male issue, the trustees shall stand possessed of the said shares in the trust for the other then living sons of the said Rambhai Somabhai Patel in equal shares after making the following provisions....."

The question that came up for the consideration was :

"Whether, on the facts and in the circumstance of the case, the inclusion in the estate of the deceased of the amount of Rs. 10,43,050 being the trust funds was justifiable in law ?"

The Supreme Court, in confirming the affirmative answer given to the question by the High Court, inter alia, observed :

"An interest in property liable to the divested on the death before beneficiary attain a certain age, coupled with a direction to accumulate the income in the meantime so far as it is not required for maintenance so as to make the accumulated income an accretion to the capital is in substance as contingent interest, and the property may be exempt from estate duty, if the beneficiary dies before he attains the age specified. But where, as in the present case, the income of the property absolutely belongs to the beneficiary and such part of the interest as is not applied for the benefit of the beneficiary, is liable to be accumulated for his benefit, and in the event of his death before he attains the age specified in the deed of trust, it is to devolve upon his heirs create in the beneficiary an interest in possession and not an interest in expectancy."

Mr. Pal submitted that inasmuch as clause (9) of the will in this matter contained provision both for "original and accruing" fund, the interest of the assessee should be treated as an interest in possession and as such assessable to tax. We do not make much of this argument. The terms of the trust in Mahendra Rambhai Patels case were a good deal different from the terms of the trust in the instant case. Clause (9) of the will, in this case, does not contain any express provisions for accumulation so far as the assessee is concerned, although there are some such directness so far as the children the testator are concerned. it will not be proper for us to import considerations which weighed with the Supreme Court in interpreting a trust deed differently worded in the instant case, where such considerations are not expressly present.

We now turn to the second branch of the argument of Mr. Pal, namely, that the power of appointment given to that assessee by the will, created in her an interest in possession, which was more than the right of a mere annuitant. The Appellant Tribunal rejected this argument on the following grounds :

- (a) the legal ownership of the funds vested in the trustees and not on the assessee;
- (b) it was life interest with restraint on anticipation;
- (c) the power of appointment was restricted to children;
- (d) the assessee was issueless, and aged round about 60 years and was incapable of making any appointment.

Now, generally speaking, a right to annuity without right of anticipation but with power of appointment is more than mere right to annuity. But in the facts of the instant case, it may be justly said that for the assessee the power of appointment no longer subsists and that consideration should not be taken to augment her right under the will.

Since we hold what was given to the assessee was not mere annuity but a share in the general income of a trust fund, we answer the question in the affirmative and against the assessee.

The Commissioner of Wealth-tax is entitled to costs.

MASUD J. - I agree

Question answered in the affirmative.