

(1975) 12 MAD CK 0037
In the Madras High Court

Mettupalayam Industrial Roadways (P.) Ltd. and Another	APPELLANT
Vs	
Thiru Mohamed Ismail Rowther and Co.	RESPONDENT

Date of Decision : 19-12-1975

Acts Referred:

Contract Act, 1872 — Section 253
Motor Vehicles Act, 1988 — Section 57(2)
Partnership Act, 1932 — Section 42

Citation : (1976) 1 MLJ 446

Hon'ble Judges : G. Ramanujam, J

Bench : Division Bench

Judgement

G. Ramanujam, J.—As these two revisions filed by two different Transport operators are directed against the same order of the State Transport Appellate Tribunal Madras, dated 10th April, 1972, they are dealt with together.

2. A proposal for the introduction of two additional buses on the route Coimbatore to Mettupalayam was notified and after considering the representations received, the proposal was approved for one bus. Applications were, therefore, called u/s 57(2) of the Motor Vehicles Act. There were as many as 56 applicants and the petitioners in these cases were applicants 25 and 36 respectively while the respondent in both the cases was the 23rd applicant. The applications were duly notified u/s 57(3). In its hearing held on 31st July, 1971, the Regional Transport Authority rejected, the claim of applicant No. 36 on the ground that he had been given a permit for the route Coimbatore to Viscose factory in the same sitting and the application of the 25th applicant on the ground that he is only a new entrant and ultimately granted the permit to applicant No. 23. Applicants 25 and 36 challenged the order of the Regional Transport Authority before the State Transport Appellate Tribunal by filing two appeals. The said two appeals were, however, dismissed. Hence the Tribunal's order has been challenged by the same applicants in these two revisions.

3. The contention of the Learned Counsel for the petitioners in both the cases is

that the 23rd applicant who has been selected for the grant of the permit both by the Regional Transport Authority and by the Tribunal is not entitled to get the permit in preference to the petitioners, that the Regional Transport Authority as well as the Tribunal have erroneously assumed that the respondents Mohammed Ismail Rowther and Company, is the same firm which applied for the permit on 22nd October, 1960, that the firm which applied for the permit in the year 1960 ceased to exist now and that therefore, the grant in favour of that firm which has ceased to exist cannot be sustained. If the permit granted to the respondent cannot be sustained on that ground, then the grant may be made after consideration of the relevant claims of applicants 25 and 36 alone. As between applicants 25 and 36, one is putting forward superior and preferential claims over the other.

4. Before dealing with the rival claims put forward by applicants 25 and 36 amongst themselves, it is necessary to consider the common attack made by the petitioners against the grant of permit in favour of the 23rd applicant, the respondent in both the cases. It is the case of the petitioners that the respondent firm had only two partners, namely K. Mohammed Ismail (Senior) and K. Mohammed Ismail (Junior) on the date of the application as seen from the application itself, that one of the partners namely Md. Ismail (Junior) died in the year 1969, that the firm should be taken to have been dissolved since 1969 and that, therefore, the grant of the permit on 31st January, 1971 to a firm which is non-existent cannot at all be sustained. The respondent repels the said contention stating that though there were two partners on the date of the application, subsequently one Yusuf joined the firm as a partner in 1967, that the firm had therefore 3 partners in the year 1969 when one of the partners died, that the two surviving partners continued the firm and that therefore the grant in favour of the firm has rightly been made on 31st July, 1971 by the Regional Transport Authority. To show that the firm was continued with two partners on or after 1969 when one of three partners died, the respondent relied on the fact that the firm in addition to carrying on of the firm's lorry business, had also started transport business by applying for a permit on the route of Mettupalayam to Karamadai on 22nd November, 1967 and produced the registration certificates of the lorry and of the bus. It also relied on the fact that from 1967 the firm is actually plying a lorry and also a bus from Mettupalayam to Karamadai. The respondent also contended that the continued conduct of the firm's business by the two partners would indicate that there was an agreement to continue the partnership in spite of the death of one of the partners.

5. The Tribunal considered in detail the above objection raised by the petitioners which, if accepted would disentitle the respondent from getting the permit. Though this was raised for the first time before the Tribunal, it held that though the firm was originally comprised of two partners in the year 1960 when the application was filed, one Yusuf having been admitted as a third partner in the year 1967, on the date of death of one of the partners namely Mohammed Ismail in 1969, there were two partners surviving, that they had continued the firm's

business as per an implied agreement between the three partners, that, the firm which applied for the grant in fact continues and that, therefore, the grant in its favour cannot be challenged on the ground that the grant is to a non-existent firm. The petitioners have attacked the said finding of the Tribunal that the grant in this case is to a firm which applied for a permit in the year 1960.

6. The Learned Counsel for the petitioners has not, however, challenged the finding of the Tribunal that though the partnership was constituted with two partners originally in the year 1960 a third partner by name Yusuf was taken in 1967 and that it is only thereafter in the year 1969 one of the partners died leaving two surviving partners and that the said two surviving partners are carrying on a partnership business in bus and lorry transport. Therefore, the only question that has to be considered is whether the surviving partners can be said to have continued the old partnership in pursuance of an agreement between the partners that the firm shall not be dissolved by the death of one partner.

7. The Learned Counsel for both the petitioners contends that normally a firm is dissolved by the death of a partner unless there is a contract to the contrary between the partners, that in this case the respondent has not produced any agreement to the effect that the firm is to be continued notwithstanding the death of the partner in 1969 and that in the absence of such an agreement between the partners the firm of Mohammed Ismail Rowther and Company which applied for a permit in the year 1960 should be taken to have been dissolved by the death of Mohammed Ismail, one of the partners. The Learned Counsel refers to Section 42 of the Indian Partnership Act which provides that subject to a contract to the contrary between the parties a firm is dissolved by death of a partner. It is not in dispute that the respondent has not produced any agreement in writing between the partners to continue the partnership in spite of the death of a partner. The Tribunal has, however, taken the view that from the fact that the surviving partners continued the same partnership business an agreement to that effect should be implied, and that the continuation of the bus and lorry operations by the two surviving partners even after the death of one of the partners will lead to the inference that the death of a partner shall not result in the dissolution of the partnership firm. In taking that view, the Tribunal took into account the fact that the partnership is not constituted for a fixed term, that it is an unregistered one constituted for carrying on a transport business, that two surviving partners continued to carry on the same bus or lorry business which was originally carried on by the three partners. This reasoning of the Tribunal is attacked by the Learned Counsel for the petitioners as unsound.

8. The Learned Counsel for the petitioners refers to the decision of Ramesam, J., in Sayyed Abdul Hawk and Others Vs. Tumuluri Vaikuntam, . In that case the Court expressed the view that though a contract to the contrary within the meaning of Section 253 of the Contract Act (Section 42 of the Partnership Act) need not always be express and can be inferred from certain facts, the mere existence of an adventure is not such a fact leading to an inference of an

agreement to the contrary and the relevant observations are these:

It is not possible to hold that where-ever there is an adventure that itself amounts to a contract to the contrary. I do not say that "a contract to the contrary" should be always express. It may be that it can be inferred from certain facts but it seems to me that the mere existence of an adventure is not such a fact as leads to the inference of an agreement to the contrary.

But the above case related to the interpretation of Section 42(b) of the Partnership Act dealing with the dissolution of the firm by completion of an adventure and, therefore, the said decision that from the mere existence of an adventure one cannot infer an agreement to the contrary cannot be taken to be a direct decision on the point in question. It is well-established that an agreement to the contrary contemplated by Section 42 of the Partnership Act need not be in writing but can also be oral. It is equally well-established that such an agreement need not be express but can be implied from the conduct of the surviving partners in carrying out the partnership activities. In *Dwarkadas Khetan and Co. Vs. Commissioner of Income Tax, Bombay City, Bombay*, , a Division Bench of the Bombay High Court consisting of Chagla, C.J., and Tendolkar, J., had expressed the view thus:

What is overlooked is that the law does not require that a partnership deed should be in writing. The agreement of partnership may be oral and the oral partnership agreement is as effective as a Written partnership agreement. It is, only for the purpose of Section 26-A and for the purpose of registration, that an instrument of partnership is necessary, and partners who have already started doing business by an oral agreement would be perfectly justified in saying to themselves....

The above decision proceeds on the basis that an agreement to form a partnership may be oral and, therefore, an agreement to the contrary contemplated by Section 42 can also be oral, provided such an oral agreement is entered into before the death of a partner. In, AIR 1945 91 (Privy Council) Sir Madhavan Nair, held that where a partnership firm has gone on as a living concern continuously since the time it was started, notwithstanding the death of some members of the firm with the surviving partners or by the legal representatives of the deceased partner taking his place, death should not be taken, to result in the dissolution of the firm. In *G. S. Oswal v. R.V. Dixit* AIR 1956 Nag. 46, a Division Bench took the view that the existence of an agreement between the partners to the effect that the death of the partner will " not cause dissolution of the partnership can be inferred from the conduct of the parties. In that case in spite of the intervening death of partners, the partnership was continued by the legal representatives of the deceased partners stepping into their shoes and this was taken as sufficient to raise a plea of existence of an agreement to the contrary between the partners as contemplated in Section 42, though there was no direct evidence of an express agreement to the effect that the partnership would not be dissolved on account of the death of the partner. In

Kesrimal and Another Vs. Dalichand and Others, the Court has also taken the same view and the reasoning contained therein is as follows:

It is true that Section 42 of the Partnership Act provides that a firm is dissolved by the death of a partner. It must, however, be remembered that this would be subject to contract between the partners as the opening words of Section 42 go to show. Again, it is not necessary that a contract between the partners in this connection need be express, but may be implied and it may be possible to spell out such a contract from the subsequent conduct of the surviving partner and the heirs of the deceased. Whether a firm which should have otherwise been dissolved by the death of one of its partners, still continued to exist without being dissolved, would depend on the facts and circumstances of each case.

In Tulsiram Sanganerla and Another Vs. Smt. Anni Bai and Others, , it has been held that though normally a partnership firm would stand dissolved on the death of a partner unless it is otherwise contracted for, if it is found from the subsequent conduct of the parties that despite the death of a partner the partnership continued and functioned with the surviving partners, then it would be taken that it continued by virtue of a contractual relationship.

9. Having regard to the principles laid down in the above cases, the conduct of the surviving partners in this case in continuing the partnership business will lead to the inference that there should have been an agreement that the death of a partner will not result in the dissolution of the firm. Therefore, the Tribunal's finding that the respondent firm which has been granted the permit is the firm which had applied for a permit in the year 1960 has to be accepted.

10. This leads to the further question as to who among the three applicants is entitled to the permit. As regards the 36th applicant, the Regional Transport Authority has excluded him from consideration on the ground that he has been granted a permit in the same sitting. It excluded the claim of the 25th applicant on the ground that he has experience only in lorry operations and not in the bus operation while the 23rd respondent has experience in bus operations. The Tribunal has taken the view that the 25th applicant is not entitled to two marks for experience as granted by the Regional Transport Authority and, therefore, he is entitled only to two marks as against four marks which the 23rd applicant is entitled to get. It is not in dispute that the Regional Transport Authority while awarding two marks for experience in the case of the 25th applicant took into account the experience of one Madhayya, who claimed to be the managing director in bus operation. Before the Tribunal it has been established that the said Madhayya, was not its managing director on the date of the grant. The fact that the said Madhayya, was not the managing director on the date of the grant has not been disputed before me. What is stated by the Learned Counsel is that the said Madhayya, has been made a director-in-charge of the lorry business and, therefore, his experience in lorry operation should be taken into account. But it is not disputed by the Learned Counsel for the petitioners that it is only the managing director's experience in bus operation that can be taken into account

and not the experience of everyone of the directors or shareholders of the company. Therefore, the Tribunal appears to be right in its finding that the two marks awarded to the 25th applicant for experience on the ground that its managing director had experience in lorry operation cannot be sustained, and, therefore, the 25th applicant should be taken to have obtained only two marks as against four marks given to the 23rd applicant.

11. Thus, excluding the 25th applicant as a person getting lesser marks it only remains to be considered the claim of the 36th applicant who also secured four marks. He has not been considered for the grant only on the ground that he has been granted a permit in respect of another route in the same sitting. The Learned Counsel for the 36th applicant brings to my notice the decision of the Supreme Court in *Ajantha Transports (P) Ltd., Coimbatore Vs. T.V.K. Transports, Pulampatti, Coimbatore District*, wherein it has been held that the relevance of the previous possession or grant of a permit appears only when other facts and circumstances connecting it with and showing either the adverse or beneficial effects of its impact, in a particular case, on the interest of the public are shown to exist, and that unless and until these other facts and circumstances indicating the nexus or connection with public interest appear, such a fact by itself should not affect an application for a permit and that the weight to be attached to such a consideration will, obviously, depend upon the totality of all such facts and circumstances viewed in a proper perspective. Reference has also been made to a decision of the Supreme Court, in *Patiala Bus (Sirhind) Pvt. Ltd. Vs. State Transport Appellate Tribunal, Punjab and Others*, which has set down the main considerations required to be taken into account for granting a permit u/s 47 as the interest of the public in general and the advantages to the public of the service to be provided including the consideration of factors such as the experience of the rival applicants, their best performance, the availability of stand by vehicles with them, their financial resources, the facility of well-equipped workshop possessed by them etc., and the failure to take into account of these considerations and proceeding as if the stage carriage permits are granted on the basis of a fair and equitable division among the rival applicants is wholly erroneous. Again in *K. Balasubramania Chetty Vs. N.M. Sambandamoorthy Chetty*, the Court pointed out that u/s 47(1) it is ultimately on the touchstone of public interest that the selection of an applicant for grant of permit must be justified and the mere fact that an applicant has more than one permit or he is a recent grantee cannot by itself be regarded as a factor against him in the matter of granting permits in the comparative scale, unless the facts and circumstances indicate that the grant of a permit to him will not serve the interest of the public generally. On this aspect the Tribunal has upheld the order of the Regional Transport Authority rejecting the claim of the 36th applicant on the ground that he was given another permit, at the same sitting as in its view the grant of the permit at the same sitting is a proper ground for elimination. In view of the above decisions of the Supreme Court, the rejection of the application of the 36th applicant on the only ground that he has been granted a

permit at the same sitting both by the Regional Transport Authority and by the Tribunal is not proper. The Regional Transport Authority as well as the Tribunal have not compared the claims of the 23rd and 36th applicants as the 36th applicant's claim has been rejected on an erroneous ground. Now that applicant No. 25 goes out of the picture, the rival claims of the 23rd and 36th applicants have to be considered by the Tribunal which it has not done in the impugned order. Civil Revision Petition No. 1029 of 1973 is therefore allowed with a direction to the Tribunal to consider the appeal of the 36th applicant afresh and in the light of the above observations. Civil Revision Petition No. 2671 of 1972 is dismissed. There will, however, be no order as to costs.