

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

UNIVERSITY OF LONDON W.C.1. 31360
 20 JUL 1953
 INSTITUTE OF ADVANCED LEGAL STUDIES

BETWEEN

THE UNITED BUS CO. LIMITED - - - Appellants

AND

THE KANDY TOWN BUS CO. LIMITED - - Respondents.

Case for the Appellants.

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1. This is an appeal, by Special Leave, from a Judgment of the Supreme Court of the Island of Ceylon, dated the 3rd February, 1949, reversing a decision of the Tribunal of Appeal (constituted under the Motor Car Ordinance, No. 45 of 1938), dated the 22nd February, 1947, which affirmed a decision of the Commissioner of Motor Transport (hereinafter called "the Commissioner"), dated the 9th March, 1946, whereby the Appellants' application (made under the Omnibus Service Licensing Ordinance, No. 47 of 1942) for an exclusive road service licence to operate a regular service of omnibuses on a route connecting the town of Kandy with certain outlying regions was granted and a substantially similar application by the Respondents was refused.

pp. 20-23.

p. 19.

p. 13 Annexure

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2. The main questions for determination on this appeal are whether or not—

(i) the judgment of the Supreme Court (which was delivered more than seven months after the appeal had been argued) was arrived at *per incuriam*—as a direct result of a misapprehension of the extent of a road service licence already held by the Respondents;

(ii) the application by the Supreme Court of the provisions of the said Ordinance No. 47 of 1942 to the facts of this case was misconceived.

Annexure

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In the Appellants' respectful submission both of these questions should be answered in the affirmative, and the appeal, therefore, ought to succeed.

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3. Relevant portions of the Motor Car Ordinance No. 45 of 1938 (hereinafter called "the 1938 Ordinance") and the Omnibus Service Licensing Ordinance No. 47 of 1942 (hereinafter called "the 1942 Ordinance"), together with a map showing the route in dispute, and routes (or portions thereof) in respect of which both parties already held licences, are included in an Annexure hereto.

Annexure

4. Omnibus services in Ceylon are now operated under the authority of exclusive road service licences which are issued by the Commissioner under the 1942 Ordinance. In deciding whether to grant or refuse an application, or in approving routes in respect of which the licence is to be issued, or in exercising his discretion to attach conditions to the issue of a licence, the Commissioner must have regard to matters such as: (A) the suitability of the route or routes on which it is proposed to provide a service; (B) the extent, if any, to which the needs of the said route or routes are already adequately served; and (C) the needs of the areas as a whole in relation to traffic and the co-ordination of passenger transport. Further, he must take into consideration any representations which may be made to him by persons who are already providing transport facilities along or near the proposed route or routes. 10

Annexure

5. The congested and chaotic conditions which previously existed when, under the 1938 Ordinance, licences were issued to different omnibus proprietors to operate services on the same route, are now avoided by Section 7 (1) of the 1942 Ordinance which enacts that the issue of licences is so to be regulated by the Commissioner as to secure that different persons are not authorised to provide regular services on the same section of any highway, but this direction is subject to the proviso that the Commissioner may, in the public interest, license two or more persons to operate services involving the use of the same section of a highway if: (A) the said section is common to the respective routes to be used for the purposes of the services to be provided under each of the licences but does not constitute the whole or major part of any such route, and (B) the principal purpose for which each such licence is issued is to authorise a service substantially different from the services to be provided under the other licence or licences. 20 30

6. For the application of the said proviso to Section 7 (1), i.e., to enable the Commissioner to issue licences to two or more persons to provide regular services involving the use of the same section of a highway, the following conditions must, it is submitted, exist—

(i) the Commissioner must have before him either applications from two or more persons for the issue of licences in respect of substantially different services, or an application from one person for the issue of a licence in respect of a service or services substantially different from all other services for which licences are in force at the time; 40

(ii) the said different services must involve the use of a section of a highway common to the respective routes to be used;

(iii) the said common section must not constitute the whole or major portion of any of the proposed routes; and

(iv) the Commissioner must be of opinion that the issue of the licences is in the public interest.

7. Before the commencement of the present dispute the Appellants and the Respondents both held exclusive road service licences which authorised them to operate omnibus services as follows :—

The Appellants operated a long distance route, from Kurunegala to the King Street Bus Stand in the town of Kandy; and, as subsidiaries to this route, they operated services from Hedeniya to Bokawala *via* Medawala, and from Arambakade to Bokawala *via* Horambawa. p. 2, ll. 24-27

The Respondents operated a town service from Katugastota to Peradeniya *via* Kandy Market Stand to Peradeniya. p. 2, ll. 21-24

10 8. As will be apparent from the map in the Annexure hereto, the said licences already held by both parties authorised them both to use a section of the highway (from near Katugastota to the Kandy King Street Bus Stand) which was, and is, common to the routes served by both; it had never been suggested that these licences were granted in conflict with the provisions of the said Section 7 (1) proviso, and it must be taken that the said common section did not constitute either the whole or the major part of either of the said routes. Annexure

The error of the learned Judge of the Supreme Court, as will be seen later, lay in his failure to notice that the Respondents' said licence was in respect of the route, Katugastota to Peradeniya (*via* the Kandy Market Stand) and *not* in respect of the route, Katugastota to Kandy. 2

9. Coming now to the applications under review :—

The Appellants, on the 12th September, 1945, applied to the Commissioner for the grant of an exclusive road service licence authorising them to operate a route between Kandy (King Street Bus Stand) and Medawala (*via* Ranawana). And, on the 12th December, 1945, the Respondents applied for a similar licence authorising them to operate a substantially similar route between the Kandy Market Stand and the 5th Mile Post at Palkumbura. p. 9
p. 3

30 10. To Question No. 3 in both application forms, which were identical, "Name any part of the route applied for which is common to any route on which any other bus owner operates a bus service," the Appellants' answer was: "Between Kandy and Katugastota"; and the Respondents' answer was "Between Kandy Market Stand and junction of Katugastota and Ranawana Roads." p. 9
p. 3

11. If the said two applications and the then existing licences are studied with the aid of the map and in the light of the statutory provisions—in particular, of the proviso to the said Section 7 (1)—it will, in the Appellants' submission, be seen clearly that— Annexure

40 (i) it would not be possible to grant both applications; and

(ii) the Appellants' application could be granted without any such overlapping of the routes covered by the said existing licences as would amount to an infringement of the said proviso;

and that the question for the Commissioner, and, if the matter were carried further, for the Tribunal of Appeal, was thus a pure question of

discretion as to which of the two applications it was better in the public interest to prefer—essentially a question proper for decision by those two tribunals—and scarcely likely to raise any point worthy of consideration in the Supreme Court.

It will also be observed that—

(iii) if it were to be erroneously believed that the Respondents at that time already held a licence for a route: Katagastota to Kandy, and not one for a longer route of which the road from Katagastota to Kandy merely formed part, it would probably be right to hold that the said proviso to Section 7 (1) would prevent 10 the Appellants' application being granted.

p. 13

12. After an enquiry into the various questions of fact which arose on both applications, the Commissioner refused the Respondents application and granted that of the Appellants, and, by his letter, dated the 9th March, 1946, both parties were informed of his decision.

p. 17, ll. 21-22

p. 18, ll. 11-15

13. The (now) Respondents appealed to the Tribunal of Appeal. In their Statement (or Petition) of Appeal, they rightly described the route which they were already licensed to serve as being "from Katugastota through the Market Stand Kandy Town to Peradeniya and Ampitiya" (and not, be it noted again, from Katugastota to the Kandy Market 20 Stand). They complained that the Commissioner's decision was "against the law and the weight of circumstances and consideration for traffic" and "a violation of the spirit on which we were invited to perform a Kandy Town Service."

14. The Tribunal of Appeal (Dr. Paul Pieris, Chairman, W. S. De Saram, Esq., and M. A. S. Marikar, Esq., Members) dismissed the appeal. Its order, dated the 2nd February, 1947, was as follows:—

p. 19

"We have carefully considered everything and have come to the conclusion that there is insufficient evidence to vary the decision of the Commissioner. Appeal dismissed." 30

p. 2

15. On the application of the (now) Respondents, the Tribunal of Appeal Stated a Case for the opinion of the Supreme Court under Section 13 (8) of the 1942 Ordinance.

The Case Stated did not—and, it is submitted, quite properly did not—refer, either directly or indirectly, to any question which might arise under the said Section 7 (1) proviso. Paragraphs 1 and 2 thereof narrated, briefly, the facts leading up to the present dispute, and the concluding paragraphs 3 and 4 ran as follows:—

p. 2

"3. The only question which had to be decided was which of the applications should be allowed. From the point of view of the greater convenience of the public the Commissioner arrived at a certain decision (Annex 5) and this Tribunal after listening to everything that had been urged (copy of the Petition of Appeal to the Tribunal marked Annex 7) saw no reason to differ from the Order of the Commissioner (Copy of Order of Appeal Tribunal marked Annex 8). 40

"4. The only question that arises for the opinion of the Supreme Court is—

"Is the Tribunal of Appeal justified in upholding the decision of the Commissioner of Motor Transport?"

16. In the Supreme Court arguments on the Case Stated were heard by Basnayake J. on the 30th June, 1948. p. 20, l. 15

17. The learned Supreme Court Judge did not deliver his Judgment until the 3rd February, 1949. He answered the question referred to him in the negative, and decided that the application of the (now) Respondents should be granted and that of the Appellants refused. p. 20, l. 16
p. 23, ll. 30-33

18. In his Judgment, the learned Supreme Court Judge, after referring to certain facts concerning the rival applications, said :—

"A part of the route proposed by the second Respondent" [i.e. the Appellants—the first Respondent was the Commissioner] "was common to the whole of the Kandy—Katugastota road service of the appellant" [i.e. the present Respondents] "for which he already held a licence." p. 21, ll. 1-4

And later he said :—

"It appears from Annex 6" [a map—substantially the same as the map in the Annexure hereto] "that the route to be taken by the road services proposed by the applicant as well as by the second respondent overlaps the entirety of the route now taken by the applicant's" [the present Respondent's] "existing road service between the Kandy Market Bus Stand and Katugastota. It also overlaps a part, but not the greater part, of the route taken by the second respondent's existing road service to Kurunegala and Bokawala, but only to the extent that the latter is already overlapped by the existing road service of the applicant." p. 23, ll. 13-20

19. The Respondents have never possessed (and indeed they have never suggested that they did) a licence to operate an exclusive road service on the route: Kandy—Katugastota, and the learned Judge's statement that they did possess such a licence appears to have been an erroneous assumption of fact arrived at *per incuriam*.

20. The serious nature of this judicial error will be apparent from the following extract from the Judgment in which the learned Judge, convinced mistakenly that the Respondents did possess such a licence, applied the said Section 7 (1) proviso of the 1942 Ordinance to the facts as assumed by him. He said :—

"Section 7 of the Omnibus Service Licensing Ordinance No. 47 of 1942 provides that the Commissioner may issue licences to two or more persons authorising the provision of regular omnibus service involving the use of the same section of a highway, if, but only if, that section of the highway is common to the respective" p. 23, ll. 21-26

routes to be used for the purpose of the services to be provided under each of the licences, but does not constitute the whole or the major part of any such route.

p. 23, ll. 26-29

“ The issue of the road service licence to the second respondent ” [i.e. the present Appellants] “ for the new road service proposed by him is therefore contrary to the express direction contained in Section 7.

p. 23, ll. 30-33

“ In view of the above considerations I think the Tribunal of Appeal was not justified in upholding the decision of the Commissioner of Motor Transport. 10

“ On the material before me I am of opinion that the applicants’ ” [i.e. the present Respondents] “ application for a road service licence should be granted.”

p. 24

21. Against the said Judgment of the Supreme Court the present appeal to His Majesty in Council is preferred, Special Leave to Appeal having been granted to the Appellants by Order-in-Council, dated the 25th November, 1949.

The Appellants respectfully submit that the Judgment appealed from should be set aside, that the said decisions of the Tribunal of Appeal and the Commissioner of Motor Transport should be restored and that 20 the appeal should be allowed, with costs, for the following among other

REASONS

- (1) BECAUSE, on the material before him, no valid grounds existed for the reversal by the learned Supreme Court Judge of the decisions of the Commissioner and the Tribunal of Appeal.
- (2) BECAUSE it is clear that had the learned Supreme Court Judge not laboured under the said misapprehension as to the Respondents' existing licence he would have no ground for reversing the decision appealed from, and 30 would, presumably, have affirmed it.
- (3) BECAUSE the application by the said Judge of Section 7 (1) proviso of the 1942 Ordinance to the circumstances of this case followed an erroneous assumption of fact by him and cannot, therefore, stand.
- (4) BECAUSE in any event the said statutory provisions are not applicable to the facts of this case.

R. K. HANDOO.

ANNEXURE.

THE OMNIBUS SERVICE LICENSING ORDINANCE NO. 47 OF 1942.

2.—(1) No omnibus shall, on or after the first day of January, nineteen hundred and forty-three, be used on any highway for the conveyance of passengers for fee or reward, except under the authority of a road service licence issued by the Commissioner of Motor Transport under this Ordinance.

Licences required to authorise the provision of road services by omnibuses and motor cabs

- (2) * * * * *
- (3) * * * * *
- 10 (4) * * * * *

3.—(1) Every application for a road service licence shall be made to the Commissioner in such form as the Commissioner may provide for the purpose, and shall contain—

Application for licence

- (a) particulars of the route or routes on which it is proposed to provide the service ;
- (b) particulars of the type or types of the omnibuses to be used for the purposes of the service ;
- (c) in the case of a licence for a regular service, the time-table and fare-table of the proposed service ;
- 20 (d) . . .
- (e) such particulars as the Commissioner may require as to the wages and conditions of employment of the persons employed or proposed to be employed for the purposes of the service ;
- (f) such other particulars as the Commissioner may require for the purposes of this Ordinance.

- (2) * * * * *

4. In deciding whether an application for a road service licence should be granted or refused, in approving under Section 5 the route or routes in respect of which any such licence should be issued, and in exercising his discretion as to the conditions to be attached under Section 6 to any such licence, the Commissioner shall—

Matters to be considered by Commissioner

- (a) have regard to the following matters—
- (i) the suitability of the route or routes on which it is proposed to provide a service under the licence ;
- (ii) the extent, if any, to which the needs of the proposed route or routes or of any such route are already adequately served ;
- (iii) the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services and the provision of unremunerative services) and the co-ordination of all forms of passenger transport ;
- 40

- (iv) [the financial position of the applicant]
- (v) [contravention of other law prescribing speed limit]
- (vi) such other matters as the Commissioner may deem relevant ;
and
- (b) take into consideration any such representations as may be made to him by persons who are already providing transport facilities along or near to the proposed route or routes or any part thereof, or by any local authority within the administrative limits of which any proposed route or part thereof is situate :

Provided, however, that the Commissioner shall not, on the ground of 10 any representations made to him under paragraph (b), make any decision refusing any application for a road service licence or attaching any condition to any licence, except after notice to the applicant and consideration of any such matters as may, before a date to be specified in the notice, be urged by the applicant in support of his application.

Approval of routes

5.—(1) In any case where the Commissioner decides to grant any application for a road service licence for a regular service, he shall specify in the licence the route or routes on which the service is to be provided under the licence and may for such purpose approve, subject to such modifications or variations as he may consider necessary, the route or 20 routes or any one or more of the routes proposed by the applicant.

(2) * * * * *

Conditions of licence

6.—(1) Subject to the provisions of this Ordinance and of any regulations which may be made in that behalf, the Commissioner may attach to any road service licence all such conditions as he may think fit with respect to the matters mentioned in Section 4 and generally for securing the safety and convenience of the public, including conditions requiring . . .

(2) * * * * *

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(3) * * * * *

Road service licences to be usually exclusive

7.—(1) The issue of road service licences under this Ordinance shall be so regulated by the Commissioner as to secure that different persons are not authorised to provide regular omnibus services on the same section of any highway :

Provided, however, that the Commissioner may, where he considers it necessary so to do having regard to the needs and convenience of the public, issue licences to two or more persons authorising the provision of regular omnibus services involving the use of the same section of highway, if, but only if—

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- (a) that section of the highway is common to the respective routes to be used for the purposes of the services to be provided under each of the licences, but does not constitute the whole or the major part of any such route ; and

(b) the principal purpose for which each such licence is being issued is to authorise the provision of a service substantially different from the services to be provided under the other licence or licences.

(2) * * * * *

8. The Commissioner shall cause a notice of the refusal of any application for a road service licence to be served on the applicant for that licence ; and in any case where there have been two or more applications for the issue for the first time under this Ordinance or licences in respect of the same route or of routes which are substantially the same, the Commissioner shall specify in the notice of refusal of any such application, the name of the applicant to whom the licence is being issued.

Notice of refusal

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13.—(1) In any case where there have been two or more applications for the issue for the first time under this Ordinance of a licence or licences in respect of the same route or of routes which are substantially the same, any person whose application has been refused may, before the expiry of a period of ten days from the date of the service on him of notice of such refusal, appeal against the decision of the Commissioner to a Tribunal of Appeal.

Appeals against decisions of the Commissioner

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* * * * *

(8) The provisions of Section 4 of the Motor Car Ordinance, No. 45 of 1938, and the regulations made thereunder shall, subject to such modifications or variations as may be prescribed by regulations under this Ordinance, apply in the case of appeals under this Section in like manner as they apply in the case of appeals preferred under that Ordinance :

Provided, however, that for the purposes of the application of the provisions of Sub-section (6) of the aforesaid Section 4 in the case of any appeal under this Section, those provisions shall have effect as though for every reference therein to a question of law, there were substituted a reference to a question whether of law or fact.

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14.—(1) A Tribunal of Appeal may in the case of an appeal under Section 13 (1) by an applicant for a licence—

Powers of Tribunals of Appeals.

- (a) make order confirming the decision of the Commissioner ; or
- (b) make order that a licence shall be issued to the applicant and that the licence, if any, issued to any other applicant in respect of the same route or of a route which is substantially the same shall be revoked with effect from a date specified in the order.

(2) * * * * *

(3) In any case where a Tribunal of Appeal makes order under the preceding provisions of this Section that a licence shall be issued to any applicant, the Tribunal shall determine the route or routes on which a service is to be provided under the licence and the conditions to be attached thereto and shall for the purposes of such determination have regard to the provisions of Sections 4 to 7 of this Ordinance.

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ANNEXURE.

THE MOTOR CAR ORDINANCE NO. 45 OF 1938.

(See now Section 13 (8) of the 1942 Ordinance.)

Tribunal of Appeal

4.—(1) For the purposes of this Ordinance the Governor may from time to time appoint not less than ten persons all of whom shall form a panel from which Tribunals of Appeal shall be constituted as hereinafter provided.

(2) * * * * *

(3) Every Tribunal of Appeal shall consist of three persons on the panel, at least one of whom shall be an Advocate or Proctor of the Supreme Court of not less than ten years' standing.

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(4) It shall be the duty of a Tribunal of Appeal to hear and determine all appeals preferred in accordance with the provisions of this Ordinance or any regulation.

(5) * * * * *

Power to state case Supreme Court

(6) (a) The decision of a Tribunal of Appeal shall be final :

Provided, however, that where an order is made by a Tribunal on any appeal, the appellant or the Commissioner may, subject to such conditions as may be prescribed and on payment of the prescribed fee, make an application to the Tribunal to state a case on a question of law* for the opinion of the Supreme Court ; and upon such application being made, it shall be the duty of the Tribunal, if a question of law is involved to state a case accordingly.

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* See now s. 13 (8) of the 1942 Ordinance, supra.

(b) The stated case shall set forth the facts and the decision of the Tribunal, and the party requiring it shall transmit the case, when stated and signed, to the Supreme Court within fourteen days after receiving the same.

(c) At or before the time when he transmits the stated case to the Supreme Court, the party requiring it shall send to the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case.

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(d) Any Judge of the Supreme Court may cause a stated case to be sent back for amendment by the Tribunal and thereupon the case shall be amended accordingly.

(e) Any Judge of the Supreme Court may hear and determine any question of law arising on a stated case and upon such determination the Registrar of the Court shall remit the case to the Tribunal with the opinion of the Court thereon ; and the Tribunal shall, in such manner as that opinion may require, rescind or revise the order in connexion with which the case was stated, and where any order so rescinded was to the effect that a licence should be refused, in addition make a new order that the licence should be issued.

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(f) In any proceedings before the Supreme Court under this section, the Court may make such order in regard to costs in the Supreme Court and in regard to the fee paid under paragraph (a) as to the Court may seem fit. Such costs may, notwithstanding anything contained in any other written law, be recoverable in the manner prescribed in sub-section (7).

(7) * * * * *

BOKKAWALA

HORAMBAWA

PUJAPITIYA

MATALE ROAD

MEDAWALA

AMBATENNE

5th MILE POST
PALKUMBURA

ARAMBAKADE

HEDENIYA

RANAWANA

To Madawala

KATUGASTOTA

KURUNEGALA ROAD

KATUGASTOTA ROAD

- The Appellants' Services
- The Respondents' Services
- Route in dispute

[Same as Annex. 6 to
Statement of Case but
with location of Bus
Stands and Route in
dispute shown]

TRINCOMALEE STREET

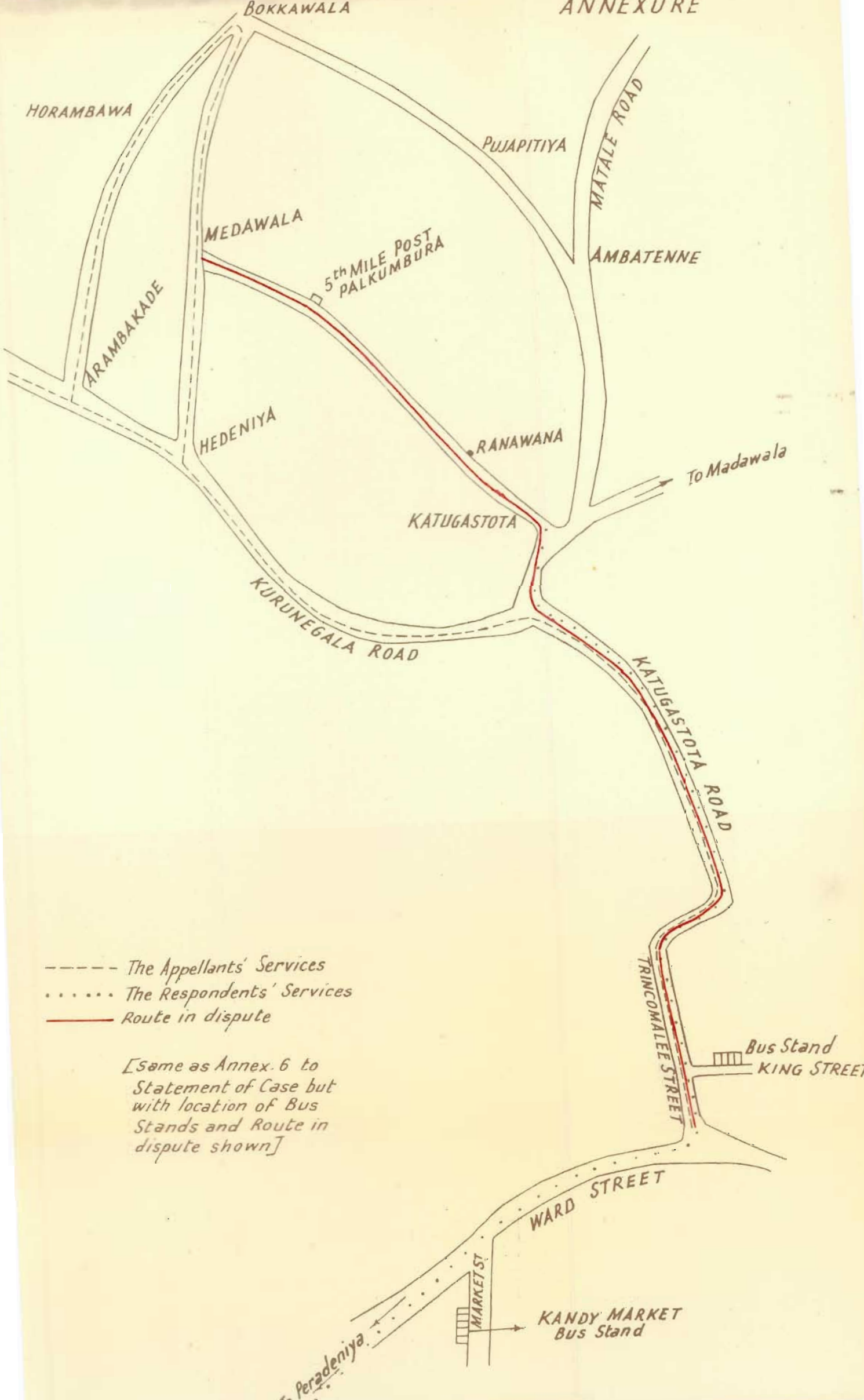
Bus Stand
KING STREET

WARD STREET

MARKET ST

KANDY MARKET
Bus Stand

To Peradeniya



Appeal No. 32 of 1950.

In the Privy Council.

ON APPEAL

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Case for the Appellants.

A. L. BRYDEN & WILLIAMS,

53 Victoria Street,

London, S.W.1,

Solicitors for the Appellants.