

(1945) 10 MAD CK 0013
In the Madras High Court

Rao Sahib P.V. Rangayya	Vs	APPELLANT
Tatavarty Nagapotha Rao and Others		RESPONDENT

Date of Decision : 09-10-1945

Acts Referred:

Citation : AIR 1946 Mad 176 : (1945) 2 MLJ 531

Hon'ble Judges : Yahya Ali, J

Bench : Division Bench

Judgement

Yahya Ali, J.—H.W. Maidan who was a partner in Maidan and Co., died in February, 1937. The business was continued by the surviving

partner Rao Sahib P. V: Rangiah, who is the petitioner here, in the name of Maidan and Co. Jaldu Venkatasubba Rao obtained a decree in O.S.

No. 546 of 1938, District Mun-siff's Court, Masulipatam, against the legal representatives of the aforesaid Maidan, the decree being against the

assets of Maidan in their hands. The decree was passed on 9th June, 1939. In execution of the decree the decreeholder applied under Order 21,

Rule 46 and Under Order 21, Rule 49 for the attachment of the assets belonging to the deceased Maidan in the partnership. The procedure

prescribed in Rule 49 of Order 21 was followed and ultimately after the appointment of a receiver, examination of accounts and the determination

of the value of the share in the goodwill of the business that belonged to Maidan, the Court below directed that the surviving partner who was the

objector, should deposit in Court the amount claimed in the execution petition in satisfaction of the charge on the profits in his hands created under

Order 21, Rule 49. This petition is to revise that order.

2. In the meantime in the course of the proceedings taken under Order 21 Rule

49, orders were passed for the production of accounts and an appeal taken against the said order was rejected in October, 1941, on the ground inter alia that no appeal lay. The appellate Court, however, gave some directions as to the lines on which further enquiry should be conducted in the matter and pursuant to the same, the District Munsiff passed a further order on 5th October, 1943, which was of a preliminary nature directing the receiver to conduct the examination of the accounts for the purpose of answering certain specific questions that were formulated. The receiver submitted a report after giving an opportunity to both sides and ultimately the order which is now sought to be revised was passed by the District Munsiff.

3. A preliminary objection has been taken by Mr. Raghava Rao for the respondents as to the maintainability of the petition. It is urged that a remedy by way of a regular suit was available to the petitioner against the order made by the lower Court under Order 21, rules 46 and 49 and that consequently a revision ought not to be allowed. The contention is that the processes prescribed in rules 46 and 49 of Order 21 are different modes of attachment laid down under the Code for different kinds of property, that rules 41 to 57 deal with such different kinds of attachment and that Rule 58 provides for claim being made to properties so attached or objections being taken to the respective kinds of attachment enumerated in the earlier rules including rules 46 and 49. He therefore contends that there being a right under Rule 58 for the party aggrieved to put forward a claim or an objection, a right of instituting a suit under Rule 63 of Order 21 is available in the event of the claim being defeated and without exercising those rights it was not open to the petitioner to pursue the remedy by way of revision. This objection does not appear to be sound for various reasons. To start with I am not certain if Order 21, Rule 63 has any application to a case of this description. That rule follows upon Rule 58 and under Rule 58 what is required is that there should have been an attachment of property and on the ground that such property is not available to such attachment a claim is preferred to the property attached or objection is made to the attachment. The underlying fact is that there was an attachment of property in execution of a decree. No doubt, Rule 46 of Order 21 specifically contemplates attachment. But it is difficult to

hold on the language of Rule 49 that there is anything in the nature of actual attachment. What the rule actually provides appears to be a process in

substitution of the ordinary process of attachment. Under Sub-Rule 2 of that rule the Court makes first what is called a charging order charging the

interest of the partner who is the judgment debtor in the partnership property and the profits with payment of the amount due under the decree.

Subsequently another order is made appointing a receiver of the share of such partner in the profits and of other moneys which may be coming to

him in respect of the partnership. Thirdly, the Court may issue directions for the taking of accounts and making all inquiries and lastly the Court may

make an order for the sale of such interest. In addition to these specific orders the Court may make such further orders as might have been

directed or made if a charge had been made in favour of the decree-holder by such partner or such further orders as the circumstances of the case

may require. It is thus clear that at no stage does Sub-Rule 2 contemplate the levying of an attachment of property such as would amount to an

attachment within the meaning of Rule 58 for the purpose of entitling the person aggrieved to prefer a claim or an objection. Turning to Rule 46 of

Order 21, I have already stated that that rule expressly contemplates an attachment but even with reference to that rule, it has been held that where

the garnishee denies the existence of the debt, the provisions contained in rules 58 and 63 of Order 21 do not apply--Butchayya v. Krishnamachari

(1935) 70 M.L.J. 20 : ILR 59 Mad. 966. It must be pointed out that the learned Judges in that case took this view in spite of the Full Bench

decision in Chidambara Patter Vs. Ramasami Patter and Others, , distinguishing the Full Bench case on the ground that in that case the question

was not whether when the existence of the debt is itself denied, the denial of the garnishee can be considered to be a claim or objection under

Order 21, Rule 58. Besides this aspect of the matter, the remedy by way of revision can be denied only if the alternative remedy is certain and

conclusive and not ambiguous. It would appear that in this case ex majore cautela, the petitioner has adopted the other remedy of instituting the

suit; but in that suit the respondent has as defendant raised the contention that the suit itself is not maintainable. That is only by the way. In any view

of the matter if the Court should be of the opinion that the Court below had no jurisdiction under Order 21, Rule 49 to make the order complained

against, even if there was some other remedy open to the person aggrieved, it would in my opinion be proper for this Court to interfere. A similar

argument that when there was a remedy by suit open, revision should not be allowed was repelled by a Division Bench of this Court in *The Official*

Receiver Vs. Amara Seshayya and Others, . It was pointed out by the learned Judges there that it has never been held by this Court, that because

the petitioner has a remedy by way of a suit, therefore this Court has no power to interfere by way of revision. Cases in which this Court has

interfered in revision in spite of the fact that the petitioner has another remedy are, it was there observed, too numerous to be quoted. For these

reasons, I overrule the preliminary objection raised by Mr. Raghava Rao. Going to the merits of the case, the first contention put forward by Mr.

Subba Rao is that Order 21, Rule 49 has no application to the case because in the present case there was no partnership in existence as such at

the time of the suit or at the time of the application for execution. As stated before, Maidan died in 1937, and the suit itself was filed in 1938, the

decree therein having been passed in 1939. With the death of Maidan, the partnership consisting of himself and Rao Sahib P.V. Rangiah became

dissolved and no fresh partnership was formed. The legal representatives of the deceased Maidan did not come into the partnership. Rule 49 of

Order 21, does not apply to the case of a dissolved partnership. Sub-Rule 1 says that property belonging to a partnership shall not be attached or

sold in execution of a decree other than a decree passed against the firm or against the partners as such. Admittedly in the present case the decree

in O.S. No. 546 of 1938 was not passed against the firm of Maidan and Co., or against a partner of the firm as such. The suit was on a

promissory note executed by Maidan in his individual capacity and the decree was passed against his assets in the hands of his legal

representatives.

4. The subsequent provisions of Rule 49 are clearly confined to the case mentioned in Sub-Rule 1. By Sub-Rule 2 the Court may on the

application of the holder of a decree against a partner make an order charging the interest of such partner, the expressions "" a partner "" and "" such

partner "" meaning obviously a partner in the firm as such. Later the rule refers to the appointment of a receiver of the share of such partner in the

profits and also of any other money which may be coming to him in respect of the partnership, and further on, the rule states that the Court might make such other order as might have, been directed or made if the charge had been made in favour of such decree-holder as partner. Under Sub-Rule 4 every application for an order under Sub-Rule 2 shall be served on the judgment-debtor and on his partners or such of them as are within British India. The entire scheme of this rule therefore is based upon the concept that there is a partnership in existence at the time when the process was sought to be taken out or that the decree which is sought to be executed was made against the partners in the firm as such; i.e., the persons should bear the character of partners in the firm at the time. The principle underlying this rule as stated by Mr. Subba Rao is to prevent as far as possible the disturbing or dislocation of the working of a continuing partnership. The principle itself would cease to apply as also the respective provisions of the rule in the case of a defunct or dissolved partnership. To this objection Mr. Raghava Rao has hardly any answer. All that is stated is that this rule should be read with Section 52(1) of the Civil Procedure Code. That section provides that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property. To such a course the petitioner has and can have no valid objection. In fact the decree is against the property of the deceased, if any, in the hands of his legal representatives. What the petitioner objects to is the setting in motion of the special machinery provided in Rule 49 which leaves him without any remedy whatever by way of appeal or perhaps by way of a separate suit. Section 52 is of a general nature which applies to all cases where a decree is sought to be executed in respect of a debt due by a deceased person against his representatives in interest. But Rule 49 of Order 21, is in the nature of a special rule covering a special class of cases, viz., decrees passed against firms or against partners in the firm as such. With regard to such decrees it is open to the Court to execute the decree in the special manner prescribed by the rule. Where the fundamentals of the rule are not satisfied, it is clearly outside the province of the Court to invoke the aid of the said rule.

5. At this stage in answer to this particular objection Mr. Rahgava Rao raised another preliminary contention, viz., that the petitioner should have come up to this Court at a much earlier stage to get the prior orders passed in this matter revised and that his failure to do so would preclude him from seeking to get the present order revised. I have indicated the various orders passed in the earlier stages of the proceedings and from a perusal of those orders, it is clear that none of them was of a definitive or conclusive nature. It is not as though the petitioner raised this objection for the first time at this stage. I find that in the counter filed by him on 30th April, 1940, to the execution petition, he raised the plea that Maidan having died in 1937 the partnership became dissolved and there was no share of Maidan which could be charged with the decree amount in the case. When he was directed to produce the accounts by the District Munsiff's order dated the 5th July, 1941, he objected and he carried the matter in appeal. The appellate Court held that no appeal lay, but gave some directions for further enquiry. While the enquiry was pending it was not open or necessary for the petitioner to invoke the revisional jurisdiction of this Court. The enquiry was completed and the receiver submitted his report and when the order was passed by the Court in pursuance of the receiver's report making specific directions for the production of the required amount into Court, that was the appropriate stage at which he could invoke the revisional jurisdiction of this Court.

6. Besides this main contention, Mr. Subba Rao has raised two other objections to the order under revision, but since I agree with him with regard to this main plea and I am not impressed with the other two arguments, it is unnecessary for me to examine them. In the result the petition is allowed and the order of the lower Court is set aside. Execution cannot proceed against the petitioner under Rule 49. But the attachment made under Order 21, Rule 46 will subsist. The petitioner will get his costs from the respondent in this Court.