

1953

Present : Pule J.

EBERT SILVA BUS CO., LTD., *et al.*, Appellants, and COMMISSIONER
OF MOTOR TRANSPORT, Respondent

*S. C. 62 and 79—In the matter of cases stated under the provisions of
section 4 of the Motor Car Ordinance, No. 45 of 1938,
read with section 13 of the Omnibus Service
Licensing Ordinance, No. 47 of 1942*

*Omnibus Service Licensing Ordinance, No. 47 of 1942—Sections 6 (2), 7, 14 (3)—
Tribunal of Appeal—Scope of its jurisdiction.*

Under section 14 (3) of the Omnibus Service Licensing Ordinance it is not open to a Tribunal of Appeal to grant a road service licence to a party to run along a particular route when there is no appeal for such a route before the Tribunal.

If the Tribunal of Appeal agree with the termini and the line of a route selected by the Commissioner but are confronted with an insurmountable obstacle raised by section 7, they should leave it to the Commissioner under section 6 (2) to vary the conditions attached to an existing licence. It is essential that where the statute expressly states that a function is to be performed by the Commissioner it should be left to him in the first instance to come to a decision.

CASES stated under the Omnibus Service Licensing Ordinance.

N. E. Weerasooria, Q.C., with *N. M. de Silva* and *W. D. Gunasekera*, for Ebert Silva Bus Co., Ltd.

C. Thiagalingam, Q.C., with *S. E. J. Fernando*, *P. Somatilakam* and *T. Parathalingam*, for the High Level Bus Co., Ltd.

Stanley de Zoysa, with *C. Manohara*, for the Gamini Bus Co., Ltd.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *A. C. M. Uvais*, for the South-Western Bus Co., Ltd.

V. Tennekoon, Crown Counsel, for the Commissioner of Motor Transport.

Cur. adv. vult.

September 11, 1953. PULLE J.—

I have already dealt in my judgments on routes Nos. 1, 2 and 3 with the events which preceded the selection by the Commissioner of Motor Transport of these routes. At the same time the Commissioner selected the fourth route with which we are concerned in this case. Torrington Square at or near which a number of Government offices have come into existence is the focal point of this route. The Commissioner thought that in the interests of all concerned Torrington Square should be linked with Maradana and Pettah. Bambalapitiya as a possible terminus which would benefit travellers on the coastal belt wishing to proceed to Torrington Square was not selected because they would be served by the Ceylon Omnibus Company's buses plying on route No. 1 from Bambalapitiya to Borella. However, passengers from Maradana and Pettah had to be provided for and that was the Commissioner's reason for selecting route No. 4. It is obvious that passengers who had to go from Pettah or Maradana to Torrington Square had no interests of any kind in common with passengers from Nugegoda, Kohuwela or even Bambalapitiya. When it came to selecting an operator the Commissioner found that he could not grant a licence to any company without contravening section 7 of the Omnibus Service Licensing Ordinance, No. 47 of 1942. He thought he could find a partial remedy for the situation if the High Level Road Bus Company ran their Nugegoda-Pettah service *via* Reid Avenue or Torrington Square. He said he would allow that modification if High Level applied with an amended time table.

Appeals were taken to the Tribunal of Appeal by High Level who had made two applications, namely, one to provide a service from Torrington Square and Maradana *via* Torrington Place, Alexandra Place, Union Place and Darley Road and another from Bambalapitiya to Maradana Railway Station *via* New Bullers Road, Bullers Road, Torrington Place, Alexandra Place, Eye Hospital junction, Union Place and Darley Road. An appeal was also taken by Ebert Silva Omnibus Company, Limited,

who had made an application from Bambalapitiya Railway Station—Maradana *via* New Bullers Road, Bullers Road, Torrington Square, Alexandra Place, Eye Hospital junction and Deans Road.

The Tribunal did not grant either of the appeals of High Level or that of Ebert Silva but found a solution of their own to meet the needs of Torrington Square. They ordered that the Kohuwela—Pettah service of Gamini which runs through Deans Road be deviated at the Bullers Road roundabout to Torrington Square to rejoin the normal Pettah service at about Torrington Place. The Tribunal did not desire to increase the number of Gamini buses on the Pettah service to meet the needs of Torrington Square for fear of increasing congestion on Deans Road. The Chairman considered the claims of High Level but thought that Gamini had a slight advantage because its buses took passengers right past Maradana Railway Station itself. There are two cases stated in connexion with route No. 4. They are Supreme Court No. 62 at the instance of Ebert Silva and No. 79 at the instance of High Level.

I have heard in regard to route 4 a good many of the arguments which were urged in support of the respective claims of Ebert Silva, Gamini and High Level to route No. 2. It is not necessary to repeat them or to express an opinion on their value for the purpose of deciding the cases stated. Counsel for Ebert Silva and High Level submitted that the decision of the Tribunal was *ultra vires* and that the order made by them should be set aside. Crown Counsel appearing for the Commissioner supported them. The question is set out succinctly in paragraph (5) of the grounds which High Level wanted to be stated for the opinion of the Supreme Court :

“ Whether the Tribunal was justified in granting to the Gamini Bus Company, Limited, a licence to run from Kohuwela to Pettah *via* Torrington Square, Deans Road and Maradana when there was no appeal for such a route before the said Tribunal.”

I have already set out details of the licences applied for by High Level and Ebert Silva. Gamini made three applications, one from Pettah to Bambalapitiya Railway Station *via* Torrington Place and Torrington Square, another from Bambalapitiya Railway Station to Maradana Railway Station *via* Torrington Square and Torrington Place and a third from Torrington Square to Eye Hospital *via* Thurstan Road and Cambridge Place. On a consideration of the six applications referred to and the proceedings before the Commissioner it is obvious that the Tribunal did not have before them any appeal for a route from Kohuwela to Pettah *via* Torrington Square or, for that matter, any appeal involving the variation of the conditions of the licence for the Kohuwela—Pettah run of Gamini's. While the Commissioner selected route No. 4 he found that section 7 stood in the way of finding an operator. In appeal it was perfectly competent for the Tribunal to have selected within the ambit of the applications (or reasonable modifications thereof) a route different to the Commissioner's selection. What the Tribunal did was to travel completely outside in search of an expedient, undoubtedly, with the best of intentions. If the Tribunal agreed with the termini and the line of the route but were confronted with an insurmountable

obstacle raised by section 7, they should have left it to the Commissioner under section 6 (2) to vary the conditions of an appropriate licence that would meet the need of transporting passengers to and from Torrington Square. It is essential that where the statute expressly states that a function is to be performed by the Commissioner it should be left to him in the first instance to come to a decision. The variation of the Kohuwela-Pettah service or any other service, if such was necessary, should properly have been considered by the Commissioner. If he did decide to vary the conditions it seems doubtful whether anyone else, except the holder of the licence and the Commissioner, had any *locus standi* before the Tribunal.

It was argued that the Tribunal could justify its order under section 14 (3) of the Ordinance. I cannot agree. What the Tribunal did in effect was to vary an existing licence and not to grant a licence substantially for a route applied for by Gamini.

It is clear that the point of jurisdiction raised by Ebert Silva and High Level must succeed and I answer the question on that point in the two cases stated in favour of these companies and set aside the order of the Tribunal.

It must be understood that I express no opinion on the relative merits of the competing claimants. I understand that the legal difficulties which stood in the way of the Commissioner finding an operator to serve on route No. 4 do no longer exist—section 55 of the Motor Traffic Act, No. 14 of 1951.

As agreed I reserve for further argument what order for costs I should make.

Order of Tribunal of Appeal set aside.
