

(1976) 02 MAD CK 0015
In the Madras High Court

U. Abdul Jabbar and Another		APPELLANT
	Vs	
Manonmani Pictures and Others		RESPONDENT

Date of Decision : 09-02-1976

Acts Referred:

Citation : AIR 1976 Mad 368 : (1976) 89 LW 367 : (1976) 2 MLJ 102

Hon'ble Judges : K. Veeraswami, C.J

Bench : Division Bench

Judgement

K. Veeraswami, C.J.—Respondents 4 and 5 in the Court below are the appellants. The first respondent had obtained a money-decree

against the first respondent in the Court below, one S.S. Fakir Mohamed, in O.S. No. 322 of 1963 in the Court of the Subordinate Judge of

Coimbatore. The decree was made on 8th October, 1964. Fakir Mohamed, the judgment-debtor, a film producer, ran into debts. He was also

carrying on business as a beedi merchant. On 19th February, 1968, Fakir Mohamed and his son Habibur Rahiman the third respondent, on, the

one hand, and the first appellant Abdul Jabbar on the other, entered into a partnership under the name and style of Majeeth Mark S.P.S. Beedi

Factory Coimbatore Majeeth Mark S.P.S. Beedi Factory by partner Abdul Jabbar, the first appellant, figures as the second appellant. Fakir

Mohamed died, on 18th January, 1972. His widow, the 2nd respondent instituted O.S. No. 48 of 1972 for dissolution of the firm and taking its

accounts. Abdul Jab-tar was a party-defendant in that suit. It ended in a consent decree which declared that the partnership stood dissolved as on

18th January, 1972, the day Fakir Mohamed died. The accounts of the firm were filed in Court which were said to have established that no

amount whatever was due to the late Fakir Mohamed from out of the firm, but he was only indebted with hisson to the tune of over Rs. 31/2 lakhs

to Abdul Jabbar. The first respondent in the appeal took out execution of the decree. Pie impleaded Fakir Mohamed (died) as the first respondent,

his widow and his son as respondents 2 and 3, Abdul Jabbar as the 4th respondent, and Majeeth Mark S.P.S. Beedi Factory by partner Abdul

Jabbar, as the 5th respondent. The petition for execution under Order 21, Rule 11(2) of the Code of Civil Procedure, was to implead respondents

2 to 5 in the Court below as legal representatives of the first respondent, Fakir Mohamed and for appointment of a receiver under Order 21, Rule

49(2) of the Code to sell and collect the amounts earned by Fakir Mohamed in the partnership business and to pay the same to the decree-holder

in discharge of the decree-debt. The Court below granted both the prayers. It was of the view that although Fakir Mohamed was the sole

proprietor of Majeeth Mark S.P.S. Beedi, it became a Firm or Partnership as from 19th February, 1968, and that in view of the recital in the

Partnership Deed, the partnership could not be dissolved by the parties unless all the liabilities mentioned in the Schedule were discharged by

Abdul Jabbar; The Court below thus thought that notwithstanding the death of Fakir Mohamed and the consent decree mentioned by us, the

partnership continued since Abdul Jabbar had not discharged all the debts. This was the basis for the order the Court below made under Order

21, Rule 49(2), since, according to the Court below, Abdul Jabbar was in possession of Majeeth Mark S.P.S. Beedi Factory after the death of

Fakir Mohamed, he was an intermeddler with, and in possession of the beedi business as a partner. The Court said that the 4th respondent was in

possession of part of the estate of the deceased. So, it held Abdul Jabbar was a legal representative of the deceased Fakir Mohamed.

2. The propriety of the order of the Court below making the appellants as the legal representatives of the deceased in file execution of the decree

against them, and appointment of a receiver and other relief under Order 21, Rule 49(2) made by the Court below, is questioned before us.

3. The contention for the appellants was that in no view of the matter can they be regarded as the legal representatives of the deceased Fakir

Mohamed. We are of opinion that the appellants are right in their contention. A ""legal representative"" as defined by Section 2(11) of the CPC is a

person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased, and

where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. It is

clear that the appellants do not represent the deceased. They are not his heirs. The first appellant is a stranger, and the second appellant is the

business which was once the property of the deceased and later on the firm of dissolved partnership. They are also not sued in a, representative

character. Nor has any estate of the deceased devolved on them. The only ground the Court below relied on to hold them to be legal

representatives of Fakir Mohamed was that the first appellant was in possession of Majeeth Mark S.P.S. Beedi Factory and so was in possession

of a part of the estate of the deceased : thus the first appellant is termed as a partner in the beedi business of the deceased as on 19th

December, 1968, 4 years after the decree was made in favour of the decree-holder. 1 the first appellant's stand is that the partnership stood

dissolved on 18th January, 1972, the day Fakir Mohamed died, the debt due to the decree-holder was not one shown in the schedule of the

partnership of the firm, the firm was called upon to discharge through the first appellant, and the firm had nothing to do with the decree debt. The

appellants also contend that the first appellant was in possession of the beedi business Majeeth Mark S.P.S. Beedi Factory after the death of Fakir

Mohamed not as his representative, but in his own right and in accordance with the terms of the compromise decree in O.S. No. 48 of 1972. We

think, the stand of the appellant is unassailable. If the first appellant is in possession of the second appellant business it is not as an intermeddler of

the estate of the deceased Fakir Mohamed, but in his own right, and adversely to the estate of the late Fakir Mohamed. Unless the first appellant's

possession of the business could be said to be in a representative capacity, that he represented the estate of the deceased by interposing in its

administration and getting into possession of it, it cannot be said that he was an intermeddler within the meaning of Section 2(11) of the Code. It

may be that the expression "legal representative" includes any person who intermeddles with the estate of a deceased partner. But as held in

V.R.M.A.S. Chockalingam Chettiar Vs. A.SP.S.K.R. Karuppan Chettiar and Others, the intermeddling must involve the assumption of a

representative capacity in relation to an estate, and not in assertion of a claim of right adversely to the estate of the deceased. The possession of the second appellant beedi business in the hands of the first appellant is not, therefore, as an intermeddler so as to make the first appellant and also the second appellant as legal representatives of the deceased. The first appellant's possession is traceable to the formation of the firm of partnership between the deceased and his son on the one part, and the first appellant on the other, and after the death of Fakir Mohamed and dissolution of the partnership to the terms of the consent decree in O.S. No. 48 of 1972. We hold, therefore, that the appellants cannot be regarded as the legal representatives of the deceased Fakir Mohamed.

4. The order of the Court below under Order 21, Rule 49(2) is also defective. Rule 49, as we understand its language, applies only to an existing partnership and not a dissolved one. Sub-rule (2) of the rule speaks of an application of the holder of a decree against a partner, and the Court making an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree. That can have reference only to an existing partnership. It is even more clear by reference to Sub-rule (3) which gives liberty to the other partner or partners to redeem the interest charged, or in the case of a sale being directed, to purchase the same. Where at the time execution is sought the firm is dissolved and no longer in existence, the provisions in the Partnership Act for winding up its business in the way mentioned therein will apply. Order 21 Rule 49(2) will have no application. The Court below, in our opinion, is not right in its view that the rule, will apply also to a dissolved firm. In some part of the judgment of the Court below it was stated that the partnership, notwithstanding the death of Fakir Mohamed, continued to exist. For taking that view it relied on paragraph 4 of Exhibit B-1 which was the Deed of Partnership which said that the partnership shall not be dissolved by parties unless and until all the liabilities mentioned in the schedule thereto were discharged by the party of the second part namely, the first appellant, and that if the partnership was put an end to by the parties of the first part, that is to say, Fakir Mohamed and his son Habibur Rahiman, the party of the second part, the appellant, should continue the business till all the amounts due to him were fully realised. We do

not agree with the Court below that this statement of the Partnership Deed amounted to the position that even though Fakir Mohamed died, still the

firm of partnership will continue. This clause in the partnership deed was inserted for the security of the first appellant who had advanced moneys

to the firm. It does not appear also that the decree debt in question was included in the recital of the partnership. In one place in the order of the

Court below it was observed that the consent decree in O.S. No. 48 of 1972 was collusive. That decree declared that the partnership stood

dissolved as on the date of death of Fakir Mohamed. There is no basis whatever in the record to support the observation of the Court below that

the consent decree was collusive. It is not in dispute that there were still large outstandings due from the erstwhile firm to the first appellant. Since

we are of the view that the firm stood dissolved the order made by the Court below under Order 21, Rule 49(2) cannot be sustained. N.S.

Ramaswami, J., in Mrs. P. Subbiah (alias) Mrs. P. Subbiah alias Dhanalakshmi Subbiah Vs. Venkatathiru Muthuraja and Others, , opined that

Order 21, Rule 49 applied to an existing firm, and not a dissolved or erstwhile one. We concur with him.

5. The appeal is, therefore, allowed with costs.