Supreme Court of India
R. M. Arunachalam Etc. vs Commissioner Of Income Tax. on 9 March, 1997
Equivalent citations: (1997) 141 CTR SC 348
Author: S C Agrawal
JUDGMENT S. C. AGRAWAL, J. :

Special leave granted in Special Leave Petition No. 10737 of 1981.

2. These appeals filed by the assessee involve the question whether the estate duty paid by the assessee under the provisions of the ED Act, 1953, to the extent it relates to the property that is transferred by the appellant, can be regarded as cost of acquisition of the said property or cost of improvement to the said property for the purpose of computation of capital gains under the IT Act, 1961 (hereinafter referred to as the Act). Civil Appeals Nos. 6098-6101 of 1983 relate to asst. yrs. 1966-67 to 1970-71, Civil Appeal No. 860 of 1988 relates to asst. yr. 1972-73 and Civil Appeal arising out of SLP (C) No. 10737 of 1981 relates to asst. yr. 1971-72.

3. Ramanathan Chettiar, who had considerable movable and immovable properties, died on 26th January, 1958 leaving behind his wife, Smt. Umayal Achi and daughter, Smt. S. Valliammai as his legal heirs. On his death the said properties devolved upon the aforesaid heirs in equal shares and a partition was effected between them under which certain properties were given to Smt. Umayal Achi and the rest to Smt. S. Valliammai. Smt. Umayal Achi adopted the assessee as her son in April, 1961. She later died on 20th August, 1964 leaving a will bequeathing all her properties to the assessee as her adopted son. During the previous years relevant to the assessment years in question the assessee disposed of various properties of Ramanathan Chettiar that were bequeathed to him by Smt. Umayal Achi. In respect of the asst. yrs. 1966-67, 1967-68, 1969-70 and 1970-71 the assessee offered Rs. 7,537, Rs. 1,84,480, Rs. 19,015 and Rs. 32,118 respectively as capital gains arising from the said transfers. For that purpose, the assessee had taken the cost of acquisition of the capital assets concerned at their market value as on 20th August, 1964, the date on which he became entitled to them under the will from his adoptive mother. The assessee claimed that since estate duty had been paid consequent upon the death of Ramanathan Chettiar and Smt. Umayal Achi, the proportionate part thereof as is attributable to the value of the properties sold should be deducted in computing the capital gains. The ITO rejected the said contention and computed the capital gains for the asst. yrs. 1966-67, 1967-68, 1969-70 and 1970-71 at Rs. 80,050, Rs. 4,89,876, Rs. 55,758 and Rs. 81,254 respectively on the ground that under Expln. to s. 49(1) of the Act, Ramanathan Chettiar alone should be considered as the previous owner and that consequently the appellant would be entitled to adopt as the cost of acquisition of the properties sold their value as on 1st January, 1954. Appeals filed against the said orders of assessment of the ITO were rejected by the AAC as well as the ITAT (hereinafter referred to as the Tribunal). At the instance of the assessee, the Tribunal referred the following question to the Madras High Court :

"Whether in computing the capital gains on the sale of properties made by the assessee during the previous years relevant for the asst. yrs. 1966-67, 1967-68, 1969-70 and 1970-71, proportionate estate duty paid on the death of Shri Ramanathan Chettiar and Shrimati Umayal Achi in respect of properties sold should be deducted ?"

Since the Division Bench of the High Court was not inclined to agree with the view taken in the earlier judgment of the said High Court in CIT vs. Indira (1979) 119 ITR 837 (Mad) on the meaning of the words "cost of improvement" in s. 55(1)(b) of the Act, the matter was referred to a Full Bench of the High Court. The Full Bench of the High Court in its impugned judgment dt. 23rd December, 1980 [Smt. S. Valliammai & Anr. vs. CIT (1981) 127 ITR 713 (Mad) has answered the said question against the assessee and in favour of the Revenue. Civil Appeals Nos. 6098-6101 of 1983 have been filed by the assessee against the said judgment of the High Court.

In respect of asst. yr. 1971-72 the assessee claimed similar deduction of proportionate estate duty paid in respect of the properties sold which claim of the assessee was declined and the following question was referred to the High Court :

"Whether in computing the capital gains on the sale of the properties made by the assessee during the previous year relevant for the asst. yr. 1971-72 the proportionate estate duty paid on the death of Shri Ramanathan Chettiar and Smt. Umayal Achi in respect of the properties sold should be deducted ?"

By judgment dt. 29th July, 1981, the High Court, following the impugned judgment of the Full Bench, answered the said question in the negative and against the assessee. Civil Appeal arising out of Special Leave Petition (C) No. 10737 of 1981 has been filed against the said judgment of the High Court.

In respect of asst. yr. 1972-73 similar question referred by the Tribunal was similarly answered against the assessee by the High Court by its judgment dt. 24th November, 1986. Civil Appeal No. 860 of 1988 has been filed against the said judgment of the High Court.

4. Before we deal with the submissions of the learned counsel for the assessee, it would be convenient to take note of the relevant provisions of the Act relating to capital gains. Under sub-s. (1) of s. 45 of the Act any profits or gains arising from the transfer of a capital asset effected in the previous year are chargeable to income-tax under the head "Capital gains" and are deemed to be the income of the previous year in which the transfer took place. Sec. 48 which prescribes the mode of computation of income chargeable under the head "Capital gains" and permissible deductions, at the relevant time, provided as follows :

"Sec. 48. Mode of computation and deductions. - 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 transfer of the capital asset the following amounts, namely :

(a) expenditure incurred wholly and exclusively in connection with such transfer;

(b) the cost of acquisition of the capital asset and the cost of any improvement thereto."

Sec. 49 makes provision regarding the cost of acquisition with reference to certain modes of acquisition of the assets. Sub-s. (1) of s. 49 provided as under :

"Sec. 49. Cost with reference to certain modes of acquisition :- (1) Where the capital asset became the property of the assessee :

(i) on any distribution of assets on the total or partial partition of an HUF;

(ii) under a gift or will;

(iii) (a) by succession, inheritance or devolution, or

(b) on any distribution of assets on the dissolution of a firm, BOI or other AOP, or;

(c) on any distribution of assets on the liquidation of a company, or

(d) under a transfer to a revocable or an irrevocable trust, or

(e) under any such transfer as is referred to in cl. (iv) or cl. (v) or cl. (vi) of s. 47 the cost of acquisition of the asset shall be deemed to be the 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.

Explanation. - In this sub-section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in cl. (i) or cl. (ii) or cl. (iii) of this sub-section".

The expressions "cost of improvement" and "cost of acquisition" for the purpose of ss. 48, 49 and 50 have been defined in s. 55 of the Act. In cl. (b) of sub-s. (1) of s. 55 "cost of improvement" was thus defined :

"(b) "cost of improvement", in relation to a capital asset, -

(i) where the capital asset became the property of the previous owner or the assessee before the 1st day of January, 1954, and the fair market value of the asset on that date is taken as the cost of acquisition at the option of the assessee, means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset on or after the said date by the previous owner or the assessee, and

(ii) in any other case, means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset by the assessee after it became his property, and, where the capital asset became the property of the assessee by any of the modes specified in s. 49, by the previous owner, but does not include any expenditure which is deductible in computing the income chargeable under the head Interest on securities, Income from house property, Profits and gains of business or profession, or Income from other sources, and the expression improvement shall be construed accordingly."

In sub-s. (2) of s. 55 the expression cost of acquisition was defined in the following terms :

"(2) For the purposes of ss. 48 and 49, cost of acquisition, in relation to a capital asset, -

(i) where the capital asset became the property of the assessee before the 1st day of January, 1954, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee;

(ii) where the capital asset became the property of the assessee by any of the modes specified in sub-s. (1) of s. 49, and the capital asset became the property of the previous owner before the 1st day of January, 1954, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of January, 1954 at the option of the assessee."

(Rest omitted)

5. A perusal of the aforesaid provisions would show that for the purpose of computation of income chargeable under the head Capital gains" the cost of acquisition of the asset and cost of improvement thereto are to be deducted in view of s. 48(b). Under sub-s. (1) of s. 49 in a case where the capital asset became the property of the assessee under any of the modes specified in cls. (i), (ii) and (iii), which include succession, testamentary as well as non-testamentary, the cost of acquisition of the asset is to be deemed to be the 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. Under the Expln. to sub-s. (1) of s. 49 previous owner in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in cls. (i), (ii) and (iii) of sub-s. (1).

6. In the present case, the capital assets became the properties of the assessee under the will executed by Smt. Umayal Achi, i.e., under cl. (ii) of sub-s. (1) of s. 49. The capital assets became the property of Smt. Umayal Achi under sub-cl. (a) of cl. (iii) of sub-s. (1) of s. 49 by succession after the death of her husband Ramanathan Chettiar. By virtue of the Explanation in sub-s. (1) of s. 49 Ramanathan Chettiar has been treated as the previous owner of the assets by the ITO. In view of s. 48(ii) for computation of income chargeable under the head "Capital gains" deduction can be claimed in respect of cost of acquisition of the capital asset or the cost of improvement thereto.

7. The question for consideration is whether the estate duty paid in respect of the estate of Ramanathan Chettiar and the estate of Smt. Umayal Achi, to the extent such duty related to the assets in question, can be claimed as a deduction as cost of acquisition or as cost of improvement.

8. Under s. 53(1) of the ED Act it was prescribed that where any property passes on the death of the deceased : (a) every legal representative to whom such property so passes for any beneficial interest in possession or in whom any interest in the property so passing is at any time vested; (b) every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and (c) every person in whom any interest in the property so passing is vested in possession by alienation or other derivative title, shall be accountable for the

whole of the estate duty on the property passing on the death but shall not be liable for any duty in excess of the assets of the deceased which he actually received or which, but for his own neglect or default, he might have received. In s. 74 of the ED Act the following provision was made :

"Sec. 74. (1) Subject to the provisions of s. 19, the estate duty payable in respect of property movable, or immovable, passing on the death of the deceased, shall be a first charge on the immovable property so passing (including agricultural land) in whomsoever it may vest on his death after the debts and encumbrances allowable under Part VI of this Act; and any private transfer or delivery of such property shall be void against any claim in respect of such estate duty.

(2) A rateable part of the estate duty on an estate, in proportion to the value of any beneficial interest in possession in movable property which passes to any person other than the legal representative of the deceased) on the death of the deceased shall be a first charge on such interest :

Provided that the property shall not be so chargeable as against a bona fide purchaser thereof for valuable consideration without notice.

(3) The Controller may release the whole or any part of any property, whether movable or immovable, from charge under this section in such circumstances and on such conditions as he thinks fit."

Before the High Court it was urged on behalf of the assessee that under s. 74(1) of the ED Act a first charge has been created on the immovable property of the deceased for the purpose of securing payment of the estate duty in respect of properties, movable or immovable passing on the death of the deceased and that as a result an interest has been carved out of the immovable properties of the deceased in favour of the Government and that the said interest has been acquired by the assessee on payment of the estate duty and, therefore, amount of proportion of the estate duty paid by the assessee in respect of the properties sold should also be treated as cost of acquisition under s. 55(2) of the Act. In the alternative it was submitted that the estate duty paid by the assessee should be treated as cost of improvement of the assets sold.

The contention that estate duty paid should be treated as cost of acquisition was rejected by the High Court on the view that it is only when the title acquired is defective, incomplete or imperfect, the cost of making the title complete and perfect can be treated as the cost of acquisition. According to the High Court, though under s. 74(1) of the ED Act, a charge is created on the immovable properties for payment of estate duty in respect of all properties passing on death the title to the immovable properties acquired cannot be said to be incomplete or imperfect in any way. The High Court has observed that the charge created under s. 74 is quite ambulatory in effect and in extent, depending on the nature of the assets passing on the death and the discretion of the CED to release the whole or any part of the property from the charge, if the circumstances so warrant under sub-s. (3) of s. 74. The High Court has stated that where the deceased left immovable property as well as cash sufficient to meet the estate duty liability on his estate, the Controller may release the immovable property from charge in view of the availability of sufficient cash and in that case, there is no effective statutory charge on the immovable property. According to the High Court when she

acquired, by inheritance, half of the properties held by Ramanathan Chettiar, on his death, Smt. Umayal Achi got full and complete title therein and likewise when the assessee got the properties under the will of Smt. Umayal Achi, he got full and complete title therein and the non-payment of the estate duty did not result in their getting an imperfect or incomplete title in the property. The High Court has, therefore, held that since the assessee became the full owner of the assets even before the payment of estate duty, he has not acquired any new rights, tangible or intangible, in the assets.

The High Court has also rejected the alternate claim put forward by the assessee that the estate duty paid is to be treated as the cost of improvement of the assets sold. While holding that in the case of a tangible asset an addition can be only in the form of physical addition but in the case of intangible assets, the addition cannot be physical and, therefore, it is not possible to say in every case that without any physical addition to the capital asset there can be no improvement thereto and that whether physical addition is necessary or not will depend on the nature of the asset, the High Court has observed that in the present case the Court was concerned with tangible assets and that by paying the estate duty and thereby releasing the property from the charge under s. 74, the assessee cannot be said to make any addition in the property as such.

The High Court has further observed that in the present case it is not possible to say that the capital assets were the only assets for which the estate duty could be paid and, therefore, there was a danger of the capital assets being proceeded against in enforcement of the charge. The High Court has found that the assessee admittedly became the full owner of the assets even before the payment of estate duty and on payment of the same the assessee had neither acquired any new right in the assets nor had the assessees title to the assets been improved.

On that view of the matter, the High Court has held that no exception could be taken to the decision in CIT vs. V. Indira (supra) and the said decision did not require reconsideration. In that case the assessees father had gifted to her a house property. A third party had filed a suit claiming title to an area of land forming part of the gifted property. The assessee compromised with the said third party by paying him a sum of Rs. 6,943. She claimed that in computing the capital gains arising out of the sale of the property the said sum of Rs. 6,943 should be deducted as cost of improvement of the property under s. 48 r/w ss. 49(1) and 55(1)(b) of the Act. The said claim was rejected by the ITO as well as by the AAC. But the Tribunal held that in paying the said amount the assessee perfected her title to the property by removing the cloud cast on it by a rival claimant and this involved an improvement to the assessees title to the property and, therefore, the amount in question would constitute the cost of acquisition within the meaning of s. 49(1) of the Act and the assessee was eligible to the deduction claimed by her. The High Court did not agree with the said view of the Tribunal and held that the amount of Rs. 6,943 should not be treated as the cost of acquisition to the previous owner and, therefore, it could not qualify for deduction as cost of acquisition of the asset and it could not also be treated as cost of improvement thereto as the expression thereto would appear to cover a case where the amount is expended on the asset itself.

In the judgment of the High Court a reference has been made to the judgment of the Kerala High Court in Ambat Echukutty Menon vs. CIT (1 (1978) 111 ITR 880 (Ker) wherein it was held that an

assessee could not claim deduction of the amount paid by him to discharge a mortgage on the asset as the cost of improvement of the asset sold under s. 48 of the Act.

9. Smt. Janaki Ramachandran, the learned counsel appearing for the assessee, has urged that in view of the s. 74(1) of the ED Act, estate duty payable in respect of the properties of Ramanathan Chettiar and Smt. Umayal Achi was the first charge on the capital assets that were transferred by the assessee and that the amount paid by the assessee towards the estate duty, to the extent it related to those assets, should be treated as cost of acquisition or in any event cost of improvement under s. 48 r/w s. 55 of the Act. The learned counsel has placed reliance on the observations of Lord Chancellor Loreburn in Winans vs. Attorney General, 1910 AC 27, explaining the difference between estate duty and legacy and succession duties. The learned counsel has also invoked the principle of diversion governing computation of income chargeable to tax for the purpose of excluding the amount payable as estate duty and has relied upon the decision of the Kerala High Court in Smt. Sarala Devi vs. CIT (1996) 222 ITR 211 (Ker) wherein this principle has been applied in the matter of computation of capital gains.

10. As noticed earlier under s. 53(1) of the ED Act the persons referred in cls. (a) to (c) thereof were accountable for the payment of estate duty on the property passing on the death of the deceased. Although this liability was in respect of the entire amount of estate duty payable in relation to such property it was limited to the assets of the deceased that were actually received or which but for his own neglect or default, might have been received by such accountable person. Sub-s. (5) of s. 53 prescribed that where two or more persons were accountable, they were liable jointly and severally for the whole of the estate duty on the property so passing. This would show that the liability of the accountable persons was personal but limited to the assets of the deceased actually received or which might have been received by the accountable person. At the same time, under s. 74(1) of the ED Act the estate duty payable in respect of the property, movable or immovable, passing on the death of the deceased was the first charge on the immovable property so passed to whomsoever it may vest on his death. What is the legal effect of the creation of this charge under s. 74 of the ED Act ?

11. In s. 100 of the Transfer of Property Act, 1882 the following provision is made regarding charges :

"Sec. 100. Charges. - Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as other expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

Construing the said provision, this Court in Dattatraya Shankar Mote & Ors. vs. Anand Chintaman Datar & Ors. 1975 (2) SCR 224, has said :

"It is apparent from the provisions of the above section that a charge does not amount to a mortgage though all the provisions which apply to a simple mortgage contained the preceding provisions shall, so far as may be, apply to such charge. While a charge can be created either by act of parties or operation of law, a mortgage can only be created by act of parties. A charge is thus a wider term as it includes also a mortgage, in that every mortgage is a charge, but every charge is not mortgage. The legislature while defining a charge in s. 100 indicated specifically that it does not amount to a mortgage. It may be incongruous and in terms even appear to be an anti-thesis to say on the one hand that a charge does not amount to a mortgage and yet apply the provisions applicable to a simple mortgage to it as if it has been equated to a simple mortgage both in respect of the nature and efficacy of the security. This misconception had given rise to certain decisions where it was held that a charge created by a decree was enforceable against a transferee for consideration without notice, because of the fact that a charge has been erroneously assumed to have created an interest in property reducing the full ownership to a limited ownership. The declaration that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge does not have the effect of changing the nature of a charge to one of the interest in property."

This would show that a charge differs from a mortgage in the sense that in a mortgage there is transfer of interest in the property mortgaged while in a charge no interest is created in the property charged so as to reduce the full ownership to a limited ownership. The creation of a charge under s. 74(1) of the ED Act cannot, therefore, be construed as creation of an interest in property that is the subject-matter of the charge. The creation of the charge under s. 74(1) only means that in the matter of recovery of estate duty from the property which is the subject-matter of the charge the amount recoverable by way of estate duty would have priority over other liabilities of the accountable person. In that sense the claim in respect of estate duty would have precedence over the claim of the mortgagee because a mortgage is also a charge. [See : State Bank of Bikaner & Jaipur vs. National Iron & Steel Rolling Corporation 1995 (2) SCC 19]. The High Court has, therefore, rightly held that as a result of the charge created under s. 74(1) of the ED Act, it could not be said that title of the assessee to the immovable properties received by him from Smt. Umayal Achi was incomplete and imperfect in anyway. In the context of the facts of this case, the High Court has found that the assessee had admittedly become the full owner of the assets even before the payment of estate duty and on payment of the same he had not acquired a new right, tangible or intangible, in the assets. It cannot, therefore, be said that the amount proportionate to estate duty paid by the assessee on the properties that were transferred should be treated as cost of acquisition of the assets under ss. 48 and 49 r/w s. 55(2) of the Act. Since the title of the assessee to the immovable properties acquired was not incomplete and imperfect in any way, it cannot also be said that as a result of the payment of the estate duty by the assessee there was an improvement in the title of the assessee and the said payment could be regarded as cost of improvement under s. 48 r/w s. 55(1)(b) of the Act.

12. In Winans vs. Attorney General (supra) the question for consideration was whether foreign bonds and certificates payable to bearer passing by delivery and marketable on the London Stock Exchange, were, when physically situate in the United Kingdom at the death of the owner, liable to

Estate duty under the Finance Act, 1894, even though the deceased was domiciled abroad. It was urged that the principle of domicile which governs the liability to legacy and succession duties was also applicable to estate duty. The said contention was negatived by the House of Lords and a distinction was made between estate duty and legacy and succession duty. In that context, Lord Chancellor Loreburn said :

"Legacy and succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination."

These observations of Lord Loreburn, on which reliance has been placed by Smt. Ramachandran, relate to chargeability of estate duty and have no bearing on the question whether any interest is created in the property in respect of the estate duty payable on the property. That is a question which has to be considered in the light of the provisions contained in the ED Act of our country. On a consideration of the said provisions (especially s. 74), we have found that as a result of the creation of the charge under s. 74 no interest is created in the property which is the subject-matter of such charge.

13. The submission regarding diversion in relation to the amount paid by way of estate duty has been raised by the assessee for the first time before this Court. Before the Tribunal as well as before the High Court the contentions urged on behalf of the assessee were confined to a claim for deduction by way of cost of acquisition or cost of improvement under s. 48 of the Act. The questions referred to by the Tribunal to the High Court have to be considered in the light of the said submissions. The submission regarding diversion involves the question whether apart from the deductions permissible under the express provision contained in s. 48 of the Act, deduction on account of diversion is permissible in the matter of computation of capital gains under the Act. This is an entirely independent issue which has not been considered by the Tribunal or the High Court. It cannot be permitted to be raised for the first time at this stage. We, therefore, do not propose to go into this question.

14. 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 vs. CIT (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 life-time 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 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 s. 49(1) of the Act 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 s. 55(1)(b) of the Act, 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 vs. ITO & Anr. (1994) 210 ITR 700 (Ker) and K. V. Idiculla vs. CIT (1995) 214 ITR 386 (Ker) A contrary view has been taken by the Gujarat High Court in CIT vs. Daksha Ramanlal (1992) 197 ITR 123 (Guj) In taking the view that in a case where the property has 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 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 life-time, which is subsisting at the time of his death, then after his death his heir only inherits the mortgagors 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 s. 48 r/w s. 55(2) of the Act. 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 s. 48 of the Act because in such a case he did not acquire any interest in the property subsequent to his acquiring the same. In CIT vs. Daksha Ramanlal (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 s. 48 of the Act.

15. For the reasons aforementioned, the appeals are dismissed. But in the circumstances there will be no order as to costs.