[IN THE PRIVY COUNCIL]

1951 *Present :* **Lord Simonds, Lord Normand and Lord Oaksey**

UNITED BUS CO., LTD., Appellant, *and* KANDY TOWN BUS CO., LTD., Respondent

PRIVY COUNCIL APPEAL No. 32 OF 1950

S. C. Application No. 29—Case stated under section 4 of the Motor Car Ordinance, No. 45 of 1938

Omnibus Service Licensing Ordinance, No. 47 of 1942—Application for exclusive road service licence—Competing claims—Error of fact—Right of Supreme Court to review decision of Commissioner—Sections 2 (1), 3 (1) (a), 4, 7, 8, 13 (1) (8), 14 (1)—Motor Car Ordinance, No. 45 of 1938, s. 4.

Appellant applied for a road service licence in respect of a route which was substantially identical with that applied for by the respondent. At the time when the applications were made both applicants were operating omnibus services over part of the route for which they applied. The Supreme Court, upon a case stated, declared that the issue, by the Commissioner, of the licence to the appellant for the new road service was contrary to an express direction contained in Section 7 of the Omnibus Service Licensing Ordinance. The judgment of the Supreme Court was, however, founded upon an inadvertent misunderstanding that the existing licence of the respondent involved two routes, when, in fact, the respondent was operating one route only.

Held, that the judgment was vitiated by the error of fact as to the extent of the route already used by the respondent.

Held further, (i) that a decision of the Commissioner to grant or withhold a licence is essentially an exercise of an administrative discretion vested in him, and unless it can be shown that it is vitiated by irregularity or by error of fact or law, the Supreme Court is not entitled to review it either by the provisions of section 13 (8) of the Omnibus Service Licensing Ordinance or otherwise.

(ii) that in the Omnibus Service Licensing Ordinance there is no requirement that a decision of the Commissioner should take the form of a reasoned document. There may, however, be circumstances in which some elaboration of the Commissioner's grounds for his decision is advisable.

APPEAL from a judgment of the Supreme Court. The judgment of the Supreme Court is reported in (*1949*) *51 N. L. R. 153.*

D. N. Pritt, K.C., with *R. K. Handoo*, for the appellant.

Ralph Millner, with *T. O. Kellock*, for the respondent.

Cur. adv. vult.

July 2, 1951. [*Delivered by* LORD NORMAND]—

This is an appeal, by special leave, from a judgment of the Supreme Court of Ceylon reversing a decision of the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, which had affirmed a

decision of the Commissioner of Motor Transport, granting the appellant's 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 and refusing a substantially similar application by the respondent.

The contention for the appellant is that the judgment of the Supreme Court was founded on an error of fact as to the extent of a route already used for the purpose of omnibus services provided by the respondent.

The Omnibus Service Licensing Ordinance, No. 47 of 1942, regulates the issue of licences for omnibus services, and the relevant provisions of the Ordinance are—

" 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.

" 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:

" 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—

" (*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;

" (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;

" (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:

" 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 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.

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

" 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 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.

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

" (*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 ".

The material provisions of the Motor Car Ordinance, No. 45 of 1938, are—

" 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.

" (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.

" (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.

" (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.

" (*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.

" (*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."

The terminal points of the route applied for by the appellant are the King Street Bus Stand and Medawala. King Street Bus Stand is in Kandy, and Medawala lies some miles to the north-west. The route

traverses the road through Katugastota, and passes the fifth mile post at Palkumbura. The terminal points of the route applied for by the respondent are Kandy Market Bus Stand and the 5th Mile Post at Palkumbura. This route is substantially identical with that applied for by the appellant. The difference between them is that Kandy Market Bus Stand is a short distance to the south-west of the Bus Stand in King Street, and that the 5th Mile Post at Palkumbura is a short distance south-east of Medawala. But the section between the Bus Stand at King Street and the 5th Mile Post at Palkumbura is common to both and is much the greater part of each. At the time when the applications were made both applicants were operating omnibus services over part of the route for which they applied. The appellant was operating under licence a long distance service between Kandy and Kurunegala 26 miles from Kandy in a north-westerly direction, with two branches, one of which, running approximately north and south, passed through Medawala, and the other lying somewhat to the west of the first, ultimately converged with it at Bokkawala, a place north of Medawala. This service traversed the same roads as the route applied for by the respondent on the section between the bus stand in King Street and a road junction a short distance south of Katugastota. The Respondent was operating a " town service ", for the purpose of taking up and setting down passengers in Kandy and its outskirts, between Peradeniya, distant about 5 miles in a south-westerly direction from the King Street Bus Stand, and Katugastota. This existing service traversed on the section between the bus stand at King Street and Katugastota the same roads as the route applied for by the appellant.

The Commissioner, after an enquiry, refused the respondent's application and granted the appellant's application. His decision was intimated to the parties by letter on March 9, 1946, three months after both applications had first come before him.

An appeal was then taken by the respondent to the Tribunal of Appeal. In the Statement of Appeal, the respondent maintained that people in the districts served by the new service granted to the appellant used to walk from their homes to bus stands on the respondent's existing route, and that by the grant of the appellant's application passengers had been filched from the respondent. It was also complained that the appellant as a " long distance " company ought not to be allowed to start a new kind of service and to carry passengers who were accustomed to make use of the omnibus of a " town service " company. It was alleged that the grant to the appellant was in breach of the spirit of the understanding on which the local services had been established. Their Lordships would observe that these objections to the Commissioner's Award were objections to the exercise of his discretion only and did not suggest that he had fallen into any mistake about the facts.

The order of the Appeal Tribunal dismissing the appeal, stated—

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

On the application of the respondent the Tribunal of Appeal on December 31, 1947, stated a Case under section 13 (8) of the 1942 Ordinance. After describing the routes applied for and the services already being operated by the parties the case continued: " 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 and this Tribunal, after listening to everything that had been urged, saw no reason to differ from the Order of the Commissioner ". From this it is clear that the considerations urged upon the Tribunal were, like the respondent's Statement of appeal, concerned with questions of the public interest and convenience, and that mistake of fact had not been put forward as a reason for allowing the appeal.

In the Supreme Court, Basnayake J. heard arguments on the case stated on June 30, 1948, and he gave judgment on February 3, 1949. He answered the question referred to him in favour of the respondent.

The learned judge criticised the form of the Commissioner's decision, saying that it ought to have stated his conclusions as to the facts and as to the questions of law which arose for his determination. Their Lordships find in the Ordinance no requirement that the Commissioner's decision should take the form of a reasoned document, and though there may be circumstances in which some elaboration of the Commissioner's grounds for his decision is advisable, their Lordships see no reason to comment adversely on the form of the Commissioner's decision in the present case.

The basis, of the learned judge's decision is, however, not the failure of the Commissioner to give a reasoned judgment, but is to be found in two passages which it will be well to quote, with the explanations that the second respondent in the Supreme Court is the present appellant, that the appellant and applicant in the Supreme Court is the present respondent, and that Annex 6 referred to in the judgment is a map of the various routes substantially as described above. He first said—

> " A part of the route proposed by the second respondent was common to the whole of the Kandy-Katugastota road service of the appellant for which he already held a licence."

And later he 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. 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 Bokkawala, but only to the extent that the latter is already overlapped by the existing road service of the applicant.

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 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.

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. ''

It is plain that if the respondent had a licence for a route, the terminals of which were Kandy Market Bus Stand and Katugastota, the route granted by the Commissioner to the appellant overlaps the whole or substantially the whole of it, and that the Commissioner's Award would have been unlawful, because one of the conditions for the operation of the proviso to section 7 of the 1942 Ordinance would have been lacking. But the evidence is that the respondent operated services between Peradeniya and Katugastota and there is no evidence that the section between Kandy Market Bus Stand and Katugastota was ever licensed as a separate route. Their Lordships were referred to section 3 (1) (*a*) of the Ordinance of 1942 which requires an applicant to furnish particulars of the route or routes on which it is prepared to provide the service, and implies that a single licence may involve more than one route. The respondent might have obtained a licence for operating an omnibus service between Peradeniya and Katugastota in two routes each with the common terminus at Kandy Market Bus Stand. The respondent might also have obtained separate licences, one for the route Katugastota to Kandy Market Bus Stand, and the other from that Bus Stand to Peradeniya. But these were bare possibilities and no more. If the fact had been that there were these two routes, it appears to their Lordships certain that the fact would have been brought to the notice of the Commissioner; that in view of his decision it would have been pointedly mentioned as the main ground of appeal in the respondent's Statement of Appeal to the Appeal Tribunal; that it would have been brought to the Tribunal's notice in the discussion before it; and that when the fact was not stated in the Stated Case a request would have been made to the Supreme Court to have the Case remitted under section 4 (6) (*e*) of the 1938 Ordinance for amendment. The conduct of the dispute from first to last affords the strongest reason for rejecting the supposition that the respondent was operating two routes and not one between Peradeniya and Katugastota.

In support of the judgment the respondent urged that the learned judge of the Supreme Court had jurisdiction under the provisions of section 13 (8) of the 1942 Ordinance to reopen the whole matter and to determine *de novo* any question of fact as well as any question of law necessary for the disposal of the case, and in the exercise of that jurisdiction to find that the respondent was operating two routes, one of which was bounded by Kandy Market Bus Stand and Katugastota. Their Lordships have some difficulty in understanding what is meant by a case stated on facts, but for the purposes of the present appeal it is sufficient to say that the learned judge does not profess to have proceeded upon any other evidence than that submitted to him in the case and its annexes and in particular the map Annex 6. and that nothing contained

in these documents warrants the finding of fact attributed to him. In truth, however, the judgment under appeal does not purport to substitute a new finding of fact for any finding of fact contained in the stated case, nor does it even hint that any dispute upon fact that had occupied the attention of the learned judge. Their Lordships must conclude that the judgment was founded upon an inadvertent misunderstanding of the fact, and that the respondent is operating one route and one route only between Peradeniya and Katugastota, of which the section between the King Street Bus Stand and Katugastota is a minor part. There was accordingly no infringement of the provisions of section 7 of Ordinance No. 47 of 1942.

But the respondent, reverting to the contentions in the Statement of Appeal, submitted that the Commissioner and the Tribunal of Appeal had erred in failing to take account of matters affecting the public interest and convenience to which they are directed to have regard by section 4 of the Ordinance of 1942, and referred especially to the circumstance that the service applied for was similar to the "town service" already operated by the respondent in a contiguous area, and different from the "long distance" service operated by the appellant. Their Lordships are of opinion that in the absence of any evidence to the contrary it must be presumed that the proceedings before the Commissioner were regular and in accordance with the provisions of the Ordinance, and that all relevant circumstances were considered by him. Further, the decision of the Commissioner to grant or withhold a licence is essentially an exercise of an administrative discretion vested in him, and unless it can be shown that it is vitiated by irregularity or by error of fact or law, the Supreme Court is not entitled to review it either by the provisions of section 13 (8) of the 1942 Ordinance or otherwise.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be allowed and that the Order of the Appeal Tribunal should be restored. The respondent will pay the costs of the appeal.

Appeal allowed.