

**(1993) 01 CAL CK 0020**

**Calcutta High Court**

**Case No:** Income-tax Reference No"s. 32 of 1991 and 9 of 1992

COMMISSIONER OF Income Tax

APPELLANT

Vs

SMT. LILA GHOSH. (AND VICE  
VERSA).

RESPONDENT

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**Date of Decision:** Jan. 18, 1993

**Citation:** (1993) 113 CTR 219 : (1993) 205 ITR 9 : (1993) 71 TAXMAN 72

**Hon'ble Judges:** Shyamal Kumar Sen, J; Ajit K. Sengupta, J; Ajit K. Sen Gupta, J

**Bench:** Full Bench

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### **Judgement**

AJIT K. SENGUPTA J. - In these two references - one at the instance of the Revenue and the other at the instance of the assessee - the following questions have been referred to this court u/s 256(2) of the Income Tax Act, 1961, for the assessment year 1980-81 :

income tax Reference No. 32 of 1991 (at the instance of the Revenue) :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding the amount of Rs. 2 lakhs which became payable by the Government of West Bengal to the assessee by virtue of the order dated February 28, 1980, of the Calcutta High Court was a capital asset and profit on transfer of this asset was taxable under the head Capital gains ?

(2) Whether the Tribunal was justified in holding that, in determining the capital gains on the transaction between the assessee and the Government of West Bengal resulting from the order dated February 28, 1980, of the Calcutta High Court, the cost of the capital asset would be the amount spent towards stamp duty and other legal expenses incurred for obtaining the decree ?"

income tax Reference No. 9 of 1992 (at the instance of the assessee) :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the sum of Rs. 2,00,000 received by the assessee in

terms of the order dated February 28, 1980, passed by the High Court was assessable as capital gains ?

2. Whether the findings of the Tribunal in relation to the mesne profits are against the evidence on record, unreasonable and/or otherwise perverse or contrary to law ?"

Shortly stated, the facts leading to these references are that the assessee inherited, on the death of her husband in 1970. However, the lessee did not give possession to the assessee. The assessee filed a suit for eviction and mesne profits. The suit was decreed in favour of the assessee on August 11, 1971. The decree was affirmed on May 19, 1970 (sic) by the Additional District Judge, by this court on May 6, 1970, by the Supreme Court on September 19, 1971. (sic). The assessee then applied for the execution of the decree. The court appointed a commissioner to determine the claim of quantum of mesne profits. While the execution of the said decree and the quantum of the mesne profits were pending, the Government of West Bengal requisitioned the demised property on December 24, 1979. The said requisition order was challenged by the assessee before this court through a writ application filed under article 226 of the Constitution. A settlement was arrived at between the assessee and the State of West Bengal in the said writ application which was recorded by this court in its order dated February 28, 1980, and September 6, 1985.

Under the terms of the settlement, the property in question was to be acquired by the State of West Bengal under the Land Acquisition Act 1894, and compensation for such acquisition was to be paid to the assessee. A sum of Rs. 11 lakhs as advance on account of compensation for such acquisition was paid by the State of West Bengal under the said order dated February 28, 1980, of this court. There is no dispute relating to the compensation received for acquisition of the said premises or as to the compensation received for acquisition of the said premises or as to the said sum of Rs. 11 lakhs received as advance towards compensation for such acquisition.

Apart from the compensation for acquisition of the said premises the assessee received a sum of Rs. 2 lakhs from the State of West Bengal on account of mesne profits for the use and occupation of the said premises by the erstwhile tenant. The relevant portion of the order of this court relating to the said sum is set out hereinbelow :

"Petitioner, Smt. Lila Ghosh, will assign the decree for mesne profits obtained and to be passed as a final decree against Messrs. Technicians Studio Private Ltd., for their use and occupation of the portion of premises No. 4, Baburam Ghosh road, Tollygunge, Calcutta, belonging to Smt. Lila Ghosh on payment of Rs. 2 lakhs (rupees two lakhs) to her by the Government of West Bengal immediately, preferably by February 29, 1980, in favour of the State of West Bengal in full and final settlement of her claim and she will also assign the decree for ejectment obtained of her claim and she will also assign the decree for ejectment obtained by

her against Technicians Studio Private Ltd., in Title Suit No. 59 of 1970 in the Court of the Subordinate Judge, Third Court at Alipore, in favour of the State of West Bengal on payment of the aforesaid sums to her, if found necessary by the State of West Bengal at any time."

By the subsequent order of this court, it was clarified as under :

"It is clarified that Rs. 2 lakhs have been paid to Smt. Lila Ghosh by the State Government on the ground of mesne profits for the period from May 1970, to February, 1980."

The undisputed facts are that the assessee was the owner of the premises in question. The said premises were tenanted and after determination of the tenancy and even after the decree was passed for ejectment by the trial court and affirmed by the appellate courts including the Supreme Court, the tenant continued to occupy the said premises. Ultimately, the State of West Bengal acquired the said premises and gave it to the said tenant for its use and occupation. The tenant was thus ultimately not ejected. The ownership of the property passed from the assessee to the State of West Bengal acquired the said premises and gave it to the said tenant for its use and occupation. The tenant was thus ultimately not ejected. The ownership of the property passed from the assessee to the State of West Bengal under the said acquisition proceeding. In this reference, the matter in question relates only to the sum of Rs. 2 lakhs received as mesne profits for the period prior to the acquisition.

While making the assessment, the Income Tax Officer assessed the said sum of Rs. 2 lakhs representing mesne profits as a revenue receipt in the hands of the assessee-company under the head "Income from other sources".

On appeal by the assessee, it was submitted, inter alia, before the commissioner of Income Tax (Appeals) that the mesne profits of Rs. 2 lakhs received by the assessee in terms of the orders of this court were nothing but damages and, therefore, a capital receipt not chargeable to Income Tax. It was also contended by the assessee before the Commissioner of Income Tax (Appeals) that in case the assessee's contention in this respect is rejected and the mesne profits of Rs. 2 lakhs are held to be a revenue receipt, the same cannot be taxed in one year since it related to the period from May 19, 1970, to December 24, 1979. Furthermore, the amount could be charged to tax only under the head "Income from house property" by way of additional rent received or receivable in the form of mesne profits on account of user of the assessee's property by the lessee. The Commissioner of Income Tax (Appeals), however, rejected all the contentions of the assessee and held that the mesne profits of Rs. 2 lakhs were a revenue receipt assessable to Income Tax under the head "Income from other sources".

The Commissioner of Income Tax (Appeals) also distinguished the three decisions cited on behalf of the assessee in [COMMISSIONER OF INCOME TAX, BIHAR and](#)

[ORISSA Vs. RANI PRAYAG KUMARI DEBI.,](#) [Commissioner of Income Tax Vs. Periyar and Pareekanni Rubbers Ltd.,](#) and in [Commissioner of Income Tax, Andhra Pradesh Vs. J.D. Italia,](#) . The Commissioner of Income Tax (Appeals) also held that the mesne profits arose to the assessee in terms of an order of the court dated February 28, 1980, which falls within the previous year relevant to the assessment year under appeal. In that view, the Commissioner of Income Tax (Appeals) held that the entire sum of Rs. 2 lakhs representing mesne profits was taxable as a revenue receipt in the hands of the assessee in the assessment year 1980-81.

On further appeal by the assessee, the Tribunal held that the mesne profits of Rs. 2 lakhs arose as a result of the transfer of the capital asset and the same were assessable under the head "Capital gains". According to the Tribunal, the assessee received the sum of Rs. 2 lakhs by transferring her right to receive the mesne profits. that right, in the opinion of the Tribunal, was a capital asset and it accrued in favour of the assessee on the order of this court passed on February 28, 1980. The Tribunal also rejected the contention advanced on behalf of the assessee that no capital gains tax was chargeable inasmuch as there was no cost of acquisition of the so-called capital asset.

Reliance in this connection was placed on the decision of the Supreme Court in [Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty,](#) . The Tribunal however, distinguished the said decision of the Supreme Court and observed that the instant case was not a case of transfer of goodwill. The capital asset transferred was a decree representing the right to receive money stipulated in the decree. This asset, according to the Tribunal, was assignable and it had been so assigned on a definite date. It was possible to determine the exact date on which the transfer took place. The Tribunal to determine the exact date on which the transfer took place. The Tribunal held that it was also possible to determine the cost of acquisition of the asset in question which, according to the Tribunal, consisted of the amount spent by the assessee towards stamp duty and other legal expenses incurred for obtaining the decree.

From the aforesaid decision of the Tribunal, both the assessee as well as the Revenue have sought reference to this court. Before us, the contentions urged before the Tribunal have been reiterated.

Section 2(12) of the CPC defines mesne profits as follows :

"(12) mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

The Judicial committee of the Privy Council in (1900) L.R. 27 I.A. 110 (Privy Council) as under :

"..... mesne profits are in the nature of damages which the court may mould according to the justice of the case."

In *Lucy Kochuvareed v. P. Mariappa Gounder*, AIR 1979 SC 1214, the Supreme Court observed at page 1219 of the Reports as under :

"Mesne profits being in the nature of damages, in invariable rule governing their award and assessment in every case can be laid down and the court may mould it according to the justice of the case."

At this stage, we may refer to the decisions cited from the Bar in support of the respective contentions. In [COMMISSIONER OF INCOME TAX, BIHAR and ORISSA Vs. RANI PRAYAG KUMARI DEBI.](#), the assessee was deprived of certain movable and immovable properties. She filed a suit and obtained a decree for the recovery of the movable and immovable properties and also damages for wrongful detention of the properties. It was held by the Patna High Court that the amount received by the widow of the deceased-holder was damages for wrongful detention of the movable properties of the assessee; it was not paid under any contract to pay any interest and was, therefore, not a revenue receipt.

In [Commissioner of Income Tax Vs. Periyar and Pareekanni Rubbers Ltd.](#), the Government took possession of the property on November 29, 1961, under an agreement with the assessee. The award was made on August 31, 1962. The assessee was paid interest for the period between the date of acquisition and the date of the award. The Kerala High Court held that there was a clear case of deprivation of property and interest paid by the Government from the date of possession to the date of award was merely a compensation for such deprivation. The court further held that such compensation was calculated as a percentage of interest on the amount of compensation and did not affect the question whether interest so paid was for deprivation of the property or not.

In *CIT v. J.D. Italia* [1983] 141 ITR (AP), the land of the assessee was unauthorisedly acquired and the civil suit instituted by the assessee for recovery of possession was decreed in his favour. During the pendency of the appeals, the parties arrived at a compromise whereunder the assessee was paid a sum of Rs. 40,000 which though described as interest was essentially in the nature of damages for use and occupation paid to the owner or compensation received by the owner for the deprivation of the use and possession of the land. The Andhra Pradesh High Court held that the amount in question was not a revenue receipt and was not includible in the taxable income of the assessee for the assessment year 1969-70.

In [Commissioner of Income Tax Vs. Ashoka Marketing Ltd.](#), the assessee had entered into an agreement for purchase of certain property belonging to the vendor. The agreement stipulated that, if the transaction could not be completed due to any default on the part of the vendor, a sum of Rs. 1 lakh was to be paid to the assessee (intending purchaser) by way of liquidated damages. The vendor failed

to complete the transaction because the title was not marketable. The assessee received a sum of Rs. 1 lakh by way of liquidated damages for non-performance of the agreement by the vendor. This court held that the amount so received by way of damages was a capital receipt and since there was no element of cost involved there was no liability to capital gains tax.

All the aforesaid cases clearly support the assessee in this reference. Since mesne profits are only damages for loss of property or goods, these are not in the nature of revenue receipts. The receipt of Rs. 2 lakhs is clearly capital in nature. Counsel for the Revenue, however, invited our attention to a decision of the Madras High Court in [Commissioner of Income Tax, Tamil Nadu-V Vs. P. Mariappa Gounder](#), . In that case, the assessee agreed to purchase a tile factory under an agreement dated May 22, 1950. The vendor, contrary to the agreement and in breach thereof, sold it to another person and put him in possession. The assessee sued the vendor for specific performance. this suit was decreed in favour of the assessee and the same was affirmed by the Supreme court. The Supreme Court also decreed mesne profits payable to the assessee as fixed by the trial court. The Madras High Court held that a claim to mesne profits is usually directed against one who has deprived the true owner from possession of his property and who has thereby prevented the true owner from enjoying the income therefrom or usufruct of the property. When, in such a suit or proceeding the court awards mesne profits to the true owner, it represents a just ought to have come to his hands but for the interference of the person in wrongful possession of the property. It is in recognition of this principle in wrongful possession of the property. It is in recognition of this principle that the true owner is entitled to the income from the property and the person who is in wrongful possession is to compensate the true owner by paying either the actual income from the property or a reasonable estimate of that income. Consequently, the mesne profits are also a species of taxable income.

With great respect to the learned judges, we could not persuade ourselves to agree with the views expressed by the Madras High Court in the aforesaid decision so far as it holds that mesne profits awarded by the court for wrongful possession are liable to be assessed as income. Neither the decision of the Privy Council in *Girish Chunder Lahiri* [1900] 27 I.A. 110, nor the decision of the Supreme Court in *Lucy Kochuvareed*, AIR 1979 SC 1214, were either cited or noticed by the learned judges of the Madras High Court. In fact, even the decision of the Patna High Court in [COMMISSIONER OF INCOME TAX, BIHAR and ORISSA Vs. RANI PRAYAG KUMARI DEBI](#), , and that of the Kerala High in [Commissioner of Income Tax Vs. Periyar and Pareekanni Rubbers Ltd.](#), , were neither noticed nor considered by the Madras High Court.

In our view, on the facts of the case, the Appellate tribunal was justified in holding that the mesne profits of Rs. 2 lakhs received by the assessee in this case were in the nature of damages and, therefore, a capital receipt.

The next question is whether the aforesaid capital receipt is liable to capital gains tax. As indicated, the Tribunal held that the decision of the Supreme Court in [Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty](#), has no application in the facts and circumstances of this case. In our view, the Tribunal fell into an error. The amount spent by the assessee towards stamp duty and/or other legal expenses incurred in obtaining the decree cannot be said to be the cost of acquisition. Whether a person in a litigation would be successful in his claim and would get a decree or not does not depend upon the incurring of legal expenses and/or payment of court fee. The expenses incurred for the purpose of securing justice or for vindication of legal rights cannot be considered as the cost of acquisition of such rights themselves which are the subject-matter of legal proceedings. Legal proceedings do not create any new or different rights. The court only recognizes the existing right or claim of the party concerned in the litigation and gives judicial recognition thereto. Expenses incurred for obtaining such judicial recognition of a right cannot amount to cost of acquisition of such right itself. In our view, therefore, no part of the said sum of Rs. 2 lakhs can be charged to capital gains tax, since there is no cost of acquisition involved in this case. The principles laid down by the Supreme Court in [Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty](#), are clearly applicable in the facts and circumstances of this case. In our view, no cost of acquisition can be envisaged in respect of the right to receive mesne profits already vested in the assessee having regard to her ownership of the property in question.

Even otherwise, we find that there is no assignment of the decree for mesne profits in this case. The State government acquired the said premises under the land Acquisition Act, 1894, and by reason of such acquisition, the said property vested in the State government free from all encumbrances. No final decree in respect of mesne profits was passed in favour of the assessee. In terms of the order passed by this court on February 29, 1980, the State government reserved the right to itself for getting an assignment from the assessee in respect of the final decree for mesne profits, if any, passed against Messrs. Technician Studios (P.) Ltd., for their use and occupation of the said property. In fact, after the order of acquisition was passed by the State government, even the preliminary decree for mesne profits obtained by the assessee was rendered infructuous. In these circumstances, it cannot be held that the assessee had made any capital gains on the transfer of a capital asset.

For the reason aforesaid, we answer both the questions raised by the Revenue in Income Tax Reference No. 32 of 1991 in the negative and in favour of the assessee.

The first question raised by the assessee in her reference is answered in the negative and in favour of the assessee.

The second question raised by the assessee in her reference is answered in the affirmative and in favour of the assessee.

There will be no order as to costs.

SHYAMAL KUMAR SEN J. - I agree.