

**S. Balachander Vs. Cit**

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**Court :** Chennai

**Decided On :** Dec-06-2001

**Reported in :** (2002)176CTR(Mad)122

**Appeal No. :** Tax Case Nos. 306 to 309 of 1986 6 December 2001 A.Y 1978-79 to 1981-82

**Appellant :** S. Balachander

**Respondent :** Cit

**Advocate for Pet/Ap. :** P.P.S. Janardhanaraja, *for the Assessee Mrs. Chitra Venkatraman, for the Revenue*

**Judgement :**

ORDER

**R. Jayasimha Babu,J.**

Assessee owned a house in his own right, threw that property into a hotchpot, regarded it as a joint family property consisting of himself, the other members of the family being his wife and son, proceeded to effect a partition between the father and son under a deed of partition dated 31-10-1977. Under that partition one floor of the building which comprises of two floors was divided, one allotted to the share of the son, the other floor being retained by the father. The son was obligated under the terms of the deed to pay a sum of Rs. 1,250 to the assesseees

wife and that payment was secured by a charge on the portion allotted to the son.

2. Section 64(2) of the Income Tax Act, which is a special provision providing for clubbing the income of the spouse and minor child with that of the individual in certain cases, in sub-clause. (c) of sub-section (2), as it stood during these assessment years viz., assessment years 1978-79 to 1981-82 reads thus :

'Section 64(2)(c) :

Where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse or minor child on partition shall be deemed to arise to the spouse from assets transferred indirectly by the individual to the spouse or minor child and the provisions of sub-section (1) shall, so far as may be, apply accordingly.'

3. The assessing authority, the appellate authority and the Tribunal uniformly took the view that, that provision was attracted to the sum of Rs. 1,250 to be paid by the son to his mother. The only material on the basis of which that view was taken was the deed of partition.

4. Section 64(2)(c) requires that the 'income derived from such converted property' be regarded as income of the assessee if such income is received by his spouse or minor child on partition. What is, therefore, essential for being demonstrated before this provision can be applied is it must first be found that the income which is sought to be added to the income of the assessee is income 'derived from such converted property'. A thing is derived only when the source from which it is derived is the immediate cause for the coming into existence of that which is derived. The fact that the son who was a major and who was entitled to receive the income if any from the property after the partition does not render the payments made by the son to his mother as monies which the mother has derived by way of income from the property. The income if any from the property in respect of the share allotted to the son is derived from the property while it is in the hands of the son. Payments made by the son, whether or not out of that fund or other funds cannot, in the hands of the recipient, be regarded as monies derived from

the property. The immediate source of the payment for such recipient, is the person who pays.

5. The fact that in the event of default of payment the mother was entitled to enforce a charge against the property does not also render the payment made by the son to the mother, an amount which is derived from the property. The son being a major and capable of earning an income of his own can very well make the payments from any other source of income that he may have. There was nothing in the partition which required the son to set apart the income if any, derived from the property allotted to his share for being paid over to his mother. Moreover the liability created under the deed was for the lifetime of the mother as also the son. The son was bound to earn a larger income than what he may have had at the time of partition, by using his talents in some one or other walk of life, and payments made by him to his mother, cannot possibly be regarded for their lifetime, as amounts which were paid to the mother from and out of the income derived from the property allotted to the share of the son.

6. The provision contained in section 64 for clubbing the income of the minor or spouse in certain circumstances is a special provision and is required to be given effect to, to the extent the plain language of the section requires. It is wholly impermissible to extend its application and allow it to take within its fold, amounts which were not required by the language of the section to be regarded as income which is clubbable with that of the assessee. The fact that the husband has a duty to maintain the wife does not on that score imply that the son cannot be obligated to provide for the maintenance of his mother when he receives a property which had been possessed by his father absolutely but which by reason of the unilateral act of the father, was impressed with the character of the joint family property. The amount so paid to the mother when paid by a son who was a major would not become income derived from the property allotted to the son, unless such derivation is established as a matter of fact. No such evidence exist in this case.

7. The only link with the property here is the charge created in favour of the wife for the purpose of securing the payment of the monies which the son is obligated to pay to his mother. The creation of a charge does not result in making the

amount for which the charge is created an income from the property on which such charge is created. When a company borrows money from a bank and creates a charge on its assets in favour of the lender, it cannot possibly be said that the amount borrowed is an amount which was derived as income by the borrower from the assets owned by it and on which a charge is created. The occasion for enforcing a charge arises only when default is committed and the existence or otherwise of the charge would be immaterial during the period when there is no default. This is not a case where the mother had recovered arrears of the maintenance which the son was required to pay in terms of the partition by enforcing a charge and receiving the amount from the sale proceeds of that property.

8. The Tribunal, therefore, was in error in taking a view that it did, The question referred to us, viz.,

'Whether on the facts and circumstances of the case, the Tribunal was right in holding that income received by the assessee's wife for maintenance is includible in the assessee's total income under section 64(2)(c) read with section 64(1)(iv) of the Act?'

is, therefore, answered in favour of the assessee and against the revenue.

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