

PETITIONER:

V.S.M.R. JAGADISHCHANDRAN (DEAD) BY L.RS,

Vs.

RESPONDENT:

COMMISSIONER OF INCOME TAX, MADRAS

DATE OF JUDGMENT: 09/07/1997

BENCH:

S.C. AARAWAL, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S

S. C. AGRAWAL, J,:

Special leave granted.

This appeal by the assessee is directed against the order dated July 25, 1984 passed by the madras high Court in T.C. No. 145 of 1983 wherein the High court on an application filed under section 256 (2) of the Act declined to direct the Tribunal to state a case and refer the following questions of law to the High court:-

"1. Whether the Tribunal was right in holding that the levy of the capital gains of Rs. 68,400/- is proper under the facts and circumstances of the case ?

2. Whether the Tribunal was right in holding that mortgage debts does not constitute diversion at source ?

3. Whether the debts discharged by the applicant on the properties cannot be said to enhance the cost of acquisition ?"

The assessee sold house property No. 22, Chariman Muthurma Iyer Road, Madurai for a sum of Rs. 90,000/- subject to incumbrance in the assessment year 1975-76 and for the same assessment year he sold plot No, 1, 3 and half of plot No. 4 in T.S. No. 831/1 for a sum of Rs. 12,600/- The Income Tax officer computed the capital gains in respect of the said properties at Rs. 68,400/-. The assessee questioned the computation of capital gains before the Appellate Assistant commissioner and contended that the debts in respect of which mortgage had been executed were discharged by the buyer himself out of the sale proceeds, that the debts should be considered as increase in cost of acquisition of the properties and that in any event the debts may be treated as improvement to the property or as the cost of acquisition of the properties and that in any event the debts may be treated as the cost of obtaining clear title to the property. The Appellate Assistant Commissioner rejected the said contention. He, however,

upheld the contention of the assessee that there was an overriding title of the creditors in respect of the sale proceeds and, therefore, there was diversion at source on their basis of such overriding title and the assessee was not liable to charge under the capital gains in respect of the sale gains of Rs. 68,400/- as computed by the Income Tax officer. The Tribunal, following the decision of the Kerala High Court in *Ambat Echukutty Menon v. Commissioner of Income Tax*, (1978) 111 ITE 880, and the decision of the Madras High Court in *Commissioner of Income Tax v. V. Indira*, (1979) 119 ITR 837, held that clearing of the mortgage debt could neither be treated as cost of acquisition nor as an 'cost of improvement' made by the assessee. The Tribunal, therefore, held that the deduction of the capital gains was not justified. Since the Tribunal declined to refer to the High Court the question referred to above, the assessee filed an application under section 256 (2) of the Act before the High Court which has been rejected by the impugned order. The High Court has relied upon the decision of the Full Bench of the High Court in *S. Valliammai & Anr. v. Commissioner of Income Tax*, (1981) 127 ITR 713, and has held that by discharging the mortgage debt subsisting on the property which was the subject matter of a sale, the assessee was not either improving or perfecting his title or improving the property in any manner and, therefore, the amount paid for discharging the mortgage debt cannot be taken to be for the cost of acquisition as contended by the assessee.

In Civil Appeals Nos. 6098-6101 of 1983 filed against the judgment of the Full Bench of the Madras High Court in *S. Valliammai & Anr. v. Commissioner of Income Tax* (supra) we have examined the correctness of the view of the Kerala High Court in *Ambat Echukutty Menon v. Commissioner of Income Tax* (supra) and have held that the said decision does not lay down the correct law in so far as it holds that where the previous owner had mortgaged the property during his life time the clearing off the mortgage debt by his successor can neither be treated as 'Costs of acquisition' nor as 'costs of improvement' made by the assessee. It has been held that where a mortgage was created by the previous owner during his time and the same was subsisting on the date of his death, the successor obtains only the mortgagor's interest in the property and by discharging the mortgage debt he acquires the mortgagee's interest in the property and, therefore, the amount paid to clear off the mortgage is the cost of acquisition of the mortgagee's interest in the property which is deductible as cost of acquisition under section 48 of the Act. In the present case, we find that the mortgage was created by the assessee himself. It is not a case where the property had been mortgaged by the previous owner and the assessee had acquired only the mortgagee by the previous owner and the assessee had acquired only the mortgagor's interest in the property mortgaged and by clearing the same he had acquired the interest of the mortgagee in the said property. The question raised by the assessee in the application submitted under Section 256(2) of the Act does not, therefore, raise any arguable question of law and the said application was rightly rejected by the High Court. In the circumstances, even though we are unable to agree with the reasons given in the impugned order, we are in agreement with the order of the High Court dismissing the application filed by the assessee under section 256(2) of the Act.

The appeal is, therefore, dismissed. No order as to

costs.

JUDIS