आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 489/JP/2015
निर्धारण वर्ष/Assessment Year : 2011-12.

Smt. Premlata Tibrewala, D-80, Road No. 7, VKI Area, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 4(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AASPT 3687 Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Vivek Bansal &
Shri I.P. Bansal (Advocates)

राजस्व की ओर से/ Revenue by: Shri K.C. Meena (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 26.09.2018.
घोषणा की तारीख/ Date of Pronouncement : 10/10/2018.

आदेश/ ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 16th March, 2015 of ld. CIT (A)-2, Jaipur for the assessment year 2011-12. The assessee has raised the following grounds :-

" 1. In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in taxing a sum of Rs. 72,62,167/- as long term capital gain in the hands of the assessee appellant. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 72,62,167/-.

2. In the facts and circumstances of the case and in law, alternatively, the ld. CIT (A) has erred in not fastening the tax liability, if any, on the legal representative of the deceased Laxmi Narayan Bagla, who had bequeathed the capital asset in

favour of the assessee appellant. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the tax demand raised against the assessee appellant.

3. The assessee craves her right to add, amend or alter any of the grounds on or before the hearing.

2. The assessee is an Individual and has filed her return of income on 13.03.2012 declaring total income of Rs. 1,66,740/-. During the course of assessment proceedings, the AO noted that the assessee did not disclose capital gain in respect of the sale of Flat No. 126, A-Wing, 7th Floor, Karachi Citizen's Co-operative Housing Society Ltd., Juhu Versova Link Road, Andheri (West), Mumbai, which was sold for a total consideration of Rs. 94,00,000/-. The assessee submitted before the AO that the said flat was purchased by Shri Laxmi Narayan Bagla, the late father of the assessee for a consideration of Rs. 9,50,000/- and further expenditure of Rs. 45,250/- was incurred on transfer of the said flat in his name. The father of the assessee had mortgaged the said flat as collateral security to Punjab National Bank (PNB) in respect of the loan taken by M/s. MPL Corporation Ltd. (previously known as M/s. Mernite Polycast Ltd.) in which he and his sons were directors. The father of the assessee expired on 9th February, 1998 leaving his last Will and testament dated 16.10.1997 whereby he bequeathed the said flat to the assessee. The assessee further explained that since M/s. MPL Corporation Ltd. was unable to clear the dues of PNB, the bank proposed to sell the said flat for recovery of the outstanding dues and accordingly found a buyer for the said flat, namely, Mrs. Trupti Bharat Shah and Mr. Bharat Jayantilal Shah. Thus M/s. MPL Corporation Ltd. and the assessee were forced to enter into one time settlement with the bank and to enter

into agreement to sell her Flat No. 126, A-Wing, 7th Floor, Karachi Citizen's Co-operative Housing Society Ltd., Juhu Versova Link Road, Andheri (West), Mumbai, to the buyer for a consideration of Rs. 94,00,000/-. The buyer has paid the entire sale consideration of Rs. 94,00,000/- to PNB against the dues of M/s. MPL Corporation Ltd. for which the said flat was pledged as collateral security with the Bank. Thus the assessee submitted that there was no capital gain on sale of the said flat in the hands of the assessee. The AO did not accept the contention of the assessee and assessed the capital gain of Rs. 72,62,167/- as long term capital gain. The assessee challenged the action of the AO before the ld. CIT (A) and raised the contention that when the said flat was inherited by the assessee through the Will along with the charge being mortgaged with the bank, then the amount directly recovered by the bank from the sale consideration of the flat shall be allowed as deduction from the total consideration while computing the capital gain under section 45 and 48 of the IT Act. The assessee has also relied upon various decisions on this point that the benefit of amount paid to the bank for discharge of mortgage debt is available against the sale consideration for computation of long term capital gain. However, the ld. CIT (A) did not accept the contention of the assessee and held that the liability to discharge the debt of the bank was not of the assessee but of the brother of the assessee as per the Will dated 16.10.1997. The ld. CIT (A) has followed the decision of Hon'ble Kerala High Court in the case of Ambat EchukuttyMenon, 111 ITR 837 (Ker.) as well as in the case of Smt. K. Sarla Devi, 222 ITR 211 (Ker.).

3. Before us, the ld. A/R of the assessee has submitted that the assessee inherited / received the flat in question through Will dated 16.10.1997 along with the charges on the said flat being mortgaged to PNB. Therefore, the flat in question was

inherited by the assessee along with encumbrances of the dues of PNB. The flat was sold on the instance of the PNB and the assessee was forced to enter into one time settlement for clearing the outstanding dues for which the flat was mortgaged by the father of the assessee. Thus the PNB has recovered the said amount of Rs. 80,00,000/- at source which was not received by the assessee at all. The ld. A/R has submitted that the assessee relied upon the decision of Hon'ble Gujarat High Court in the case of CIT vs. Daksha Ramanlal, 197 ITR 123 (Guj.) as well as the decision of Hon'ble Supreme Court in the case of R.M. Arunachalam vs. CIT, 227 ITR 222 (SC). However, the ld. CIT (A) preferred to rely some other decisions on the ground that the decisions relied upon by the assessee are distinguishable on facts. The ld. A/R took us to the decisions of Hon'ble Gujarat High Court as well as of Hon'ble Supreme Court and submitted that on the identical facts the Hon'ble Supreme Court has held that where the property had been mortgaged by the previous owner during his life time and the assessee after inheriting the same, has discharged the mortgage debt, the amount paid by him for the purpose of clearing of the mortgage has to be regarded as cost of acquisition under section 48 read with section 55(2) of the IT Act. Thus the ld. A/R has submitted that the issue involved in this case regarding the discharge of mortgage debt to be considered as cost of acquisition is now covered by the decision of Hon'ble Supreme Court. The ld. A/R has further submitted that the AO has restricted the cost of indexation to the year of death of the father of the assessee instead of the date of acquisition of the flat in question by the father of the assessee. Thus the AO has denied the consequential benefit to the assessee while computing the long term capital gain. The assessee is entitled to get the indexation benefit from financial year 1991. In support of his

contention he has relied upon the decision of Hon'ble Bomay High Court in the case of CIT vs. Manujla J. Shah, 355 ITR 474 (Bom.) as well as the decision of Hon'ble Delhi High Court in the case of Arun Shungloo Trust vs. CIT, 205 taxman 456 (Delhi). The ld. A/R has pointed out that a similar view has been taken by the Hon'ble Karnataka High Court in the case of CIT vs. Smt. Asha Machaiah, 227 Taxman 155 (Kar.). The AO as well as the ld. CIT (A) has denied the benefit by ignoring the binding precedents. Thus the ld. A/R has submitted that if the amount of discharge of mortgage debt is allowed as cost of acquisition and indexation benefit is allowed from the date of acquisition by the father of the assessee as per the provisions of sections 48 and 49 of the Act, then there would be no capital gain arising from the present sale transaction.

4. On the other hand, the ld. D/R has submitted that the assessee has inherited the flat in question by Will and as per the last Will of the father of the assessee, the debts of the bank were to be discharged by the brother of the assessee and not by the assessee. Therefore, when the liability to discharge the debt was on the brother of the assessee as per the Will in question, then even if the assessee has paid the said amount that cannot be allowed as deduction or cost of acquisition of the property in question. He has further submitted that the ld. CIT (A) has discussed this issue in detail and found that as per the sale agreement between the assessee, M/s. MPL Corporation, PNB and purchasers, the amount of Rs. 80,00,000/- was given by the purchaser to the PNB for discharge of debt liability of M/s. MPL Corporation Ltd. which was not the liability of the assessee and, therefore, the same cannot be considered as the cost of acquisition of the flat. The assessee was not bound to pay the said debt to the bank but only the principal debtor M/s. MPL

Corporation Ltd. as well as Shri Shiv Kumar Bagla, the brother of the assessee were liable to discharge the said liability.

5. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the flat in question bearing no. 126, A-Wing, 7th Floor, Karachi Citizen's Co-operative Housing Society Ltd., Juhu Versova Link Road, Andheri (West), Mumbai, was purchased by Shri Laxmi Narayan Bagla, the father of the assessee during his life time and mortgaged the same as a collateral security with the PNB against the loan sanctioned to M/s. MPL Corporation Ltd. The assessee inherited the said flat by Will dated 16.10.1997 after the death of her father on 09.02.1998. Thus the Will dated 16.10.1997 was the last testimony of late Shri Laxmi Narayan Bagla whereby he bequeathed the said flat to the assessee. The assessee has inherited the said flat along with the charge of mortgage debt. It is also not in dispute that the father of the assessee during his life time mortgaged the flat in question which was subsisting at the time of his death and thereafter the assessee inherited the mortgage, the father's interest in the property. The assessee cannot inherit more than the interest of the testator i.e. the father of the assessee and hence once the interest of the father of the assessee was in the mortgaged property includes the interest of mortgage, then the said interest of mortgage in the property was also inherited by the assessee along with the flat in question. The ld. CIT (A) denied the benefit of payment of the mortgage debt or clearing of the mortgage debt on the ground that the debt was not the liability and responsibility of the assessee but was the responsibility of the brother of the assessee. We find that this issue was considered by the Hon'ble Gujarat High Court in the case of CIT vs. Daksha Ramanlal (supra) in para 9 to 11 as under :-

"**9.** *Though the Madras and Kerala High Courts have taken the view that, when a capital asset is received by an assessee by one of the modes specified by section 49, what has to be taken into consideration is the cost of acquisition to the previous owner and any sums paid by the assessee for removing any encumbrance thereon cannot be deducted while computing the capital gains on sale of such property. With due respect to them, we cannot agree with that view. In our opinion, what has been overlooked in those cases is that the word 'property' does not mean merely the physical property, but also means right, title or interest in it. In case of a mortgage or lease, different persons will have different rights in the same property. If a person is an absolute owner of the property, then it. can be said that he has all the rights and interest in that property. If the property is mortgaged or leased, then the owner of the property would possess only those rights, which are not transferred to the mortgagee or the lessee, as the case may be. When a person, who has mortgaged the property, transfers it to another person, what he transfers is only those rights, which he possesses. The transferee would get the property subject to the rights created by the previous owner in favour of others. This aspect does not appear to have been considered while deciding those cases. If we are right in taking this view, then it follows that when the previous owner gifted the mortgaged property to the assessee, what he had transferred to the assessee was the right, title or interest, which he had in that property. When the assessee discharged the mortgage by paying Rs. 25,000 to the mortgagee, what he did was to purchase that right or interest, which the mortgagor did not then possess and which the mortgagee had in the property. When the assessee sold the property, he did not merely sell the right, title or interest, which he had received from the donor, but also the right, title or interest, which he had purchased from the mortgagee. For this reason, the case would not be covered by section 49(1)(ii) nor by section 55(2)(ii) for the purpose of computation of the capital gains.*

Section 55(2) can have application only in those cases where the capital asset becomes the property of the assessee by any of the modes specified by sub-section (1) of section 49. The capital asset, which the assessee sold, had not become the property of the assessee by one of the modes specified by sub-section (1) of section 49. It was partly by that mode and partly by purchasing the interest of the mortgagee in the property. Therefore, the case, in our opinion, will be governed, either by section 48, read with section 55(2)(i) or partly by section 48(1)(ii) and partly by section 49(1), read with section 55(2)(i).

In either case, what is required to be considered is the cost of acquisition of the asset to the assessee. Payment of Rs. 25.000 to the mortgagee for removing that encumbrance was certainly the cost of acquisition of the interest of the mortgagee and, therefore, that was required to be taken into account for the purpose of computing the total cost of acquisition of the property, which the assessee sold and thereby made capital gains.

10. *As we are taking this view, it is not necessary to consider the two decisions in Miss Dhun Dadabhoy Kapadia v. CIT [1967] 63 ITR 651 (SC) and CIT v. Bilquis Jahan Begum [1984] 150 ITR 508 (AP)*[1] *, relied upon by the learned counsel for the respondent in support of his contention that in working out the capital gains or loss, the principles that have to be applied are those which are a part of the commercial*

practice or which an ordinary man of business will resort to when making computation for his business purpose.

11. *The view which we have taken also gets support from the decision of the Madras High Court in CIT v. C.V. Soundararajan [1984] 150 ITR 80[2]. In that case, the assessee had paid a certain sum to his mother in order to obtain relinquishment of her right of residence in the property, which the assessee sold. While computing the capital gains arising from the sale of that property, the assessee claimed deduction for the sum paid to the mother. The ITO allowed that claim, but the Commissioner, exercising his revisional powers, set aside the order giving deductions. The Tribunal held that the money received by the mother was for extinguishment of her right of residence in the property and, hence, it could not be taken into the computation of capital gains and, accordingly, directed its deduction, As the Tribunal refused to draw up a case and refer the same to the Madras High Court, the Commissioner filed an application to the Madras High Court. While dismissing that application, the High Court held that as the assessee did not have the benefit of the sum which, in fact, had been paid to the mother as consideration for relinquishing her life interest in the property, the said sum was required to be excluded for the purpose of computation of capital gains. The High Court observed that when the interest of the mother in the property in question had been purchased by getting a relinquishment for a consideration, the sum paid as consideration could not be taken to be consideration paid in respect of the interest of the assessee. Thus, the sum which the son was required to pay to the mother was held excludible while computing the capital gains."*

Tough there are decisions of other High Courts having divergent views on this issue, however, this issue was finally settled by the Hon'ble Supreme Court in the case of R.M. Arunachalam vs. CIT (supra) wherein the Apex Court has upheld the view of Hon'ble Gujarat High Court in the case of CIT vs. Daksha Ramanlal (supra) and held in para 27 as under :-

*"**27.** While we are affirming the impugned judgment of the High Court, we are unable to endorse the view of the Kerala High Court in Ambat Echukutty Menon's case (supra)to which reference has been made by the High Court in the impugned judgment. In that case, the assessee, as one of the heirs, had inherited property from the previous owner who had mortgaged the same during his lifetime and after his death the heirs, including the assessee, had discharged the mortgage created by the deceased. The said property was subsequently acquired under the Land Acquisition*

Act, 1894, and for the purpose of capital gains the assessee sought deduction of the amount spent to clear the mortgage. The High Court held that the capital asset had become the property of the assessee by succession or inheritance on the death of the previous owner under section 49(1) and the cost of acquisition of the asset is to be deemed to be the cost for which the previous owner acquired it, as increased by the cost of any improvement of the assets incurred or borne either by the previous owner or by the assessee. According to the High Court, having regard to the definition of the expression 'cost of improvement' contained in section 55(1)(b) in order to entitle the assessee to claim a deduction in respect of the cost of any improvement, the expenditure should have been incurred in making any additions or alterations to the capital asset that was originally acquired by the previous owner and if the previous owner had mortgaged the property and the assessee and his co-owners cleared off the mortgage so created, it could not be said that they incurred any expenditure by way of effecting any improvement to the capital asset that was originally purchased by the previous owner. This decision has been followed in subsequent decisions of the High Court in Salay Mohamad Ibrahim Sait v. ITO [1994] 210 ITR 700 (Ker.) and K.V. Idiculla v. CIT [1995] 214 ITR 386 / 81 Taxman 190 . A contrary view has been taken by the Gujarat High Court in CIT v. Daksha Ramanlal [1992] 197 ITR 123 . In taking the view that in a case where the property has been mortgaged by the previous owner during his lifetime and the assessee, after inheriting the same, has discharged the mortgage debt, the amount paid by him for the purpose of clearing off the mortgage is not deductible for the purpose of computation of capital gains, the Kerala High Court has failed to note that in a mortgage there is transfer of an interest in the property by the mortgagor in favour of mortgagee and where the previous owner has mortgaged the property during his lifetime, which is subsisting at the time of his death, then after his death his heir only inherits the mortgagor's interest in the property. By discharging the mortgage debt his heir who has inherited the property acquires the interest of the mortgagee in the property. As a result of such payment made for the purpose of clearing off the mortgage the interest of the mortgagee in the property has been acquired by the heir. The said payment has, therefore, to be regarded as 'cost of acquisition' under section 48, read with section 55(2). The

position is, however, different where the mortgage is created by the owner after he has acquired the property. The clearing off the mortgage debt by him prior to transfer of the property would not entitle him to claim deduction under section 48 because in such a case he did not acquire any interest in the property subsequent to his acquiring the same. In Daksha Ramanlal's case (supra) the Gujarat High Court has rightly held that the payment made by a person for the purpose of clearing off the mortgage created by the previous owner is to be treated as cost of acquisition of the interest of the mortgagee in the property and is deductible under section 48."

Thus the Hon'ble Supreme Court has upheld the view that by discharging the mortgage debt, his heir has inherited the property acquires the interest of the mortgagee in the property. As a result of such payment made for the purpose of clearing of the mortgage the interest of the mortgagee in the property has been acquired by the heir. The said payment has, therefore, to be regarded as cost of acquisition under section 48 read with section 55(2) of the IT Act. The Hon'ble Supreme Court has clarified the position, where the mortgage is created by the owner after he had acquired the property and, therefore, in such situation clearing of mortgage debt by him prior to transfer of property would not entitle him to claim deduction under section 48 because in such a case he did not acquire any interest in the property subsequent to his acquiring the same. Accordingly, we find that the ld. CIT (A) has committed an error in distinguishing these decisions relied upon by the assessee in support of the claim.

6. As regards the indexation cost of the flat is concerned, there is no dispute that the flat in question has been acquired by the assessee under the Will and, therefore, the provisions of section 49(1)(ii) provides that the cost of acquisition of

the asset shall be deemed to be cost for which the previous owner of the property acquired it as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. The Explanation to section 49(1) further clarifies the term previous owner of the property in relation to any capital asset means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to clauses (i), (ii) and (iii) of sub section (1). The Hon'ble Bombay High Court in the case of CIT vs. Manjula J. Shah (supra) while considering an identical issue has held in para 15 to 17 as under :-

> *"**15.** For better appreciation of the dispute, we quote the relevant part of Section 48 herein :-*
>
> *" Mode of Computation.*
>
> *48. The income chargeable under the head "capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the result of the transfer of the capital asset the following amounts, namely:-*
>
> *(i) expenditure incurred wholly and exclusively in connection with such transfer;*
>
> *(ii) the cost of acquisition of the asset and the cost of any improvement thereto;*
>
> *Provided that .....*
>
> *Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:*
>
> *Provided also .....*
>
> *Provided also .....*
>
> *[Provided also .....]*
>
> *Explanation - For the purposes of this Section, -*
>
> *(i) and (ii)** ** **
>
> *(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held*

by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

(iv) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asst took place;

(v) 'Cost Inflation Index', in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index for urban non-manual employees for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf. "

***16.** It is the contention of the revenue that since the indexed cost of acquisition as per clause (iii) of the Explanation to Section 48 of the Act has to be determined with reference to the Cost Inflation Index for the first year in which the asset was held by the assessee and in the present case, as the assessee held the asset with effect from 1/2/2003, the first year of holding the asset would be FY 2002-03 and accordingly, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.*

***17.** We see no merit in the above contention. As rightly contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was 'held by the assessee'. Since the expression 'held by the assessee' is not defined under Section 48 of the Act, that expression has to be understood as defined under Section 2 of the Act. Explanation 1(i)(b) to Section 2(42A) of the Act provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As the previous owner held the capital asset from 29/1/1993, as per Explanation 1(i)(b) to Section 2(42A) of the Act, the assessee is deemed to have held the capital asset from 29/1/1993. By reason of the deemed holding of the asset from 29/1/1993, the assessee is deemed to have held the asset as a long term capital asset. If the long term capital gains liability has to be computed under Section 48 of the Act by treating that the assessee held the capital asset from 29/1/1993, then, naturally in determining the indexed cost of acquisition under Section 48 of the Act, the assessee must be treated to have held the asset from 29/1/1993 and accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition."*

Thus for the purpose of indexation, the cost of acquisition in the hands of the deceased father of the assessee has to be taken into consideration and not at the time of acquisition of the property by the assessee. The ld. CIT (A) has recorded this fact in para 3.5 as under :-

> *"3.5. As per the sale agreement, dated 17/05/2010, entered into between the appellant, M/s. MPL Corporation Ltd. (borrower), PNB (mortgagee) and the purchasers, this flat was sold for consideration of Rs. 94,00,000/- out of which a sum of Rs. 80 lacs was given by the purchaser directly to PNB and the balance amount of Rs. 14 lacs was given by the purchaser to the appellant. (A copy of this agreement is on record). Surprisingly, Shri Shiv Kumar Bagla, the sole executor and trustee who was supposed to clear the debt and get the flat discharged was not made a party to this agreement."*

Thus when the assessee has received nothing from the sale consideration of the property in question, then the question of any capital gain in the hands of the assessee does not arise. Accordingly, following the decision of Hon'ble Supreme Court in the case of R.M. Arunachalam vs. CIT (supra), the amount for discharge of mortgage interest has to be considered as cost of acquisition and accordingly the net consideration on sale of the flat in question will be Nil. Accordingly, we set aside orders of the authorities below, qua this issue and allow the claim of the assessee.

5. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 10/10/2018.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल रॉव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

Jaipur

Dated:- 10/10/2018.

Das/

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. The Appellant- Smt. Premlata Tibrewal, Jaipur.
2. The Respondent – The ITO Ward 4(2), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 489/JP/2015)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar