

~~C. L. C. 2.~~

22, 1951

31261 of 1950.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

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

BETWEEN

THE UNITED BUS COMPANY LIMITED - - *Appellant*

AND

THE KANDY TOWN BUS COMPANY LIMITED *Respondent.*

CASE FOR THE RESPONDENT

RECORD.

10 1. This appeal is by special leave from a judgment of the Supreme Court of Ceylon, dated 3rd February, 1949, reversing a decision dated 22nd February, 1947, of the Tribunal of Appeal under the Motor Car Ordinance, No. 45 of 1938, whereby the said Tribunal confirmed a decision of the Commissioner of Motor Transport (or of one D. R. C. Hanwella on behalf of the Commissioner of Motor Transport) dated 9th March, 1946, refusing an application by the Respondent under the Omnibus Service Licensing Ordinance, No. 47 of 1942, for a road service licence for a certain route, viz. between Kandy Market Stand and 5th Mile Post at Palkumbura, and granting an application by the Appellant under the said Ordinance for a road service licence for substantially the same route, viz. between Kandy and Medawala. p. 20. p. 19. p. 13.

2. The question that arises for determination on this appeal is whether the said judgment should be reversed on the grounds, alleged by the Appellant, that the said judgment was arrived at *per incuriam* as a result of a misapprehension of the extent of a road service licence already held by the Respondent and that the application by the Supreme Court of the provisions of the said Ordinance, No. 47 of 1942, to the facts of the case was misconceived.

30 3. The Omnibus Service Licensing Ordinance, No. 47 of 1942, provides for a system of exclusive road service licences for omnibuses. Section 2 of the said Ordinance prohibits the use of omnibuses 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. Section 3 contains provisions as to the form in which applications for licences are to be made to the Commissioner. Section 4 prescribes the matters which the Commissioner is required to consider in deciding whether an application should be granted or refused. Section 7

contains provisions for securing that licences granted shall usually be exclusive. By Section 8 the Commissioner is required to cause notice of the refusal of any application for a licence to be served on the applicant, and Section 13 makes provision for appeal against the decision of the Commissioner, by an unsuccessful applicant, to a Tribunal of Appeal, and gives the appellant the further right to have a case stated for the opinion of the Supreme Court on any question whether of law or of fact. The powers of a Tribunal of Appeal are laid down in Section 14. Copies of the material parts of the said Ordinance, together with a copy of the material parts of Section 4 of the Motor Car Ordinance, No. 45 of 1938, under which 10 Tribunals of Appeal are constituted, are annexed hereto.

pp. 3, 4, 5.
p. 7.

4. The Respondent made an application to the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942, for the grant of a road service licence authorising it to provide a regular omnibus service on a route between the two terminal points Kandy Market Stand and 5th Mile Post at Palkambura : the said application was dated 12th December, 1945. The route in respect of which the Respondent made its said application is shown in the sketch map (Annexure 2) annexed to the Case stated by the Tribunal of Appeal.

p. 15.

5. At the time when the said application was made the Respondent 20 held a road service licence, under the authority of which it operated an omnibus service on part of the route in respect of which it now sought a licence : the route of the said service is shown on the sketch map (Annexure 6) annexed to the said Case Stated.

p. 17.

6. The Respondent provided a "town" service, i.e. an omnibus service for the purpose of taking the regular passengers in and out of the town of Kandy from the outskirts of the town and from various points in the town, and at the time of its said application had provided such a service for many years.

p. 15.

7. The Appellant also provided a certain omnibus service but this was 30 substantially different from the Respondent's said "town" service, in that the Appellant's service was a "long distance" service, i.e. a service between Kandy and Kurunegala, 26 miles from Kandy, and intermediate places, with two branches between the Kandy-Kurunegala road and Bokkawala : part of the route of the Appellant's said service is shown on the sketch map (Annexure 6) previously referred to.

pp. 9, 10.
p. 11.

8. The Appellant had made an application, similar to the Respondent's application, for the grant to them of a road service licence to authorise it to provide an omnibus service on a route substantially the same as the route proposed by the Respondent but longer by about 1 mile ; the said 40 application was dated 12th September, 1945. The route proposed by the Appellant is shown in the Sketch map (Annexure 4) annexed to the said Case Stated.

9. The Respondent's application was refused and the Appellant's application was granted. Notice of this decision was given by a letter dated 9th March, 1946, signed by one D. R. C. Hanwella "for Commissioner

of Motor Transport ” ; it does not appear from the said letter whether the Commissioner himself had considered the said applications or that the said decision was made by the Commissioner himself, and the said letter did not state the reason or reasons for the said decision. A copy of the said letter was annexed to the said Case Stated (Annexure 5). p. 13.

10. The Respondent appealed from the said decision to the Tribunal of Appeal, and in a Statement of Appeal, a copy of which was annexed to the said Case Stated (Annexure 7), put forward the following reasons why the said decision should be reversed :— pp. 17-18.

10 “ (iii) At present nobody is doing the service between Katugastota and Medawala via Ranawana.

(iv) The Appellant runs services from Katugastota through the Market Stand Kandy Town to Peradeniya and Ampitiya. In the absence of any other convenient means for people of Ranawana to come to town, they walk up to the Katugastota Bus Stand and make use of our services which have been established to serve the people who travel in and out of town and from the various points in the town and its outskirts. We have been established as a Town Service on the invitation of the Chairman of the Municipal Council for the purpose of taking the regular passengers in and out of town from the outskirts of the town and from various points in the town. We have serviced people of the outskirts of the town and those within for over 10 years.

(v) The Commissioner has refused our application and granted a road service licence to the United Bus Co. Ltd., to run a service through our service from the Kandy Market Stand via Katugastota and Ranawana to Medawala. By this grant the passengers who used to walk up from the Ranawana Road to Katugastota and take our service have been taken away from us and given exclusively to a long distance Company which has been instituted to service between Kurunegala and Kandy and other midway points on that route and any detours from that route. The United Bus Co. Ltd. has among its detours a service from Kandy via Hedeniya passed Medawala to Bokkawala. People on the Ranawana route who are closer to Medawala walk up to Medawala and take their buses. People from Palkumbura along Ranawana Road walk up to Katugastota and take our buses. By the grant of the Commissioner, the United Bus Co. has been allowed to start a new kind of service outside their normal area and to carry passengers whom they are not now carrying and who are being carried by us.

(vi) The decision of the Commissioner is against law and the weight of circumstances and consideration for traffic.

(vii) The grant of the Commissioner is a violation of the spirit of the understanding on which we were invited to perform a Kandy Town Service by the Chairman of the Municipal Council on which understanding we curtailed our long distance services and spent a sum of over Rs.1 lakh to provide buses according to the specifications of the Chairman and adopting ourselves to all his conditions.

(viii) The long distance companies were intended to do long distance bus services while the town services have been organised to serve the needs of the daily travellers to the town from its outskirts.

(ix) If the long distance companies have obtained their monopoly rights for long distance route it is unfair that the Department of the Commissioner should allow them to evolve a new technique in asking for various short distance routes to cut into the profits of town services thereby making for uneconomic competition and making the position of town companies intolerable. 10

(x) The authorities are allowing town bus services to come up for the convenience of travellers in and out of the town from their suburbs and such service should be protected from undue competition from long distance services after they have been set up by Government for the benefit of the public.

(xi) The Kandy Town Bus Co. has only three routes in all so far and this is the fourth route it has asked for in order to make it convenient for the public who walk along Ranawana road to enable them to travel in buses in and out of the town. The grant of the Commissioner to another company of our route is tantamount to taking off a slice of our income and giving it to a long distance company which has a number of long and lucrative routes." 20

p. 19.

11. The Respondent's said appeal was dismissed by Order of the Tribunal of Appeal dated 22nd February, 1947 : a copy of the said Order was annexed to the said Case Stated (Annexure 8). The Tribunal of Appeal did not state the reason or reasons for their said decision.

p. 2.

12. The Respondent applied to the Tribunal of Appeal to state a case for the opinion of the Supreme Court under Section 13 (8) of the said Omnibus Service Licensing Ordinance, No. 47 of 1942, and accordingly a Case was stated, dated 31st December, 1947. The question for the opinion of the Supreme Court was stated, in the said Case, in the following terms :— 30

" 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 ? "

The said Case Stated was considered in the Supreme Court, and the judgment, dated 3rd February, 1949, delivered by Basnayake, J.

p. 21.

13. In the course of his judgment the learned Judge observed that the letter dated 9th March, 1946, signed by D. R. C. Hanwella, was not under the hand of the Commissioner of Motor Transport, and that it did not appear from the said letter that the Commissioner himself had made the decision thereby conveyed, and stated that applications for road service licences under the Omnibus Service Licensing Ordinance, No. 47 of 1942, must be considered and decided by the Commissioner himself. The learned Judge further observed that the reasons for the refusal of 40

the Respondent's application were not contained in the said letter of 9th March, 1946, and do not appear to have been recorded elsewhere and then went on :—

10 “ In the case of decisions under section 4 of the Omnibus Service Licensing Ordinance No. 47 of 1942 the Commissioner should state his reasons in view of the injunction to the Commissioner in section 4 (a) that in making his decision thereunder he should have regard to the matters enumerated therein. The decision should be in the form of a reasoned document which states the conclusion as to the facts and as to the questions of law, if any, which have arisen for determination by the Commissioner. A statement of the reasons underlying the Commissioner's decision would not only materially assist the tribunal of appeal in the exercise of its appellate functions, but also help the appellant to formulate the grounds of appeal which he is required to state by regulation 5 of the regulations made under section 4 of the Motor Car Ordinance. The instant case offers a good example of the difficulties caused by the absence of such a statement. A bare refusal of the applicant's application as in Annex 5 gives no indication that the Commissioner has exercised his judgment with due regard to all the matters he is required by the statute to consider.”

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And in reference to the decision of the Tribunal of Appeal the learned Judge remarked :—

“ Its decision is recorded with the same brevity as the Commissioner's.” p. 22.

14. The said Judgment contained the following statement as to the nature of the questions for the determination of the Supreme Court :—

30 “ . . . the case stated . . . appears to raise both questions of law and fact.”

15. The Judgment then set out the Case Stated, followed by the sentence :—

“ It does not appear from the stated case that any facts outside the documents annexed to it were before the Commissioner or the Tribunal of Appeal, for if there were they would have been stated.” p. 23.

There follows the passage upon which the Appellant relies in alleging that the learned Judge, in applying the provisions of Section 7 of the said Omnibus Service Licensing Ordinance, No. 47 of 1942, acted *per incuriam*, and then the final conclusion is stated, in the following terms :—

40 “ 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. On the material before me I am of opinion that the applicant's application for a road service licence should be granted.” p. 23.

16. Dealing with the application of the said Section 7 of the said Omnibus Service Licensing Ordinance, No. 47 of 1942, the learned Judge said :—

“ It appears from Annex 6 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 existing road service between the Kandy Market Bus Stand and Katugastota.”

“ Section 7 of the Omnibus Service Licensing Ordinance, No. 47 of 1942, provides that the Commissioner may issue licences 10 to two or more persons authorising the provision of regular omnibus services involving the use of the same section of a highway if, but only if, that section of the highway is common to the respective routes to be used for the purpose of the service to be provided under each of the licences, but does not constitute the whole or the major part of any such route. The issue of the road service licence to the second respondent for the new road service proposed by him is therefore contrary to the express direction contained in section 7.”

17. The way in which the Supreme Court is required to deal with any 20 Case Stated for the Court's opinion under the Omnibus Service Licensing Ordinance, No. 47 of 1942, was considered by de Kretser, J., in *Blue Line, Green Line, Red Line v. Commissioner of Transport* (1944) 44 N.L. 401, and the effect of the material statutory provisions were stated (correctly, it is submitted) by the learned Judge in that case as follows (p. 403) :—

“ Ordinance No. 47 of 1942, which is to be read along with the main Motor Ordinance, provides for a case to be stated on law as well as on facts. I am not clear as to what exactly is meant by a case stated on facts, but it seems to me that just as it was intended that the Commissioner's decision should be open to review by the 30 Tribunal of Appeal in every respect—*vide* section 50 of the main Ordinance—so in the same way this Court should be able to review the whole case when the matter came before it through the medium of a case stated.”

18. Special leave to appeal was granted by His Majesty's Order in Council of the 25th November, 1949.

19. It is humbly submitted that the Appeal should be dismissed for the following, among other,

REASONS

- (1) Because the Judgment of the Supreme Court was an 40 exercise of a discretion by the learned Judge after a review of the whole case and a consideration *de novo* of all the material before him, and there is nothing in the said Judgment to show that the said discretion was improperly or incorrectly exercised.

- (2) Because the learned Judge was right in holding that the issue of a road service licence to the Appellant for the new road service proposed by it was contrary to the provisions of that part of Section 7 of the Omnibus Service Licensing Ordinance, No. 47 of 1942, to which he referred.
- (3) Because the said Judgment was not arrived at *per incuriam* and the said provisions of the said Ordinance were correctly applied to the facts of the case.
- 10 (4) Because it does not appear that there was any misapprehension by the learned Judge of the extent of a road service licence already held by the Respondent.
- (5) Because even if there was a misapprehension of the extent of a road service licence already held by the Respondent, the issue of a licence to the Appellant was in the circumstances of the case contrary to the provisions of Section 7 of the said Ordinance.
- 20 (6) Because the object of the said Ordinance is to provide a system of "exclusive" road service licences for omnibuses, and the grant of the licence sought by the Appellant would cause more overlapping of omnibus routes than the grant to the Respondent of the licence to which it is entitled under the said Judgment.
- (7) Because the decision to grant the Respondent's application for a road licence was in the circumstances of the case just and reasonable and in accordance with the provisions of the said Ordinance.
- (8) Because for other good and sufficient reasons the Judgment of the Supreme Court is correct.

MOTOR CAR ORDINANCE, No. 45 OF 1938.

* * * * *

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.

* * * * *

(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.

* * * * *

(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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ORDINANCE No. 47 OF 1942.

* * * * *

Short title.

1. This Ordinance may be cited as the Omnibus Service Licensing Ordinance, No. 47 of 1942.

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

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.

* * * * *

Application for licence.

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—

- (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 ;

* * * * *

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 ;

10 (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 ;

(iv) the financial position of the applicant, in so far as it may affect the efficient operation of the proposed service ;

(v) the question whether any provision of any other written law prescribing a speed limit is likely to be contravened ;

20 (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 :

30 Provided, however, that the Commissioner shall not, on the ground of 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.

* * * * *

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 :

Road service licences to be usually exclusive.

40 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 a highway, if but only if—

(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.

* * * * *

Notice of refusal

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 of 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, 10 the name of the applicant to whom the licence is being issued.

* * * * *

Appeals against decisions of the Commissioner.

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.

* * * * *

(8) The provisions of section 4 of the Motor Car Ordinance, No. 45 of 1938, and the regulations made thereunder shall, subject to such 20 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 of fact.

Powers of Tribunals on appeals.

14. (1) A Tribunal of Appeal may in the case of an appeal under section 13 (1) by an applicant for a licence— 30

- (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.

* * * * *

In the Privy Council.

ON APPEAL FROM THE SUPREME
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CASE FOR THE RESPONDENT

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