PETITIONER:
COMMISSIONER OF WEALTH TAX, LUCKNOW

Vs.

RESPONDENT:
P. K. BANERJEE (DEAD) BY LRS.

DATE OF JUDGMENT09/09/1980

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
BHAGWATI, P.N.

CITATION:
1981 AIR 401 1981 SCR (1) 657
1981 SCC (1) 63
CITATOR INFO :
D 1987 SC 522 (45)

ACT:
Wealth Tax Act, 1957, Section 2(e)(iv), scope of-Annuity-Nature of the amount to fall under the annuity, to claim exemption under the Wealth Tax Act, explained. C

HEADNOTE:
The respondent assessee, under a deed of trust dated October 26, 1937 executed by his father Pyarey Lal Banerji which was modified by another trust deed dated April 28, 1950, received "the net income of the trust funds" after the death of his father. The assessee treated this amount as an annuity and claimed exemption under section 2(e)(iv) of the Wealth Tax Act, 1957. The claim for exemption was negatived by all the authorities including the Appellate Tribunal, Allahabad Bench. The Tribunal, however, holding that the inclusion of the entire value of the corpus in the computation of net wealth was not correct as the assessee had merely a life interest in it, directed the Wealth Tax Officer to modify the assessments valuing the life interest of the assessee according to recognised principles of valuation. On a reference, at the instance of the assesee, the High Court held the interest of the assessee in the trust fund amounted to an annuity exempt under section (e)(iv) of the Wealth Tax Act. E

Allowing the appeal by special leave and answering against the assessee, the Court
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HELD: (I) In order to claim that an item of property should not be treated as an asset for purposes of the Wealth Tax Act, by virtue of subclause (iv) of section 2(e)(1), it has to be established (a) that it is an annuity and (b) that commutation of any portion thereof into a lumpsum grant is precluded by the terms and conditions thereto. [663 C]

(2) It is true that the word "annuity" is not defined in the Act. In order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one and it should not be liable to any variation depending upon or any ground relating to the general income of the fund or estate which is charged for such payment. The intention of the settlor must be seen, whether he wanted

that the assessee should get a pre-determined sum every year or whether the assessee should get the whole net income of the trust fund. [665 C, 671 G]

In the instant case, since the interest of the settlor was that the whole net income of the trust fund should go to the assessee, the right of the assessee cannot be treated as an annuity. The fact that under the trust deed the trustee had been given the power to reinvest the proceeds of the Government securities leads to the possibility of variation of the income and Consequently of the amount to be received by the assessee. make it clear that it was not an annuity. The fact that no such reinvestment had taken place during the relevant year is immaterial. [671 H-672 B]

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Ahmed G.H. Ariff & Ors. v. Commissioner of Wealth-tax, Calcutta, (1970) 76 I.T.R. 471; Commissioner of Wealth-tax, Gujarat II v. Mrs. Arundhati Balkrishna, (1968) 70 I.T.R. 203, explained and applied.

Commissioner of Wealth-tax, Rajasthan v. Her Highness Maharani Gayatri Devi of Jaipur (1971) 82 I.T.R. 699, followed.

Commissioner of Wealth-tax, A.P. v. Nawab Fareed Nawaz Jung & ors. (1970) 77 I.T.R. 180, overruled.

In re Duke of Norfolk: Public Trustee v. Inland Revenue Commissioners (1950) Ch 467 distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1163 - 1167 of 1973.

Appeal by Special Leave from the Judgment and order, dated 15-3-1971 of the Allahabad High Court in Wealth Tax Reference No. 232 of 1964.

S. T. Desai and Miss A. Subhashini for the Appellant.

S. N. Kacker, V. K. Pandita and E. C. Agarwala for the Respondent.

VENKATARAMIAH, J.-These appeals by special leave under Article 136 of the Constitution are directed against the judgment, dated March 15, 1971 of the Allahabad High Court in Wealth Tax Reference No. 232 of 1964.

The facts of the case may be briefly stated thus: The Income tax Appellate Tribunal, Allahabad Bench, Allahabad referred under section 27 (1) of the Wealth-tax Act, 1957 (hereinafter referred to as 'the Act') to the High Court of Allahabad for its opinion the following question of law arising out of the assessment orders made under the Act in respect of the assessment years 1957-58 to 1961-62:

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

The assessee concerned in this case is Shri P. K. Banerji. Under a deed of trust, dated October 26, 1937 executed by his father, Shri Pyarey Lal Banerji (hereinafter referred to as 'the settlor') the assessee became entitled to receive the income arising out of the trust fund during his (assessee's) life-time after the death of the settlor subject to the liability to pay out of such income certain specified sums periodically as mentioned in the deed to two other persons. After the death of the assessee, the income of the trust fund was directed to be paid in equal shares to the two other persons referred to above and if either of them should die before the death of the asessee then the whole of such income had to be paid

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to the survivor of them during his or her life. There were certain other directions in the trust deed with regard to the disposal of the income arising out of the trust fund with which we are not concerned in this case. The trust fund consisted of certain India Government loan bonds or securities issued from time to time under which certain specified interest was payable. The total face value of such bonds amounted to Rs. 10 lacs. The Imperial Bank of India, Calcutta (hereinafter referred to as 'the trustee') was appointed as the trustee under the trust deed and the Government loan bonds or securities referred to above were transferred and endorsed in favour of the trustee with a direction to discharge the obligations referred to in the trust deed. Under clause (1) of the trust deed, the settlor directed the trustee to retain with it the said Government loan bonds or securities and upon redemption of any of them to invest the proceeds thereof in the purchase of three and a half per cent Government promissory notes (old issue) or if this was not practicable in any other security of the Government of India or if this too was not practicable then in any other securities authorised for the investment of trust funds by the Indian Trusts Act, 1882 or any statutory modification thereof and to hold and stand possessed of the Government loan bonds or securities referred to above or any other investments representing the same as the trust fund to be used in accordance with the directions contained in the deed. The following are the relevant recitals of the trust deed, dated October 26, 1937 containing directions regarding the manner in which the income arising from the trust fund should be appropriated or spent:-

"(a) The Bank shall pay the net income of the Trust Fund to the settlor during his life and may instead of paying the same to him direct, credit the same to the current account of the settlor with the Bank, so long as there shall be any such current account.

(b) From and after the death of the settlor, the Bank shall pay the net income of the trust fund to the settlor's son Pranab Kumar Banerji during his life, if he should survive the settlor subject to the payment there out every six months on the thirtieth day of April and thirty first day of October in every year of a sum of Rupees Nine hundred to the settlor's son Sunab Kumar Banerji and a sum of Rupees six hundred to the settlor's daughter-in-law Purnima Banerji during his or her life, if he or she shall survive the settlor.

(c) If the said Pranab Kumar Banerji shall predecease the settlor or if he should die after having survived the settlor, then

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in the former case on and from the death of the settlor and in the latter case on and from the death of the said Pranab Kumar Banerji, the income of the trust fund shall be paid in equal shares to the said Sunab Kumar Banerji and Purnima Banerji (if he or she should be then alive) or the whole of such income to the survivor of them during his or her life.

(d) If the said Pranab Kumar Banerji, Sunab Kumar Banerji and Purnima Banerji shall predecease the settlor or if they or any one or more of them shall die after having survived the settlor then in the former case on and from the death of the settlor and in the latter case on and from the death of the survivor of the said Pranab Kumar Banerji, Sunab Kumar Banerji and Purnima Banerji, the Bank shall stand possessed of the

trust fund and the income thereof UPON SUCH TRUSTS as the said Pranab Kumar Banerji by any deed or deed with or without power of revocation may appoint or by will or codicil shall at any time or times appoint AND IN DEFAULT of and so far as any such appointment shall not extend IN TRUST for the settlor's nephew Manoj Kumar Banerji and the settlor's niece Jhuni Banerji (now minors), if they are both alive, or such one of the two as may be alive and in default of both for the person or persons who under the law relating to intestate succession would on the death of the settlor have been entitled thereto, if the settlor had died possessed thereof and intestate."

In exercise of the power that he had reserved to himself under the trust deed, dated October 26, 1937 to modify the terms thereof, the settlor executed another trust deed, dated April 28, 1950 by which clauses (b) and (c) of the trust deed, dated October 26, 1937 extracted above were substituted by the following clauses:

(b) From and after the death of the settlor the Bank shall pay the net income of the trust funds to the settlor's son Pranab Kumar Banerji during his life time, if he should survive the settlor.

(c) If the said Pranab Kumar Banerji shall predecease the testator or if he should die after having survived the settlor then in the former case on and from the death of the settlor and in the latter case on and from the death of the said Pranab Kumar Banerji, the income of the trust funds should be paid in equal shares to my son Sunab Kumar Banerji and my daughter-in-law Shakuntala Banerji (if he or she should be then alive) or the whole of such income to the survivor of them during his or her life."

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The name 'Purnima Banerji' occurring in clause (d) of the trust deed, dated October 26, 1937 was substituted by the name 'Shakuntala Banerji' by the trust deed, dated April 28, 1950. The resulting position was that the trustee was obliged to pay the net income of the trust fund to the settlor during his life time and after his death the trustee had to pay the net income of the trust fund to the assessee during his life time if he should survive the settlor. If the assessee should pre-decease the settlor then on and from the death of the settlor and if the assessee should die after the settlor on and from the death of the assessee, the income of the trust fund had to be paid in equal shares to Sunab Kumar Banerji, the other son of the settlor and Shakuntala Banerji, the daugther-in-law of the settlor (if he or she should be then alive) and the whole of such income had to be paid to the survivor of them during his or her life. We are concerned in this case principally with the character of the benefit conferred on the assessee by clause (b) of the trust deed as substituted by the trust deed dated April 28, 1950. The settlor died sometime in 1952 and since then the assessee was receiving the net income from the trust fund in accordance with the said clause as the sole beneficiary.

During the assessment proceedings under the Act relating to the assessment years in question, the assessee contended before the Wealth-tax Officer, Allahabad that since the corpus of the trust fund was vested in the trustee and not in him, the value of the trust fund should not be included in his total wealth and that in any event as he had only the right to receive an annuity under the trust deed, the trust fund should not be taken into account by reason of

section 2 (e) (iv) of the Act. The Wealth-tax Officer rejected the contentions of the assessee and included the full market value of the trust fund in the total wealth of the assessee in all the five assessment orders passed by him. The appeals filed by the assessee before the Appellate Assistant Commissioner of Wealth-tax, Allahabad were dismissed. On further appeal, the Income-tax Appellate Tribunal, Allahabad Bench, Allahabad confirmed the orders passed by the Wealth-tax Officer and the Appellate Assistant Commissioner of Wealth-tax in so far as the question of non-applicability of section 2 (e) (iv) of the Act was concerned but it held that the inclusion of the entire value of the corpus in the computation of net wealth was not correct as the assessee had merely a life interest in it. Accordingly it directed the Wealth-tax Officer to modify the assessments valuing the life interest of the assessee according to recognised principal of valuation. Thereafter at the instance of the assessee the common question of law set out above was referred to the High

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Court of Allahabad under section 27 (1) of the Act. All the five references relating to the five assessment years were heard together by the High Court in the year 1970. Since the High Court was of the view that it was necessary to direct the Income-tax Appellate Tribunal to submit a supplementary statement of the case 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?"

it directed the Tribunal by its order, dated February 27, 1970 to submit a supplementary statement of the case on the above questions. In accordance with the directions of the High Court, the Tribunal submitted a supplementary statement of the case in August, 1970 stating that the asset in question was not an annuity referred to in section 2 (e) (iv) of the Act. The cases were there after heard by the High Court. By its judgment, dated March 15, 1971, the High Court answered the common question of law referred to it in the affirmative in favour of the assessee, holding that the interest of the assessee in the trust fund amounted to an annuity exempt under section 2 (e) (iv) of the Act. Dissatisfied with the judgment of the High Court, the Department has come up in appeal to this Court.

There is no dispute that in the case of assets chargeable to tax under the Act which are held by a trustee under a duly executed instrument in writing whether testamentary or otherwise, wealth tax can be directly levied upon and is recoverable from the person on whose behalf the assets are held. Section 3 of the Act creates the said charge 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 Schedule I to the Act. 'Net wealth' according to section 2 (m) of the Act means the amount by which the aggregate value computed in accordance with the provisions of the 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 date under the Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than those debts referred to in subclauses (i) to (iii) thereof. In section 2 (e) of the

Act, the expression "assets" is defined as including property of every description,
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movable or immovable but not including in relation to the assessment year commencing on the 1st April, 1969 or any earlier assessment year those items which are mentioned in sub-clauses (i) to (v) of section 2 (e) (1). Sub-clause (iv) of section 2 (e) (1) of the Act which is relevant for the purpose of this case excludes from the definition of the word 'assets' 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. In order to claim that an item of property should not be treated as an asset for purposes of the Act by virtue of sub-clause (iv) of section 2 (e) (1), it has to be established (i) that it is an annuity and (ii) that commutation of any portion thereof into a lump sum grant is precluded by the terms and conditions relating thereto.

The property in question is the right of the assessee to receive the net income of the trust funds during his life-time. The primary facts that emerge from the orders of the Tribunal are (1) that under the trust deed, the settlor intended that after the settlor's death, the assesee should be the sole beneficiary of the net income from the trust fund during his (assessee's) life-time (2) that the assessee had been treating himself as the owner of the trust fund for purposes of income tax payable by him and had been declaring the income of the trust as his own income and claiming in his own income-tax returns deduction for tax paid at source by the trust; (3) that in fact the assessee was the sole beneficiary of the net income derived from trust fund; (4) that he had under the trust deed the right of appointment of his successors under certain circumstances and (5) that the trustees had the power to invest the proceeds of the Government loan bonds or securities which constituted the trust fund upon their redemption as provided in the deed and that therefore the net income realisable from the trust fund was subject to variation. One of the significant features of the trust deed, dated October 26, 1937 is that what was payable to the assessee was not a periodical payment of a definite predetermined sum of money but only the net income of the trust funds, although it was possible to predicate at any given point of time such income with some certainty having regard to the fact that the trust fund in the instant case consisted of Government loan bonds or securities, the proceeds of which on redemption were liable to be invested in other securities as indicated in the trust deed, dated October 26, 1937.

The principal reason given by the High Court to arrive at the conclusion that the property in question was an annuity is set out in its judgment thus:
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"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 a fixed and determined rates. The settlor conferred upon the trustee the power to redeem the government securities and to invest the proceeds in the purchase of 3 1/2% Government promissory notes (old issue) or in any other securities 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. Inland Revenue Commissioner (1950) 1 Ch. 467, it cannot be described as a life interest. We are fortified in the view we are taking by the decision, on somewhat comparable faces of the Andhra Pradesh High Court in Commissioner of Wealth-tax v. Nawab Fareed Nawaz Jung & Ors., (1970) 77 I.T.R. 180.

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

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of the charges and expenses payable on account of the administration of the trust it does not lose its character as an annuity.

Upon the aforesaid consideration, 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."

The High Court appears to have felt that the facts of the case were distinguishable from the facts in Ahmed G. H. Ariff & Ors. v. Commissioner of Wealth-tax Calcutta(1) and the facts in Commissioner of Wealth-tax, Gujarat II v. Mrs. Arundhati Balkrishna(2). We shall presently deal with these two cases.

The word 'annuity' is not defined in the Act. In one of the earliest legal compilations of the English law, the term 'annuity' has been explained as an yearly payment of a certain sum of money granted to another in fee or for life or for a term of years either payable under a personal obligation of the grantor or charged upon his pure personality, although it may be made a charge upon his freehold or leasehold lend in which latter case it is commonly called a rent-charge (See Co. Litt 144b). In Halsbury's Laws of England, Third Edition (Vol. 32, page 534 para 899), the meaning of the said expression is given as a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land; it differs from a rent-charge in that a rent-charge issues out of land. In Bignold v. Giles.(3) 'annuity' is described thus:

"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; and there is also this singularity about annuities, that although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate; so an annuity may be given to a man and the heirs of his body; that does not, it is true, constitute an estate tail, but that is by reason of the Statute De Donis, which contains only the word 'tenements' and an annuity, though a hereditament, is not a tenement; and an annuity so given is a base fee."

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It is further observed in the above decision thus:

"But this appears to me at least clear, that if the gift of what is called an annuity is so made, that, on the face of the will itself, the testator shows his intention to give a certain portion of the dividends of a fund, that is a very different thing; and most of the cases proceed on that footing. The ground is, that the court construes the intention of the testator to be, not merely to give an annuity, but to give an aliquot portion of the income arising from a certain capital fund".

The three illustrations given under section 173 of the Indian Succession Act, 1925 dealing with bequests of annuities also refer to the payment of certain definite sums periodically and they do not refer to periodical payments of income arising out of any trust fund.

It is against this background that this Court proceeded to decide the case of Ahmed G. H. Ariff (supra). In that case, the Court was called upon to determine whether the benefits conferred on the appellants under a deed creating a wakf-alal-aulad were annuities or not. The relevant part of the deed, which declared that the ultimate benefit in the case of complete intestacy of the descendants of the settlor was reserved for poor Musalmans of Sunni community deserving help, read thus:

"After payment of all necessary outgoings such as establishment charges, collections charges, revenue taxes, costs of repairs, law charges and other expenses for the upkeep and management of the said wakf property, the mutawalli or mutawallis shall apply the net income of the said wakf property as follows, viz.:

(a) in payment to me during the term of my life of one-fifth of the said net income by monthly instalments;

(b) in payment to each of my sons during the respective terms of their lives one-sixth of the said net income by monthly instalments;

(c) in payment to my wife, Aisha Bibi, during the term of her life one-tenth of the said net income by monthly instalments.

The moneys payable as aforesaid to such of my sons as are minors shall until they attain the age of majority be respectively invested (after defraying the expenses of their maintenance and education) in proper securities or in landed property in Calcutta and such securities or property shall be

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made over to the said sons on their respectively attaining the age of majority."

This Court held that the right of the beneficiary to receive an aliquot share of the net income of the properties

was an asset covered by the definition of section 2(e) of the Act and not a mere 'annuity' and affirmed the decision of the Calcutta High Court in Ahmed G. H. Ariff v. Commissioner of Wealth Tax Calcutta.(1)

In the case of Mrs. Arundhati Balkrishna (supra) to which one of us was a party, under two trusts created by the father of the assessee and one trust created by her mother-in-law, she was to be paid annually the net income of each of the trusts after deducting costs and expenses of administration of the trust. Under the terms of the trusts, after the life time of the assessee, the corpus of the trust in each case had to be dealt with as provided in them. Since the assessee was entitled to the whole residue of the income from the trust funds available after defraying expenses of the trust and not any specified or pre-determined amount, the High Court of Gujarat held that the right of the assessee under each of the trust deeds was not an annuity but only amounted to a life interest. The decision of the High Court of Gujarat was later affirmed by this Court in Commissioner of Wealth-tax, Gujarat v. Arundhati Balkrishna(2) in which it was observed thus:

> "On an analysis of the relevant clauses in the three trust deeds, it is clear the assessee was given thereunder a share of the income arising from the funds settled on trust. Under those deeds she is not entitled to any fixed sum of money. Therefore, it is not possible to hold that the payments that she is entitled to receive under those deeds are annuities. She has undoubtedly a life interest in those funds. In Ahmed G. H. Ariff v. Commissioner of Wealth-tax (1966) 59 I.T.R. 230 (Cal.), a Division Bench of the Calcutta High Court held that the right of a person to receive under a wakf an aliquot share of the net income of the wakf property is an "asset" within the meaning of the Wealth-tax Act, 1957, and the capital value of such a right is assessable to wealth-tax. Therein, the Court repelled the contention that the right in question was an "annuity". This decision was approved by this Court in Ahmed G. H. Ariff v. Commissioner of Wealth-tax (1970) 76 I.T.R. 471 (S.C.) Civil Appeals Nos. 2129-2132 of 1968 decided on
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> August 20, 1969) and the same is binding on us. A similar view was taken by another Bench of the Calcutta High Court in Commissioner of Wealth-tax v. Mrs. Dorothy Martin (1968) 69 I.T.R. 586 (Cal.). In that case under the will of the assessee's father the assessee was entitled to receive for her life the annual interest accruing upon her share in the residuary 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 under section 16 (3) of the Wealth-tax, 1957. That order was confirmed by the Appellate Assistant Commissioner but the Tribunal in appeal excluded the same in the computation of the net wealth of the assessee. On a reference made to the High Court, it was held that, on a construction of the various clauses in the will, the assessee was entitled to an aliquot share in the general income of the residuary trust fund and not a fixed sum payable periodically as "annuity" and, therefore, the value of her share was an asset to be included in computing his net wealth. These decisions in our view correctly lay down the legal position. In this view, it is not necessary to consider whether the

income receivable by the assessee under those deeds, either wholly or in part, is capable of being commuted into a lump sum grant.

For the reasons mentioned above, we agree with the High Court that payments to be made to the assessee under the three trust deeds cannot be considered as annuities, and, hence, she is not entitled to the benefits of section 2(e) (iv)."

It is, however, contended on behalf of the assessee in this case that since the trust fund consisted of Government securities which were yielding definite annual income by way of interest and there was no evidence of the said securities having been converted into other securities yielding higher or lower income, it should be assumed that the benefit conferred on the assesee was only an 'annuity' and not a life interest. This contention has to be rejected for the very reason for which a similar contention was rejected by this Court in Commissioner of Wealth-tax, Rajasthan v. Her Highness Maharani Gayatri Devi of Jaipur(1) in the following words:

"From these clauses it is clear that the intention of the Maharaja was that the assessee should get a half share in the income of the trust fund. Neither the trust fund was fixed nor the amount payable to the assessee was fixed. The only thing certain is that she is entitled to a 15/30 share from out

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of the income of the trust fund. That being so, it is evident that what she was entitled to was not an annuity but an aliquot share in the income of the trust fund.

Mr. Setalvad, learned counsel for the assessee, contended that during the year with which we are concerned, there was no change in the trust fund and in view of that fact and as we are considering the liability to pay wealth-tax, we would be justified in holding that the amount receivable by the assessee in the year concerned was an annuity. We see no force in this contention. The question whether a particular income is an annuity or not does not depend on the amount received in a particular year. What we have to see is what exactly was the intention of the Maharaja in creating the trust. Did he intend to give the assessee a pre-determined sum every year or did he intend to give her an aliquot share in the income of a fund? On that question, there can be only one answer and that is that he intended to give her an aliquot share in the income of the trust fund. An income cannot be annuity in one year and an aliquot share in another year. It cannot change its character year after year. From the facts found, it is clear that the assessee has life interest in the trust fund."

The decision of the High Court of Andhra Pradesh in Commissioner of Wealth-tax, A. P. v. Nawab Fareed Nawaz Jung &Ors.(1) on which the High Court has relied in this case to the extent it takes a contrary view must be held to be incorrect.

We may now to consider the decision in In re Duke of Norfolk: Public Trustee v. Inland Revenue Commissioner(2) on which the High Court relied heavily in arriving at its conclusion. The point which arose for consideration in the above case was whether, where one continuing annuity for two or more lives was given to two or more persons in succession and charged on property, on the death of any annuitant, other than the last to die, estate duly was payable under

section 1 of the Finance Act, 1894 on the footing that it was the annuity which passed on the annuitant's death. The estate duty authorities claimed estate duty on the death of an annuitant, who was not the last of the annuitants to die on the slice of the capital required to produce the annuity, on the footing that as annuitant, the deceased had an interest on the capital charged with the annuity and that cesser of that interest gave rise to a benefit taxable under
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section 2(1)(b) of the Finance Act, 1894. The Public Trustee, in whom the estate vested, claimed that estate duty became payable on the value of a continuing annuity for the life of the annuitant who succeeded to the annuity on the death of the deceased annitant. Jenkins L.J. in the course of his judgment in the above case explained the difference between an annuity and a life interest thus:

> "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.
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> On the other hand, 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. The property which changes hands on his death (or in other words passed under s. 1) thus clearly consists of the designated share of capital, which then passes from his beneficial enjoyment to that of another, an annuity cannot be so related to any fixed proportion of capital: See De Trafford v. Attorney-General (1935) A. C. 280."

Evershed M. R. who delivered a separate judgment agreed with the observation and stated thus:

> "In the case of one who has enjoyed for his life (say) one fourth of the income of an estate, it seems to me in accordance with common sense and a natural use of language to say that he enjoyed for his life, that he was life tenant of, a fourth part of the (corpus of the) estate; and, accordingly, that upon his death a fourth part of the estate passed to the next successor. But no such language can, in my judgment, appropriately be used in the case of an annuitant. He is in no way concerned
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> with changes in the yield of the estate; his right to his annuity will continue whatever income the estate may produce or (unless he has a right to look income only) though the estate produce no income at all."

The learned Master of the Rolls distinguished the cases of In re Northcliffe(1) and Christie v. Lord Advocate(2) from the case before him thus:

> "Both the two last-mentioned cases were instances 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 (as in the case of In re Cassel (1927) 2 Ch. 275) is in no way dependent upon or related to the general income of the estate."

Accordingly the contention of the Crown was rejected. On going through the above decision carefully, we do not find any support for the contention urged on behalf of the assessee in the present case. The decision is quite clear on the point that when the payment is dependent upon the income of the corpus, it cannot be called an annuity and that an annuity even though it may be variable as in the case of In re Cassel(3) can in no way be dependent upon or related to the general income of the estate. The High Court was, therefore in error in relying upon the decision in Duke of Norfolk: In re. Public Trustee (supra) for holding that notwithstanding the existence of the possibility of variation in the payment to be made in the above case to the assessee depending upon the income of the fresh securities to be acquired by the trustee on the redemption of any of the securities transferred at the time of the execution of the trust deed, the payment would amount to an annuity.

On a consideration of the decisions cited before us, we feel that in order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending upon or on any ground relating to the general income of the fund or estate which is charged for such payment. In the instant case, as observed in the case of Her Highness Maharani Gayatri Devi of Jaipur (supra) what we have to see is the intention of the settlor, whether he wanted that the assessee should get a pre-determined sum every year or whether the assessee

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should get the whole net income of the trust fund. Since the intention of the settlor was indisputably the latter one, the right of the assessee cannot be treated as an annuity. An additional factor which requires us to take the same view is that under the trust deed the trustees had been given the power to reinvest the proceeds of the Government securities which leads to the possibility of variation of the income and consequently of the amount to be received by the assessee. The fact that no such reinvestment had taken place during the relevant years is immaterial.

In view of the foregoing, the appeals are allowed, the judgment of the High Court is set aside and the question referred to the High Court under section 27(1) of the Act is answered in the negative and against the assessee. In the circumstances of the case, the assessee shall pay the costs of the Department. (Hearing fee one set).

Appeal allowed.

V.D.K.

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