

1953

Present : Pulle J.

IN RE SOUTH WESTERN BUS CO., LTD., *et al.*

S. C. 48, 64, 65, 71—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, ss. 4 (b), 13 (8)—Case stated—Instance when a case may be stated—Route licence—Past representation by local authority—Relevancy—Certain other factors for consideration.

In a case where a route licence is revoked by the Tribunal of Appeal, the Commissioner of Motor Transport may, under section 4 (6) of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of the Omnibus Service Licensing Ordinance, assist the licence holder to place his case before the Supreme Court by himself moving to have a case stated. This does not necessarily mean that from the point of view of the executive the licence must be restored to the licence holder.

A communication addressed by a local authority drawing the attention of the Commissioner of Motor Transport to the congestion of traffic on a road within its area can be regarded as a representation under section 4 (b) of the Omnibus Service Licensing Ordinance, even though the communication was not addressed in connexion with the selection of a route of which that road forms a part.

A Tribunal of Appeal should not interfere in matters left purely to the discretion of the Commissioner of Motor Transport.

A company providing an omnibus service exclusively within an urban area has no overriding claims as against a company operating both within and outside the urban area.

CASES stated by the Tribunal of Appeal under the Omnibus Service Licensing Ordinance.

H. V. Perera, Q.C., with Colvin R. de Silva, H. W. Jayewardene, J. W. Subasinghe and A. C. de Zoysa, for the South Western Bus Co., Ltd.

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

C. Thiagalingam, Q.C., with Sylvan Fernando, P. Somatilakam and T. Parathalingam, for the High Level Bus Co., Ltd.

D. D. Athulathmudali, with L. Gunaratne, for the Colombo Omnibus Co., Ltd.

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

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

Cur. adv. vult.

September 11, 1953. PULLE J.—

*This judgment relates to four cases stated by the Tribunal of Appeal under the Omnibus Service Licensing Ordinance, No. 47 of 1942, and bearing Supreme Court Nos. 64, 65, 71 and 48. Learned Counsel desired that they should be heard together for the reason that they, are all concerned with the competing claims of four omnibus companies to be granted an exclusive road service licence under the Ordinance referred to to ply omnibuses on what will be called hereafter as route No. 2. There were three other groups of cases stated in respect of routes Nos. 1, 3 and 4 and I was specially requested not to record my decision until the arguments in all the cases concerning the four routes had been heard.

In order to understand the issues which arise for determination it is necessary to set out the facts in the first instance in a condensed form. In 1947 about fifty applications for licences to run omnibuses along various routes in the City of Colombo were under consideration by the Commissioner of Motor Transport. The Commissioner selected four routes of which route No. 2 was from Bambalapitiya Railway Station to Maradana via New Bullers Road Museum Road, Alexandra Place and Dean's Road. The Commissioner then made an order dated the 10th July, 1948, granting a licence to operate on this route to a company which will be referred to as Ebert Silva. Three companies which will be referred to as South Western, High Level and Gamini were among rival claimants in the sense that they too wanted to operate between the termini Bambalapitiya and Maradana. The rival claimants appealed to the Tribunal of Appeal under section 13 (3) of Ordinance No. 47 of 1942. By its order dated the 26th March, 1949, the Tribunal of Appeal directed that a licence be granted to High Level for the route running from Bambalapitiya coast road at its junction with New Bullers Road to the Pettah via Thurstan Road and Darley Road. Darley Road leads directly to Maradana along a small stretch named Sutherland Road which at the time of the hearing by the Tribunal of Appeal was closed to omnibus traffic. Sutherland Road was opened to traffic on the 15th July, 1949, so that in terms of the Tribunal's order High Level obtained a licence to ply on the route Bambalapitiya—New Bullers Road junction to Maradana via Darely Road and Sutherland Road. In this connexion reference may be made to the case of *Ebert Silva Bus Company Limited v. High Level Road Bus Company Limited*.¹

Section 4 sub-section 6 of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of Ordinance No. 47 of 1942 gives a remedy only to an "appellant" before the Tribunal or the Commissioner of Motor Transport to have a case stated by the Tribunal either on a question of law or fact to the Supreme Court. In Supreme Court Nos. 64 and 65 the cases have been stated at the instance of South Western. It is not material to enter into the reasons why two cases were stated on the application of South Western. Supreme Court No. 48 was stated at the instance of the Commissioner. Few words of explanation are necessary to shew why in certain instances the Commissioner moves the Tribunal to state a case. It will be seen that Ebert Silva who succeeded in first getting the licence

¹ (1949) 51 N. L. R. 162.

* Application made to the Privy Council for special leave to appeal from this judgment was refused.—Ed.

lost it in appeal. There is no provision under which Ebert Silva could have got a case stated. It is not unusual in a case where a licence is revoked by the Tribunal for the Commissioner to assist the licence holder to place his case before the Supreme Court by himself moving to have a case stated. It does not necessarily mean that from the point of view of the executive the licence must be restored to the licence holder. Learned Crown Counsel who appeared for the Commissioner made this plain. His position was that of *amicus curiae* and I am greatly indebted to him for presenting his arguments in a spirit of fairness to all competing claimants. Ebert Silva appeared in the role of a respondent but that company was for all practical purposes the appellant in case No. 48.

The difficulties confronting me in deciding these cases are manifold. There is no procedure for taking evidence either before the Commissioner or the Tribunal. The record consists of a transcript of the speeches of Counsel and the documents marked by them. In selecting either a route or a licensee the Commissioner is not required to give a detailed statement of the reasons on which his decisions are based. It is comparatively easy on a given statement of facts to decide purely a point of law arising from them, but when it comes to deciding whether on a question of fact the Tribunal of Appeal was wrong in reversing the Commissioner the principles that this Court should apply are by no means clear when, as said before, there is not a detailed statement of reasons for the Commissioner's decision. The Commissioner, the members of the Tribunal and Counsel who appeared before them were familiar with the highways comprised in the routes and I must say that as a resident of Bambalapitiya for the last eighteen years I have travelled almost daily from my residence to the Law Courts (via Maradana) both along Darley Road and Dean's Road.

There are yet some other preliminary matters to be noticed. In case No. 48 the Commissioner moved the Supreme Court for an order on the Tribunal to state an amended case but that application was withdrawn. In Nos. 64, 65 and 71 amended cases were sent by the Tribunal. In Nos. 64 and 65 the appellant is South Western. It would unduly lengthen this judgment were I to state in detail the grounds for not disturbing the concurrent decisions of the Commissioner and the Tribunal not to give route No. 2 to South Western. Thus the three main contestants are Ebert Silva, High Level and Gamini. Gamini supported High Level in the submission that having regard to the services provided by them they (Gamini and High Level) had a superior claim to Ebert Silva's but Gamini supported Ebert Silva to this extent that there was no reason for the Tribunal to disturb the Commissioner's selection of the route to Maradana via Dean's Road. High Level's contention was that if a service from Bambalapitiya to Maradana had to be provided it was in the public interest that the last stretch from the Eye Hospital junction to Maradana should be via Darley Road and not via Dean's Road. Once this route was selected it was argued that High Level's claim to be granted the licence was incontestable.

At the time the Commissioner selected route No. 2 (i.e., via Dean's Road) Ebert Silva was operating on the route Turret Road to Maradana via Eye Hospital junction and Dean's Road. Eight buses were plying on

this route. Both Gamini and High Level operated two services which took them along a common stretch of the highway between a point on Havelock Road where it is intersected by Link Road and the Eye Hospital junction. At this junction Gamini proceeded along Dean's Road and thence to Pettah and High Level proceeded along Union Place and Darley Road and turned off to Pettah along McCallum Road. Both Gamini and High Level could not, by reason of section 7 (1) of the Ordinance, operate on substantially the same section of highway and hence Gamini was diverted at the Eye Hospital junction to Dean's Road, a condition being inserted in the licence requiring Gamini to charge a fare along the Dean's Road stretch double that charged by Ebert Silva.

The reasons given by the Commissioner for fixing the route and for selecting Ebert Silva are stated as follows :

“ A service from Bambalapitiya to Maradana is essential in order to provide travelling facilities to the students of the University and the schools and to officers of Government departments in the area. Ebert Silva Bus Company are operating the section from Maradana to Union Place and from there to Colpetty. Although they have not applied for the identical route mentioned by me but from Maradana to Bambalapitiya via Turret Road I consider that they are the most suitable to run a service on the route. I therefore allow them the route Bambalapitiya Railway Station to Maradana via New Bullers Road, Thurstan Road, Cambridge Place, Albert Crescent, Museum Road, Baptist Chapel Road and Dean's Road.”

In the course of the hearing before the Tribunal the Commissioner furnished a memorandum dated the 15th October, 1948, in which he elaborated the grounds for selecting the route via Dean's Road and for granting to Ebert Silva the licence to operate on this route. He says, “ Route 2 was selected by me as it is the shortest and direct route ”. Further he states that if the route is divided into two sections, one from Maradana to Alexandra Place (i.e., a short distance from the Eye Hospital junction) and the other from Alexandra Place to Bambalapitiya (via Museum Road and Thurstan Road) then the position is, that Ebert Silva alone is providing already a service (remembering that Gamini is required to charge double fare on Dean's Road) on the first section while no service is provided on the second. Another point which the Commissioner thought was in favour of Ebert Silva is set out in paragraph 4 of the memorandum. It reads, “ People living in the south of the city in places such as Bambalapitiya, Wellawatte, Dehiwela, Mt. Lavinia, &c., want a short service to Maradana instead of travelling to Pettah and thence to Maradana. Such a service is at present provided by the Ebert Silva Omnibus Company Limited ; people get down at Kollupitiya, take this company's buses and go to Maradana ”. The Commissioner concluded his memorandum with the statement that if Maradana to Bambalapitiya via Darley Road and Thurstan Road is selected the claims of either High Level or Gamini would appear to be greater than the claim of Ebert Silva.

The Tribunal was not prepared to assent to the statement of the Commissioner that residents of Bambalapitiya or Wellawatte whose houses lie between the coast road and Havelock Road and Thurstan Road would in going to Maradana take a coastal bus as far as Turret Road junction

and there catch an Ebert Silva bus to Maradana. It is difficult to controvert the statement of the Tribunal that a large number of these residents may well patronize the High Level or Gamini buses which are constantly plying along Havelock Road and Reid Avenue. Some support for the Tribunal's view is furnished by the Commissioner himself in his memorandum of 15th October, 1948, wherein he states that if Ebert Silva is allowed route No. 2 that would substantially affect the services provided by Gamini and High Level along Reid Avenue.

I come now to what the Tribunal has described as a decisive objection against Ebert Silva. The regulations made in pursuance of the Motor Car Ordinance, No. 45 of 1938, specifically provide that a Tribunal of Appeal may during the hearing of any appeal call for such evidence, oral or documentary, as it may consider necessary for the decision of any matter in issue in the appeal. At the hearing High Level produced two documents marked HLR 2 and HLR 3. HLR 2 is a communication dated 12th March, 1947, addressed to the Commissioner by the Secretary, Municipal Council, Colombo, stating that the Council at its meeting of 5th March, 1947, considered the question of the congestion of traffic on Dean's Road owing to its narrowness and decided to request the Commissioner that the service provided by Gamini along Dean's Road be diverted to Union Place and Darley Road and through McCallum Road to Pettah and that Ebert Silva, being a city service, be allowed to remain. To this the Commissioner replied on the 1st April, 1947, that only one service of Gamini is allowed to run along Dean's Road, i.e., the Colombo-Kohuwela service, while all the other services run along McCallum Road. This was allowed by the Commissioner as under section 7 of Ordinance No. 47 of 1942, the service from Kohuwela to Colombo cannot be allowed to run along McCallum Road. Kohuwela is a hamlet about a mile outside Colombo to the south.

I would pause here to make a few observations. To begin with the representation was not made in connexion with the selection of route No. 2 by the Commissioner. It was made earlier with reference to two existing services, namely, the Colpetty-Maradana service of Ebert Silva and the Kohuwela-Pettah service of Gamini via Dean's Road. Now a local authority is entitled under section 4 (b) of Ordinance No. 47 of 1942 to make representations to the Commissioner in regard to the suitability of a route within its administrative limits. The argument for High Level is that at the time the Commissioner selected route 2 he had either overlooked or ignored the opinion of the Municipal Council that far from putting a third service on Dean's Road there should not be more than one service operating on that Road. I understand that the result of a third service along Dean's Road would be to increase the number of buses by eight. Whatever be the figure the congestion on Dean's Road was bound to worsen. The Tribunal said,

“ There is a second and decisive objection to this order. It sets up a new stream of traffic along Dean's Road, whereas most of the companies sought the route along Darley Road. Now the Municipal Council of Colombo has passed a resolution (HLR 2) protesting against increase of traffic on Dean's Road. Such resolutions are matters which the statute specially directs us to consider in making these orders.”

The Tribunal proceeded further to state,

“ It is common knowledge that Dean’s Road is far more narrow than Darley Road and traffic on it is twice as congested. I (the Chairman) have travelled on these two routes twice or thrice a month for many years and that is the fact about traffic as I met it.

“ I think it is dangerous and wrong to increase the number of buses plying on Dean’s Road.”

A carefully prepared statement was handed to me by learned Counsel setting out the case for Ebert Silva. The first point taken by Ebert Silva, to which I have already adverted, is that no duty was cast on the Commissioner to consider under section 4 the representation contained in HLR 2 because it was not made in connexion with the fixing of the route Bambalapitiya to Maradana. There is no statutory machinery for bringing applications for route licences to the notice of local authorities. It is not suggested that in the present case any notice was given by the Commissioner to the Municipal Council of any of the fifteen applications for linking Bambalapitiya with Maradana. In actual practice all that a local authority can do is to draw the attention of the Commissioner to the dangerous condition of road transport within its area. I am of opinion that it would be too technical a view to take that the document HLR 2 cannot, for purposes of determining route No. 2, be regarded as a representation under section 4 (b). The Commissioner may without incurring any blame have overlooked it, but it is clear that in any event if the Commissioner did not consider it the Tribunal of Appeal could regard it as an important and relevant piece of evidence in the course of a re-hearing. Be it noted that the Tribunal has not uncritically accepted the implications of HLR 2. All the members of the Tribunal are agreed that it is “ dangerous ” to increase the number of buses plying on Dean’s Road. I cannot with any degree of confidence say that the Tribunal erred in preferring Darley Road as the last lap to Maradana.

It is argued that HLR 2 and HLR 3 were produced from the files in the Commissioner’s Department and, therefore, one must assume that the Commissioner selected Dean’s Road with full knowledge of their contents. Neither in his order selecting route 2 nor in the memorandum of 15th October, 1948, does the Commissioner refer to these documents, nor was any reference made to these documents by any of the Counsel who appeared before the Commissioner. In fact, I believe, it was produced by Counsel for High Level before the Tribunal on the 23rd October, 1948. The probabilities are that these documents came to the Commissioner’s notice when they were produced by High Level on the 23rd October, 1948. In these circumstances it was quite competent for the Tribunal to set aside the selection of the Dean’s Road route.

I hope I am not disrespectful to learned Counsel if I do not consider in detail their arguments in regard to the relative merits of Dean’s Road and Darley Road, arguments to which I have had to listen for several days. These were really matters for assessment by the persons appointed by the statute to judge, namely, the Commissioner and the members of the Tribunal. My function is to correct errors of law and fact committed by

the Tribunal and in discharging that function I have borne in mind that in matters left purely to the discretion of the Commissioner the Tribunal would be wrong in interfering with it.

It is not argued that Darley Road as a means of access to Maradana is objectionable. Counsel for High Level repeated what he urged strenuously before the Tribunal that while the Darley Road route to Maradana is about quarter mile longer there are many more commercial houses and public institutions on the lap between Eye Hospital junction, Union Place, and Darley Road up to its junction with McCallum Road than there are on Dean's Road. If the Tribunal took this also into account I would say that they did so properly.

In selecting the operator the Tribunal said,

“ It remains to select which company shall hold the licence. Two already ply buses along Darley Road, viz. : High Level Company and Gamini Company. The statute plainly contemplates a preference to companies already using a route and forbids grant of licence to others except under specific circumstances.”

I have heard a good deal of argument on the following questions :—

(a) whether the provisions of section 7 of Ordinance No. 47 of 1942 would be a bar to the grant of a licence to Ebert Silva to operate on route 2 as selected by the Tribunal, having regard to the existing services of High Level and Gamini ?

(b) whether these provisions would be a bar to the grant of a licence to High Level or Gamini to operate on that route having regard to the existing services of Gamini or High Level respectively ?

No material has been placed before me on which I could answer either question in the affirmative. Hence I answer that there is no legal bar to the grant of the licence to any of these companies.

I think I ought to say a few words on one of the submissions made on behalf of Ebert Silva. It is said that he operates three services within the Municipal limits of Colombo and that High Level and Gamini operate from points many miles outside Colombo. It is true that places like Horana, a terminus of Gamini, and Ingiriya a terminus of High Level are far from Colombo ; but on the other hand both companies operate on sections with Pettah as one terminus and Nugegoda (in the case of High Level) and Kohuwela (in the case of Gamini) as the other terminus, the two latter places being on the south eastern outskirts of Colombo. I am averse in any event to giving effect to an argument which would result in restricting competition and enlarging the field of monopoly. That Ebert Silva is operating only within Colombo may be relevant but cannot be overriding. In his memorandum of 15th October, 1948, the Commissioner stated that if Darley Road was selected he would prefer the claims of Gamini and High Level to Ebert Silva's. The Tribunal has concurred in this view apparently for the reason that route 2 is more in the neighbourhood of the routes on which Gamini and High Level have been operating.

Left with selecting either High Level or Gamini the Tribunal preferred the former on the ground that in their opinion it could give a better service. They say that High Level owns a very much larger number of Nelson type buses and they are superior to open buses. I am unable to find any material on which I could say that the Tribunal has erred in giving weight to this fact. If it be the fact that the proportion between the new and old buses is the same in the case of both companies, it does not still vitiate the basis of the Tribunal's preference.

I think I have substantially answered the issues of fact and of law arising on the four cases stated. In the ultimate analysis the position is that the Tribunal thought Darley Road was more suitable than Dean's Road in the last lap of the route to Maradana. Both the Tribunal and the Commissioner thought that in that event High Level and Gamini had better claims than Ebert Silva. Ebert Silva's claim was not dismissed *in limine* on any ground of law arising under section 7. The Tribunal preferred High Level's claims for reasons which I have stated. In the result I see no reason to interfere with the decision of the Tribunal and I accordingly affirm it.

As agreed the question of costs is left over for further argument.

Decision of Tribunal of Appeal affirmed.

