

(1971) 03 AHC CK 0011
In the Allahabad High Court
Case No : Wealth-tax Reference No. 232 of 1964

P.K. Banerji

APPELLANT

Vs

Commissioner of Wealth Tax

RESPONDENT

Date of Decision : 15-03-1971

Acts Referred:

Income Tax Act, 1922 — Section 27(5), 66(4)
Wealth Tax Act, 1957 — Section 2, 27(5)

Citation : (1972) 83 ITR 117

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Advocate : Ashok Gupta, for the Appellant; R.R. Misra, for the Respondent

Judgement

This Judgment has been overruled by : Commissioner of Wealth-tax Vs. P.K. Banerjee (dec'd., by legal representatives), AIR 1981 SC 401 : (1980) 19 CTR 376 : (1980) 125 ITR 641 : (1981) 1 SCC 63 : (1981) 1 SCR 657 : (1980) 12 UJ 934

Pathak, J.—The Appellate Tribunal, constituted under the Wealth-tax Act, has referred the following question :

" Whether the interest of the assessee in the trust fund amounted to an annuity exempt u/s 2(e)(iv) of the Wealth-tax Act ? "

2. The assessee is Pranab Kumar Banerji, son of late Shri Pearey Lal Banerji, and the reference relates to the assessment years 1957-58 to 1961-62.

3. Shri Pearey Lal Banerji created a trust by an indenture of trust dated October 26, 1937. The corpus of the trust consisted of Government securities of the face value of Rs. 10,00,000. The Imperial Bank of India, Calcutta, was constituted the trustee, and the securities were transferred to it. By virtue of a power to modify or alter the trust reserved by the settler the trust deed was subsequently modified. A supplementary deed of trust dated April 28, 1950, was executed. Reading the two deeds together, the terms of the trust appear to be as follows:

The trustee would pay the net income of the trust fund to the settler during Ms life. Upon his death, the net income would go to his son, Pranab Kumar, during his life. If Pranab Kumar died before the settler, then from the date of the settler's death the net income would be paid in equal shares to the settler's other son, Sonab Kumar, and his daughter-in-law, Shakuntala, wife of Pranab Kumar, during their life or entirely to the survivor of them. That would also follow if Pranab Kumar survived the settler in which case upon the death of Pranab Kumar the net income would be paid to Sonab Kumar and Shakuntala or their survivor. In case the two sons and daughter-in-law died before the settler then, on and from the death of the settler and in case any one or more of them survived the settler then from the death of the last survivor of them, the trustee would stand, possessed of the trust fund and its income upon such trusts as Pranab Kumar appointed. In the absence of such appointment or to the extent that the appointment did not extend, the trust fund and income would be held in trust for the settler's nephew, Manoj Kumar Banerji, and the settler's niece, Jhuni Banerji or the survivor of them. If neither was surviving at the relevant time then the trust fund and income would be held in trust for the persons who under the law relating to interstate succession would, on the death of the settler have been entitled if the settlor had died possessed of the property and intestate.

4. Shri Pearey Lal Banerji died in 1952, and the trustee began paying out the income from the trust fund to the assessee as the sole beneficiary.

5. In assessment proceedings under the Wealth-tax Act, the Wealth-tax Officer treated the entire corpus of the trust estate as representing the assets of the assessee and rejected the contention that the assessee was entitled to receive an annuity only. The assessee appealed, and the appeal was dismissed by the Assistant Commissioner of Wealth-tax. The assessee then appealed to the Appellate Tribunal. The Appellate Tribunal accepted the contention of the assessee that he had no right to the corpus of the trust fund and that the Imperial Bank remained trustee of all the corpus. But the Appellate Tribunal rejected the assessee's contention that in respect of the income received by him from the trust fund he was entitled to exemption u/s 2(e)(iv) of the Wealth-tax Act. In the result, the Appellate Tribunal directed the Wealth-tax Officer to modify the assessments by valuing the life interest of the assessee according to recognised principles of valuation. And now this reference.

6. The Wealth-tax Act charges tax in respect of the net wealth of an assessee. " Net wealth " is defined by Section 2(m) of the Act as the amount by which the aggregate value of all the assets of the assessee on the valuation date exceed the aggregate value of all the debts. What are the " assets " of an assessee has been defined by Section 2(e). They include property of every description, movable or immovable, but they do not include, among other things, " a right to an annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant. " That is Section 2(e)(iv). The assessee says that the income received by him from the trust fund

constitutes an annuity and the terms and conditions of the amended trust deed preclude the commutation of any portion of the annuity into a lump sum grant.

7. When this reference was first heard by this court, it was found that the Appellate Tribunal had held that the income received by the assessee could not be described as an annuity and, therefore, on that ground alone refused exemption. It did not consider it necessary to find whether the terms and conditions of the trust deed precluded the commutation of any portion of the annuity into a lump sum grant. The court sent for a supplementary statement of the case observing:

" The Tribunal held that the assessee had only " a life estate in the trust fund and as such life estate was to ensure for more than six years, the exemption allowable u/s 2(e)(iv) was not available to the assessee." Evidently, the finding given by the Tribunal, on the materials presented before it, are incomplete and it is not possible to answer the question under reference on the basis thereof. The mere fact that the assessee had only a life estate in the trust fund is not a decisive factor. An annuity may be, and, very often is, granted for the life of the annuitant. The finding of the Tribunal that the income which the assessee was entitled to receive from the trustees was limited to the term of his life does not necessarily mean that it was not an annuity. Secondly, the Tribunal has come to no finding whatever as to whether the second condition for exemption mentioned in Sub-clause (iv) of Clause (e) of Section 2 was satisfied in the present case.

In the absence of these findings, it is necessary to call for a supplementary statement of case u/s 27(5) of the Act. "

8. A supplementary statement of the case was called for on the following questions:

"(1) Whether the right of the assessee to receive the amounts in terms of the deeds of trust, referred to above, is an " annuity" within the meaning of Section 2(e)(iv) of the Act ?

(2) If so, whether the terms and conditions relating to such annuity preclude the commutation of any portion thereof into a lump sum grant?"

9. The Appellate Tribunal has now submitted a supplementary statement of the case. But it appears that it has confined itself to merely reproducing extracts from the order of the Appellate Assistant Commissioner and briefly referring to the order of the Appellate Tribunal. It has made no attempt to examine other material on the record for the purpose of giving a finding on each of the two questions formulated by this court. Indeed, it seems to have been of the opinion that it had no jurisdiction to render such findings. We are constrained to hold that the Tribunal erred in adopting the approach which it did. It was not open to the Tribunal to decline to give such findings. The contents of the order made by this court were patently clear. The Tribunal was specifically required to give its findings on the two questions. The court had repelled the contention on behalf of

the assessee that it had no jurisdiction to call for a supplementary statement of the case. In holding that it had jurisdiction it relied upon the opinion of the Privy Council in *Sundar Singh Majithia v. Commissioner of Income Tax* [1942] 10 ITR 457(P.C.) the decision of the Patna High Court in *HASSAN KASSAM AND OTHERS Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, and of the Kerala High Court in *Hopkin and Amp; Williams (Travancore) Ltd. Vs. Commissioner of Income Tax, Kerala, .* In *Sundar Singh Majithia's* case the Privy Council observed :

" To answer the question of law which has been propounded by the Commissioner it is necessary to descend from the realm of hypothesis to the region of fact. The Commissioner has taken pains to state some matters very fully, but he has not found the material facts as he should have done. It is necessary to know as regards: (a) the business, machinery, plant and other movables; (b) the factory buildings and land whether they were before 1931 the self-acquired property of the father or his ancestral property or joint family property or whether they fall into some other and what category according to the customary law. It is necessary that the customary law of the family should be found as a fact so as to show what right if any the father had to partition or transfer the movable or immovable property above-mentioned, to whatever category it may be found to belong in whole or in part. The *riwa-ji-am* is evidence of the custom but it is not conclusive and a finding as to custom is required. When the rights of the members of the family have been ascertained, it will be necessary to ascertain whether in fact the father did at any time purport to give shares or interest in any of the above-mentioned property to his wife and sons. If so at what time ? What shares did he give ? In what manner? In what property ? Did he purport to be alienating his own property or effecting a partition of family property or how otherwise ? Again, what agreement if any was made prior to February 12, 1933, and when as to a partnership being constituted to carry on the sugar factory and as to the assets which it was to have as a firm ? None of these essential facts have been found and stated by the Commissioner, with the result that the question referred cannot be answered until the High Court has exercised its powers under Sub-section (4) of Section 66 of the Act. Their Lordships leave it to the discretion of the High Court to specify the particular additions and alterations which the Commissioner should be directed to make."

10. It is clear that in the opinion of the Privy Council the High Court had jurisdiction u/s 66(4) to require the Appellate Tribunal to give findings of fact in respect of matters not considered by it when disposing of the appeal.

11. Similarly, in *Hassan Kassam* the Patna High Court pointed out that, while considering a claim u/s 25, Indian Income Tax Act, 1922, the Appellate Tribunal in its order u/s 33(4) had failed to decide whether the partnership was genuine or not nor did it decide whether the business now sought to be assessed was the business assessed under the Indian Income Tax Act, 1918, nor whether the new

business was identical with the old business, and accordingly the court made an order u/s 66(4) referring the case back to the Appellate Tribunal for giving its findings on those three questions. In *Hopkin & Williams (Travancore) Ltd.* a direction of the same nature was made by the Kerala High Court upon the view that it was open to the Tribunal to give a finding in a supplementary statement of the case on a matter not considered by the Tribunal when disposing of the appeal, provided it confined itself to the evidence already on the record. Apart from these cases, there are the observations of the Supreme Court in *Rajkumar Mills Ltd. Vs. Commissioner of Income Tax, Bombay*, *New Jehangir Vakil Mills Ltd. v. Commissioner of Income Tax* [1959] 37 ITR 111: [1960] 1 S.C.R.249(S.C.), *Zoraster and Co. Vs. The Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat (Now) Madhya Pradesh*, *PETLAD TURKEY RED DYE WORKS CO. LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY NORTH*, *Commissioner of Income Tax, Madras Vs. M. Ganapathi Mudaliar*, and *The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North*, ; [1965] 2 S.C.R. 908 (S.C.). The Tribunal has referred to some of these cases, but has failed to appreciate the true intent of this court's order. The court has made it clear that no fresh material should be taken on the record for the purpose of giving findings on the questions framed by it. As regards the point whether the terms and conditions of the deed of trust precluded the commutation of the annuity or any portion of it into a lump sum grant, that was never considered by the Tribunal at all in its appellate order.

12. In view of the considerations mentioned above, we felt that we should send the matter back again to the Tribunal for a proper compliance of this court's order u/s 66(4). But learned counsel for the parties jointly state that they would be satisfied if this court proceeded to dispose of the reference on the material which is already contained in the existing statement of the case. Accordingly, we shall now proceed to decide the question referred on the basis of what is before us.

13. Two points arise for consideration. Firstly, whether the right of the assessee under the deed of trust dated October 26, 1937, as amended by the supplementary deed dated April 28, 1950, is a right to an annuity and, secondly, whether the terms and conditions of the trust deed as amended preclude the commutation of any portion of the annuity into a lump sum grant.

14. Dealing with the first point, it is necessary to examine whether an annuity has been settled on the assessee. The Wealth-tax Act does not define an annuity. In *Halsbury's Laws of England*, 3rd edition, volume 32, page 529, it is stated:

" The right created by an instrument (whether deed, will, codicil or statute) to receive a definite annual sum of money is an interest which may be either a " rent charge " or an " annuity". If the annual sum is charged on and payable exclusively out of land, the interest is a rent- charge, but, if there is no charge or the annual sum is charged on personal property, not being leasehold land, or on a mixed fund, then the interest is an annuity."

15. And Jarman on Wills, page 113, extracts the following statement from the judgment of Kindersley V. C. in Bignold v. Giles [1856] 4 Drew 343 : 113 R.R. 390:

" An annuity is a right to receive deanno 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; . . ."

16. Williams in the work, on Executors and Administrators, describes " annuity " as the yearly payment of a certain fixed sum of money granted for life or for years charging the person of the grantor only.

17. During the last few years, the courts in India have had occasion to consider the content of the word " annuity " occurring in the Section 2(e)(iv) of the Wealth-tax Act. The Calcutta High Court, in Ahmed G. H. Ariff v. Commissioner of Wealth-tax, [1966] 59 I.T.R. 230 (Cal.) observed that an annuity, in the sense of the law, means a fixed sum of money payable every year and unlike the right to receive an aliquot share of the net income of a property it is not dependent upon variations in such net income. The distinction drawn by the Calcutta High Court appears to have received the approval of the Supreme Court on appeal. The point was considered in greater depth by that High Court in COMMISSIONER OF WEALTH-TAX Vs. MRS. DOROTHY MARTIN., . The Rajasthan High Court, in Commissioner of Wealth Tax, Delhi and Rajasthan Vs. Her Highness Maharani Gayatri Devi of Jaipur, analysed the concept of an annuity into the following elements : (1) it is a money payment, (2) it is made annually, (3) it is a fixed sum, and (4) usually it is a charge personally on the grantor. The difference between an annuity and a life interest was examined by the Gujarat High Court in COMMISSIONER OF WEALTH-TAX, GUJARAT II Vs. MRS. ARUNDHATI BALKRISHNA., . The court pointed out that the amount of an annuity may not be absolutely fixed and may be variable from year to year, but so long as the variation in the amount to be received is in no way dependent upon or related to the general income of the estate it can still be described as an annuity.

18. In the cases mentioned above, reference was made to Northcliffe, In re [1929] 1 Ch. 327 : 2 E.D.C. 361 (Ch. D.) : Christie v. Lord Advocate, [1936] A.C. 569: 2 E.D.C. 529 (H.L.) and Duke of Norfolk, In re: Public Trustee v. Inland Revenue Commissioners [1950] Ch. 467 : 3 E.D.C. 109(C.A.). It will be of advantage to notice what was said by the learned judges in the last case. Evershed M. R. pointed out that an annuity, even though variable, as in the case of In re Cassel [1927] 2 Ch. 275 : 2 E.D.C. 345 (Ch. D.) . was in no way dependent upon or related to the general income of the estate. Jenkins L. J., in an illuminating passage, observed :

" An annuity charged on property is not, nor is it in any way equivalent to, an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more or less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged,

(and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded. "

19. On the contrary, he points out:

"... a life interest in a share of the income of property is equivalent to, and indeed constitutes, a life interest in the share of the capital corresponding to the share of income. The life-tenant enjoys the share of income whatever it may amount to, and his interest, viewed as a life interest in capital, consists of a constant proportion of the whole property, whether the income is great or small, and whether the capital value of the property rises or falls."

20. In the case before us, the property settled under the trust deed consists of Government securities, and it is apparent from the schedule appended to the deed that they bear interest at fixed and determined rates. The settler conferred upon the trustee the power to redeem the Government securities and to invest the proceeds in the purchase of 31/2 Government Promissory Notes (old issue) or in any other security of the Government of India, or that if that was not practicable then in any other securities authorised for the investment of the trust fund by the Indian Trusts Act. There is nothing on the record before us to show that the original securities comprising the trust property were converted or replaced by securities not bearing a fixed rate of interest and returning a fixed and definite income. Proceeding, therefore, on the basis that a definite and certain income is yielded by the securities, we have no hesitation in holding that what the assessee received was an amount which did not depend upon or was related to the general income of the estate in the sense that it fluctuated with a fluctuating income. Having regard to the character and nature of the property settled under the trust, no question arises of a rise or fall in the amount of income produced by the trust property and, therefore, in a real sense what the assessee is entitled to is a definite and certain sum. Also, having regard to the terms of the trust deed, it is not possible to say that the interest of the assessee constitutes an interest in the capital of the trust fund. Therefore, upon the test laid down by Jenkins L. J. in *Duke of Norfolk, In re: Public Trustee v. Commissioners of Inland Revenue*, it cannot be described as a life interest. We are fortified in the view we are taking by the decision, on somewhat comparable facts, of the Andhra Pradesh High Court in *Commissioner of Wealth-tax Vs. Nawab Fareed Nawaz Jung and Others*, .

21. It is true that the assessee is entitled to the net income only and that because the trustee has the right to deduct from the gross income its remuneration, its annual income fee and the expenses in managing the trust estate, the net income may vary from year to year. Yet even here the remuneration and the annual income fee can be charged by the trustee at a fixed

rate only, and any variation in the net income may be attributed to the varying expenses from year to year in managing the trust estate. We have already pointed out that freedom from variation is not an absolute test determining the character of an annuity. We are of opinion that where it varies merely because of the charges and expenses payable on account of the administration of the trust it does not lose its character as an annuity.

22. Upon the aforesaid considerations, it seems to us that the right of the assessee to the net income from the trust property under the trust deed can be described in law as a right to an annuity.

23. The next point is whether the terms and conditions of the trust deed preclude the commutation of any portion of the annuity into a lump sum grant. The question, we think, is easily answered. Under the terms of the deed, the assessee is not entitled to require the trustee to pay him the value of the annuity in a lump sum. The right recognised by Section 174 of the Indian Succession Act does not belong to him. That would have been possible had the deed directed that the annuity should be provided out of the proceeds of property or out of property generally, or if money had been bequeathed to be invested for the purchase of an annuity for the assessee. In Halsbury's Laws of England, 3rd edition, volume 32, page 547, the law is stated thus:

" In the case of a simple bequest of a life annuity, where the testator's estate is sufficient, the annuitant cannot claim to be paid in cash the value of the annuity; . . . "

24. It will also be noticed that the devolution contemplated by the trust deed is incompatible with any claim of the assessee to the commutation of any portion of the annuity into a lump sum grant. Upon the death of the assessee the net income passes in equal shares to Sonab Kumar Banerji and Shakuntala Banerji, and after them the trustee stands possessed of the trust fund and income upon such trusts as the assessee may appoint, and in the absence of such appointment it is to be held in trust for Manoj Kumar Banerji and Jhuni Banerji or their survivor of them, If neither is surviving at the relevant time, then the trust fund and income is to be held in trust for those persons, who under the law relating to intestate succession would, on the death of the settlor have been entitled if the settlor had died possessed of the property and intestate. In our opinion, the terms and conditions of the trust deed preclude the commutation of any portion of the annuity into a lump sum grant. We are supported in this view by the observations of the Gujarat High Court in the case of Dr. E. D. Anklesaria and of the Rajasthan High Court in Maharani Gayatri Devi.

25. We hold that both the conditions of Section 2(e)(iv) of the Wealth-tax Act are fulfilled in the present case, and the right of the assessee to the net income of the trust property under the trust deed dated October 26, 1937, as amended by the supplementary deed dated April 28, 1950, cannot be treated as an asset of the assessee for the purposes of the Wealth-tax Act.

26. We answer the question referred in the affirmative, in favour of the assessee and against the Commissioner of Wealth-tax. The assessee is entitled to his costs, which we assess at Rs. 200. Counsel's fee is assessed in the same figure.