1947 *Present :* **Jayetileke J.**

THE SOUTH WESTERN BUS CO., LTD., Petitioner, *and* ARUMUGAM *et al.*, Respondents

S. C. 346—Application for Writs of Certiorari *and* Mandamus *on the Commissioner of Motor Transport and another*

Writ of Certiorari—*Omnibus Licensing Ordinance—Applications for licences—Issue from time to time—Powers of Commissioner—Ordinance No. 47 of 1942, Section 7.*

Under section 7 of Ordinance No. 47 of 1942 the Commissioner of Motor Transport has power to issue road service licences from time to time as occasion requires. The proviso to that section does not contemplate simultaneous applications and simultaneous orders for the issue of licences.

The granting of a licence by the Commissoiner of Motor Transport is a judicial order and is, therefore, subject to a writ of *certiorari*.

APPLICATIONS for writs of *certiorari* and *mandamus*.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the petitioner.

Walter Jayawardene, C.C., for 1st respondent.

E. F. N. Gratiaen, K.C. (with him *D. W. Fernando* and *C. de S. Wijeratne*), for 2nd respondent.

Cur. adv. vult.

August 26, 1947. JAYETILEKE J.—

This is an application for a Writ of Certiorari to bring up and quash an order made by the 1st respondent, who is the Commissioner of Motor Transport, under section 7 of the Omnibus Service Licensing Ordinance, No. 47 of 1942. Certiorari is a prerogative writ issued by a Court of superior jurisdiction to bring up for examination the acts of bodies of inferior jurisdiction. It is applicable to judicial as well as to quasi-judicial proceedings though it is commonly said that it is applicable only to judicial proceedings. In *Rex v. London County Council* [1] Scrutton L.J. said :—

"It is not necessary that it should be a Court in the sense that this Court is a Court ; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition ; and it is not necessary to be strictly a Court ; if it is a tribunal which has to decide rights after hearing evidence and opposition it is amenable to the writ of certiorari."

In *Rex v. Woodhouse* [2] in which it was held that licensing jurisdiction is judicial, Fletcher-Moulton L.J. said :—

"The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to

[1] *(1931) 2 K. B. 215 at p. 233.* [2] *(1906) 2 K. B. 501 at p. 534.*

'judicial acts' but the cases by which this limitation is supposd to be established shew that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial'. For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. From very early times the common law courts considered that they had jurisdiction to examine into rates by certiorari, and the case of *Rex v. King and Others* (1788) 2 *T. R. 234* which is cited in the text books as an authority to the contrary, tends to support the view that their refusal to grant writs of certiorari in cases of poor rates was based on reasons of expediency and not on any doubt as to their powers. Orders of the Poor Law Commissioners can be brought up on certiorari, and the provisions of the Poor Law Amendment Act (4 & 5 Will. 4c 76), relating thereto do not purport to give the right, but treat it as a case of restricting the exercise of a right assumed to exist. In the case of *In re the Constables of Hipperholme* (5 D & L 79) the Court held that the order of two justices appointing a constable under the powers of 5 & 6 Vict. c. 109, s. 19, could be examined on certiorari. Other instances could be given, but these suffice to shew that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a court, nor would its acts be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term 'judicial acts' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."

Three tests have been laid down in *Rex v. Electricity Commissioners*[1] for the application of certiorari. The inferior jurisdiction concerned must (1) have legal authority to determine questions affecting the rights of subjects, (2) have the duty to act judicially and (3) have exceeded its jurisdiction. In the course of his judgment Atkin L.J. said :—

"The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the Commissioner. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction ; certiorari requires the record of the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But

[1] *(1924) 1 K. B. 171 at p. 204*

the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The facts which gave rise to this application are as follows:—On October 1, 1944, the 1st respondent issued a road service licence to the petitioner from Kalutara to Atura through Matugama, Agalawatta and Kalawellawa to be in force till March 31, 1946. After the expiration of that period he re-issued the licence up to September 30, 1947. On March 27, 1945, he issued a road service licence to the 2nd respondent from Horana to Atura to be in force up to February 28, 1946. On September 28, 1945, the 2nd respondent made an application to him to extend his route from Atura to Kalawellawa, a distance of 2½ miles. The petitioner objected to the application on two grounds:—(1) that that section of the route was covered by his licence and (2) that the 1st respondent had no power under section 7 of the Ordinance to entertain or to allow the application. On February 2, 1946, the 1st respondent, after inquiry, allowed the application. The present application is to have the order made by the 1st respondent quashed on the ground that in making it he acted in excess of this jurisdiction. At the argument before me, Mr. Jayewardene faintly argued that the granting of the licence was not a judicial order but a decision made by the 1st respondent in the performance of duties which were purely administrative and, that it was not. therefore, subject to certiorari. I think it is clear from the provisions of the Ordinance that the question whether the 1st respondent should issue a licence is not left to him as a matter of pure discretion but it is a matter on which he has to pronounce judicially after hearing the parties. He has, no doubt, a discretion in regard to the issue of licences, but that discretion he must exercise according to law and not arbitrarily. Section 4 provides that, before refusing an application for a licence, the Commissioner must give notice of any objections to the applicant, and hear what the applicant has to urge in support of his application. Section 12 gives the Commissioner power to suspend or revoke a licence issued to any person if any condition attached to the licence has been contravened or not been complied with. There are two provisos to that section. The first provides that no licence shall be revoked or suspended unless the Commissioner is of opinion that such revocation or suspension is necessary owing to the repetition of the breach of condition, or to the breach having been committed wilfully, or to the danger to the public involved in the breach. The second provides that no order of revocation or suspension shall be made by the Commissioner except after notice to the holder of the licence and consideration of any representations as may be made by the holder either in writing, or in person, or by representative against the making of the order. Section 13 gives a person, whose application for a licence or for the renewal of a licence is refused by the Commissioner, a right of appeal to the Tribunal of Appeal. It also gives a person, who is aggrieved by the decision of the Commissioner to

attach any condition to the licence, or to vary the conditions of the licence, or by an order of the Commissioner revoking or suspending the licence, a right of appeal to the Tribunal of Appeal.

These provisions imply that the character of the jurisdiction which is vested in the Commissioner is essentially judicial.

I shall now proceed to deal with Mr. Perera's argument that, under section 7 (1) of the Ordinance, the moment the Commissioner issues a licence, his powers are exhausted and that he has no further power to issue another licence in respect of any section of the route covered by the licence he has already issued. The sub-section reads :—

"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."

Fixing upon the words "to be used", "to be provided" and "each such licence is being issued", Mr. Perera contended, with considerable force, that the section contemplates simultaneous applications and simultaneous orders for the issue of licences. The general rule of interpretation is set out in section 4 of the Interpretation Ordinance (Chapter 2) which provides that when an Ordinance confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

This section would give the Commissioner the power to issue licences from time to time unless the legislature has expressed a contrary intention in section 7 (1) of the Omnibus Service Licensing Ordinance. The Ordinance taken as a whole contemplates that applications for licences may be made at any time and that the power to issue them may be exercised as occasion requires. It must be noted that there is no provision in the Ordinance that applications for licences should be made before a particular date. The first line of section 7 (1) speaks of the "issue of road service licences under this Ordinance", an expression which is in accordance with the notion that licences may be issued from time to time. The section requires the Commissioner to regulate his general power to issue licences so as to secure that different persons are not authorised to provide regular services on the same section of the highway. It imposes on the Commissioner a duty to take this precaution whenever he issues licences under the Ordinance. Mr. Perera's argument is based

entirely on the terms of the proviso. The opening lines of the proviso empower the Commissioner "to issue licences to two or more persons authorising the provision of regular omnibus services involving the use of the same section of a highway." The main part of sub-section 1 having provided that different persons should not be authorised to use the same section of a highway, it is natural that the proviso, which is intended to create an exception, should permit of the issue of licences to more than one person in special circumstances. If a licence has already been issued to one person and another licence is subsequently issued to another person, the effect is that the Commissioner has, in fact, exercised a power to issue licences to two persons, a situation which appears to be quite in accordance with the power "to issue licences to two or more persons". The words the Commissioner "*may issue*" do not refer to an act limited in point of time; they are the usual words by which the legislature confers a power. The issue of two or more licences simultaneously is no doubt comprehended within this expression but that does not mean that the power to issue licences *from time to time* is expressly excluded from its scope. The words "may issue licences to two or more persons" do not, in my opinion, by themselves rebut the general rule set out in section 4 of the Interpretation Ordinance.

It remains now to consider whether there is anything in the remaining part of the proviso which gives a different interpretation to these words. The power to issue licences to two or more persons in respect of the same section of a highway can only be exercised if the two conditions mentioned in paragraphs (*a*) and (*b*) of the proviso are satisfied. Under paragraph (*a*) that section of the highway must be common to the respective routes *to be used* for the purpose of the services *to be provided* under each of the licences. Stress was laid on the words italicised by me in support of the argument that the paragraph intends to refer only to licences which are issued simultaneously. The Commissioner has to consider when deciding if he is or is not to issue licences to two or more persons whether the condition imposed by paragraph (*a*) is satisfied. To do this he has to consider the effect of issuing the licences. This effect is necessarily an effect in the future and not in the present or in the past. He has to be satisfied that the section of the highway is common to the respective routes, not which are used, or have been used, but which *will be* used for the purposes of the services, that is of services, not which are being provided, or have been provided, but which *will be* provided under each of the licences. He has, therefore, always to contemplate an effect in the future and the words merely describe the results which will follow from a decision to issue two or more licences. These expressions have necessarily to find a place in paragraph (*a*) for the reasons just stated and, that being so, it would be stretching the argument too far to rely upon their occurrence in the paragraph as a support for the view that the words "*to be*" should be construed so as to modify the ordinary scope of the power conferred earlier in the proviso "to issue licences to two or more persons". Paragraph (*b*) of the proviso provides that "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." Here again stress was laid

on the words italicised by me. I think it is convenient to consider all the words "each such licence is being issued" together. These words refer to each of the licences which is being issued at any given time by virtue of the power "to issue licences to two or more persons". If the licences are being issued at one and the same time to two or more persons then the words "each such licence" refer to every one of the licences. If, on the other hand, one licence has already been issued and two or more licences are again being issued under the general power, the words "each such licence" refer not to the one already issued but to the new ones which are being issued. The only difficulty is to appreciate the appropriateness of the words "each such licence" in a case where one licence has already been issued and *one* new licence is to be issued. The argument is that the words "each such licence" are inappropriate and that if the intention was to include such a case the word "each" should have been omitted. I think there is a fallacy in this argument. Suppose a section of an Ordinance were to provide that "the proper officer may issue certificates to two or more persons, subject to the condition that each such certificate is to be in force for six months", it would not be denied that there is a power to issue the certificates from time to time; and the expression "each such certificate" would not imply that the two or more certificates should be issued together but merely that each one which is issued will continue in force for the specified period. In the same way, the words "each such licence" in paragraph (*b*) of the proviso refer to each one of the licences which is issued at any given time, and each of them must authorise the provision of a service substantially different from the services to be provided under the other licence or licences, whether already issued or then being issued, which authorise the provision of regular services on the same section of the highway. It will be seen, therefore, that the terms of paragraph (*b*) are not in conflict with the meaning that must *prima facie* be given to the words "may issue licences to two or more persons", namely, that such licences can be issued from time to time.

If the intention of the legislature had been that a section of a highway included in a route covered by a licence already issued should not form part of the route authorised by a subsequent licence, that intention could easily have been, and should have been, clearly and unequivocally expressed.

I think that the view put forward by Mr. Perera would be too narrow a view of the powers of the Commissioner under section 7 of the Ordinance and would, to a certain extent, nullify the provisions of the Ordinance. For the reasons given by me I am of opinion that it was within the scope of the powers of the 1st respondent to grant a licence to the 2nd respondent.

I would, accordingly, dismiss the application with costs.

Application dismissed.