

1953

Present : PULLÉ J.

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

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 4, 7, 14 (3)—Route licence—Competing applicants—Matters to be considered when selecting a particular applicant—Stage carriage permit—Motor Traffic Act, No. 14 of 1951, s. 246 (5).

Three omnibus companies—A., B. and C.—were applicants for a route licence under the Omnibus Service Licensing Ordinance. The Commissioner of Motor Transport granted the licence to A. On appeals taken by B. and C., the Tribunal of Appeal set aside the order of the Commissioner and granted the licence to B. In two cases stated by the Tribunal of Appeal at the instance of the Commissioner (on behalf of A.) and C. respectively—

Held, (i) that cases stated on questions of fact should not be decided on a meticulous consideration of facts of minor importance. The question was whether on vital matters the Tribunal of Appeal had erred to such a degree that its decision was unsustainable.

(ii) that the person on whom the duty was cast in the first instance to decide on the respective merits of claimants to a route was the Commissioner and that the Tribunal was an appellate body.

(iii) that in the issue of a route licence the needs of the public were of paramount consideration. If a particular company could give the best service, it should not be shut out solely on the ground that it was endeavouring to increase its profits by enlarging its existing operations.

(iv) that it was not a serious objection to a new operator providing a service along a route near to an existing one that the old operator would suffer a diminution of profits. It would, however, be against the public interest if, as a result of the new licence, the old operator had to forego profits to the extent of rendering his service unremunerative from a business standpoint.

CASES stated under the provisions of section 4 of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of the Omnibus Service Licensing Ordinance, No. 47 of 1942.

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

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

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

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

Cur. adv. vult.

September 11, 1953. PULLE J.—

*The questions which arise for determination in this matter are contained in two cases stated by the Tribunal of Appeal under section 13 (8) of the Omnibus Service Licensing Ordinance, No. 47 of 1942, read with section 4 of the Motor Car Ordinance, No. 45 of 1938. The two cases stated bear Supreme Court Nos. 49 and 72 and they relate to the grant of a route licence to operate an omnibus service from the Bambalapitiya coast road at its junction with New Bullers Road through Thurstan Road, Flower Road, General's Lake Road to the Pettah. This route will be described throughout this judgment as route No. 3.

In 1947 the Commissioner of Motor Transport had before him about fifty applications by omnibus companies to operate on various routes the termini of each being within the city of Colombo. The Commissioner selected four routes of which one was almost identical with route No. 3, the difference being that the southern terminus was not the junction of Bambalapitiya coast road and New Bullers Road but Bambalapitiya Railway station which is by the sea on the western side of the coastal road. The Commissioner's selection was altered by all the members of the Tribunal of Appeal to the extent that the latter cut out the portion between the railway station and the junction referred to.

The principal claimants to this route (or substantially the same route) are three omnibus companies which I shall refer to as South Western, High Level and Gamini. Really the choice was between South Western and High Level and since 1948 a fierce battle has been fought by them for this route. The statutory provisions under which decisions had to be reached by the Commissioner and the Tribunal did not require them to take any formal evidence. The record consists of the transcript of the speeches of Counsel and the documents marked by them. No considered order setting out the merits of the arguments urged before the Commissioner was delivered with the result that a wide range of topics was discussed both before the Tribunal and this Court.

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

The Commissioner by his order dated the 10th July, 1948, selected the route described earlier with the southern terminus as Bambalapitiya Railway station and stated his reason for granting the licence to South Western as follows :

“ This is a route almost parallel to the Galle Road. At present people living in the Thurstan Road-Flower Road area who wish to proceed to Pettah would naturally go to Galle Road and take the South Western Bus Company's buses. This company I consider has the best claims to this route and I allow it. ”

Appeals were taken to the Tribunal of Appeal by High Level and Gamini. Of the three members constituting the Tribunal only the Chairman was in favour of affirming the order of the Commissioner and the Tribunal directed that the licence in favour of South Western be revoked and a licence granted to High Level subject to the condition “ that they run non stop from Slave Island to the Pettah and the Pettah to Slave Island ”. This condition had to be inserted because South Western was at this time operating a service between Slave Island and Pettah and it would have been a breach of section 7 (1) of Ordinance No. 47 of 1942 for High Level to provide a service along the entirety of Slave Island-Pettah route held by South Western. The order of the Tribunal was made on the 26th March, 1949, and shortly after the reasons for the Chairman's opinion and the reasons for the majority decision were delivered. Under section 4 (6) (a) of the Motor Car Ordinance either Gamini or the Commissioner had the right to ask the Tribunal to state a case but not South Western because that company was not an “ Appellant ” before the Tribunal. I am aware of the practice of the Commissioner to assist an unsuccessful respondent who had obtained a licence to put his case before the Supreme Court. Case No. 49 was stated at the instance of the Commissioner. In effect the appellant was South Western and learned Crown Counsel who appeared for the Commissioner was more an *amicus curiae* than an advocate for the Commissioner. Case No. 72 was stated at the instance of Gamini. The substantial question which I have to decide in case No. 49 is whether the Tribunal was wrong in reversing the order of the Commissioner who granted the licence to South Western. It is conceded that the Tribunal in giving the licence to High Level has not contravened section 7 (1) of the Ordinance for the reason that High Level has to run “ express ” from Slave Island to Pettah.

In case No. 72 Gamini took up the position before me that if the choice of the operator lay between them and High Level there was no valid reason for preferring the latter. They have no quarrel with South Western. Counsel for Gamini stated that the fact that South Western was already providing a regular service on a part of the route, namely, Slave Island to Pettah, ought to give them a preferential right as against High Level who had no prior licence to operate an exclusive service between termini lying within route No. 3. If the Tribunal was wrong in setting aside the order of the Commissioner then it is obvious that there is only one claimant to whom the licence must be given and that is the South Western.

In regard to all four routes I have had to listen to arguments for very many days regarding the policy of the Ordinance in so far as one could gather it from sections 4 and 7. It was the desire of the Counsel engaged in these cases that I should defer my decision until I had heard the arguments touching all four routes. On behalf of High Level and Gamini notes setting out a summary of their respective contentions were sent to me. I do not think that these cases stated on questions of fact should be decided on a meticulous consideration of a number of facts of minor importance. I have to ask myself whether on vital matters the Tribunal has erred to such a degree that its decision is unsustainable. I have further to remember that while the functions of the Tribunal are in the nature of a re-hearing and while it is invested with wide powers under section 14 (3) of the Ordinance the person on whom the duty is cast in the first instance to decide on the respective merits of claimants to a route is the Commissioner and that the Tribunal is an appellate body.

Before I enter on a discussion of the reasons embodied in the two opinions of the Tribunal I desire to make a few observations of a general character. The needs of the public are of paramount consideration. It would not be proper to extend the monopolies envisaged by the Ordinance beyond the limits laid down. If a particular company can give the best service or if any arrangement would ensure the speedy transport of passengers, I do not think it should be shut out solely on the ground that it is endeavouring to increase its profits by enlarging its operations. In the case of route No. 2 I have held that so-called city operators are not always to be preferred to those who enter the city from termini situated outside. That one company is running services on what are called inland routes of the city and another along the coastal belt is indeed relevant but cannot, in my view, be decisive.

It is bound to happen especially in a crowded city that the grant of a licence to operate a service close to an existing one would take away a part of the custom of the earlier licensee. I do not think it is a serious objection to a new operator providing a service along a route near to an existing one that the old operator would suffer a diminution of profits. I quite accede to the argument of learned Counsel for High Level that it would be against the public interest if, as a result of the new licence, the old operator has to forego profits to the extent of rendering his service unremunerative from a business standpoint. He would then have no incentive to provide an adequate and efficient service. I would, however, entirely dissent from the view that if a company operating on a route is making large profits it has, so to speak, a vested right to maintain those profits at the same level and that in the assertion of that right every new competitor must be shut out.

A rough background to the case is provided by the following facts :

South Western buses enter the city of Colombo from the south along the coastal road. Between Wellawatte and Pettah it has a few shuttle services of which one that figures prominently in this case is from Slave Island to Pettah which comprises a part of route No. 3. High Level buses enter Colombo along an inland route the point of entry being a bridge.

which is on the south eastern boundary of Colombo. A number of High Level buses on entering Colombo proceed to Pettah along Havelock Road, Reid Avenue, Alexandra Place, Union Place, Darley Road and McCallum Road. The Tribunal of Appeal has awarded this company route No. 2 the termini of which are entirely within Colombo. This route runs from the junction of Bambalapitiya coast road and New Bullers Road to Maradana via Thurstan Road, Cambridge Place, Albert Crescent, Museum Road, Alexandra Place, Union Place and Darley Road. Gamini buses also traverse Havelock Road. One of their services to Pettah enters Colombo from a village on the southern outskirts of Colombo called Kohuwela and runs parallel with High Level along Havelock Road, Reid Avenue, and Alexandra Place and falls into Maradana via Deans Road. I gather from a list tendered to me of bus services within the Municipal limits of Colombo—which has been accepted as correct—that High Level and Gamini also have what has been described as “shuttle services” within Colombo.

Both High Level and South Western also possess licences limited to carrying school children to various educational institutions in Colombo. These are in the nature of occasional licences.

On the days that the Ceylon Turf Club holds a race meet and on other special occasions when it is desirable to avoid congestion of traffic on Reid Avenue the Gamini and High Level buses are diverted. They get between themselves practically the whole of the passenger traffic to the racecourse. Their buses are allowed to halt in the vicinity of the old Sinhalese Sports Club Grounds, i.e., close to the junction of Torrington Place and Alexandra Place. From this point it is a short distance for the passengers to walk to the racecourse, especially to the side of the open enclosure.

It would be a convenient stage now to discuss the reasons given by the majority of the Tribunal for reversing the Commissioner's order.

In the second and third paragraphs it is stated that when Ordinance No. 47 of 1942 was brought into operation High Level and Gamini were “relegated” to the less profitable inland routes. With great respect I do not think this was a proper approach to the problem. When licences were first issued under the Ordinance it was done in accordance with its provisions. There was no arbitrary assignment of a lucrative route to one operator or a “relegation” of another to a less profitable route. One cannot but assume that each applicant's case was dealt with on its merits. The third paragraph further states, “In our opinion it would be as unfair for the South Western Bus Company Limited to come inland and skim the cream of the passenger traffic of these two latter companies from the Bullers Road roundabout to the Pettah as it would be for the inland route companies to make a proposal to tap the passenger traffic along the coast road of which the South Western Bus Company Limited has now a monopoly”. Whether the grant of route No. 3 to South Western would “skim the cream” of the passenger traffic of High Level and Gamini would be a question of fact depending on the evidence which I shall later consider. I must say that I did not gather from anything said by Gamini

before me that they anticipated such a disastrous result. They are reconciled to South Western getting the licence for route No. 3. If, as I said before, a grant has the effect of a crippling financial blow to the old operator, that would be a ground for withholding the grant or for giving the licence to the old operator, but no company should be shut out by a label being attached to it. No operator has any particular claim except what the statute recognizes.

In paragraph 4 the right of South Western to provide a service from Slave Island to Pettah or Fort is described as a "lodgment" in an inland route brought about by wartime restrictions. The paragraph proceeds that although the war is over South Western, in addition to the use of the old coastal route through Galle Face, "clung" to its right to operate on the Slave Island route. It seems to me that the majority of the Tribunal felt that what would otherwise be a circumstance in favour of South Western was nullified by their perversity in not quitting an inland route to take their proper place along the coast. I must express my surprise at this argument. Whatever be the reason South Western was lawfully in possession of a licence covering a part of route No. 3 and they were entitled to a just appraisal of this fact. Counsel for South Western said that far from being a "lodgment" the Slave Island route was held by its predecessor in title and moved to read some official documents in support. Counsel for High Level objected and I upheld the objection, although my impression was that it was agreed by all parties that official documents the authenticity of which was not challenged could be produced before me. I have adverted to this only for the reason that Counsel for South Western asked me to record his application.

Paragraphs 5 and 6 appear to suggest that in the opinion of the majority High Level had acquired a strong claim to route No. 3 and that the only obstacle or "snag" in the way of a licence being granted to them earlier was the attitude of South Western in clinging to the Slave Island-Pettah section. The document which throws light on this subject is 3 SW B 3 dated the 6th September, 1945, which is a letter addressed to the Commissioner by High Level. At this date McCallum Road was not open to traffic and the High Level buses on the run from Nugegoda (a suburb of Colombo) to Pettah proceeded via Maradana. High Level without permission from any authority carried out an experimental express service through Flower Road, General's Lake Road and Slave Island via Fort to Pettah. High Level informed the Commissioner that after watching the experiment for a week or two they would apply for a special licence to run an express service in the mornings, *until such time as McCallum Road was opened*. A copy of this letter was sent to South Western for their observation and they objected to the proposal by their letter 3 SWB 1. They honestly feared that in spite of the service being said to be express High Level's employees might set down and pick up passengers on the Slave Island section.

In paragraph 5 the majority describe the Slave Island section held by South Western as "the snag" which obstructed the High Level Bus Company Limited from obtaining the licence contemplated in 3 SWB 3. They add, "It is noteworthy that the South Western Bus Company

Limited strongly objected to the route claimed by the High Level Road Bus Company Limited at that time" and continued in paragraph 6 :

" But it is this very route that the Commissioner has, forgetful of the past, granted to the South Western Bus Company Limited"

It seems to me that if the Commissioner had forgot the past it enured more to the advantage of High Level, for the running of omnibus services, be they express or not, experimental or otherwise, without a licence must always be regarded as a serious lapse.

Paragraph 7 deals with an argument by South Western based on their holding licences to carry school children. I agree that the Tribunal was free to attach little or no importance to these occasional licences.

Would the grant of route No. 3 to South Western " skim the cream " of the passenger traffic of High Level and Gamini, especially on race days ? The majority have answered the question in the affirmative. The Commissioner evidently did not think that the normal traffic to Pettah by High Level and Gamini buses would be affected to any marked degree. It is a matter of common knowledge that the South Western coastal route from Bambalapitiya to Galle Face Hotel runs through thickly populated areas on *both* sides and it would be rash for anyone to say that the Commissioner was wrong in stating, " At present people living in the Thurstan Road-Flower Road area who wish to proceed to Pettah would naturally go to Galle Road and take the South Western Company's buses ". High Level submits that the South Western buses from Bambalapitiya could take passengers only as far as Fort and not Pettah and, therefore, the Commissioner is in error in stating that passengers who wish to proceed to *Pettah* would take the South Western buses. Probably the Commissioner had in mind what everybody knows to his cost today that it is easier to walk from Fort to Pettah than waste time looking for a public conveyance. Even those who own cars find it easier to park them in Fort and walk considerable distances to attend to their business.

The Chairman of the Tribunal in his dissenting note said,

" Secondly, there is much weight in the point put by Mr. Colvin R. de Silva. Admittedly, for many months there has been heavy congestion on the coast road buses : there have been long queues waiting. What is the reason for that ? The most probable explanation is that most of the inhabitants of South Colombo on *both* sides of the coast road are wont to make their daily journey to the Fort or Pettah by South Western Company's buses. Therefore, to give another company the short new route through General's Lake Road will damage the South Western Company as much as the opposite will damage the High Level Company or more. "

Counsel for High Level has argued that I must accept the finding of the majority that the grant of the licence to South Western would result in grave loss of custom to High Level and that my function is limited to answering whether the majority were wrong for that reason in revoking

the licence granted to South Western. I regret I am unable to agree. There is no evidence that High Level's takings on their "parallel" route to Pettah from Nugegoda would be affected to such an extent that the running of that service would be unremunerative. On the order made by the Commissioner South Western did operate on route No. 3 roughly from July, 1948, to March, 1949. Did High Level feel the impact of the new competitor? Did the number of passengers carried on their Pettah service go down? What was the loss on the racecourse traffic? Records of sales of tickets ought to have been readily available to throw light on these questions. It seems to me that High Level did feel the need of supporting their allegations as to loss of traffic before the Tribunal with documentary evidence. They produced a statement of income and expenditure (3 H L R 13) for the period 1st April, 1948, to 28th February, 1949, certified by an accountant shewing a loss of Rs. 25,820. As evidence of High Level's loss during the time that South Western operated on route No. 3 the document is entirely unconvincing. In producing 3 HLR 13 before the Tribunal Counsel for High Level is recorded to have said :

" I produce the accounts of Nugegoda to Dehiwala, Maharagama to Kirillapone via Embuldeniya and Maharagama to Town Hall via Embuldeniya. Those are grouped for the purpose of accounts. Every year we had profits but this time we have run that section at a total loss of Rs. 25,820. This is from April 1948 to February 1949 So this loss must have been due to the competition of last 7 or 8 months. "

The majority say they are convinced that if South Western is allowed the route the cream of the High Level passenger traffic would be skimmed. They could not have based that finding on 3 HLR 13. I fail to see on what other material they could have come to that finding.

That both High Level and Gamini will lose a part of the racecourse custom is evident but not to the extent of being described as "skimming the cream". If South Western bring race traffic from Pettah the point nearest to the racecourse appears to be the junction of Flower Road and Racecourse Avenue. A passenger going to the open enclosure, not to the covered stands, would have to walk along Racecourse Avenue, a part of Reid Avenue and then turn right at Maitland Crescent-Torrington Place junction. For this reason it seems to me that High Level and Gamini on their Pettah routes have an advantage in relation to race traffic over South Western operating on route No. 3, for the two former companies can put down their race passengers at a more convenient spot. I have referred to what is comparatively a minor circumstance to show that the description "skimming the cream" of race traffic is exaggerated.

Another reason for setting aside the Commissioner's order is contained in the latter part of paragraph 11. It is said that some day South Western may apply for a licence to ply on a part of route No. 3, as a shuttle service, from Bullers Road roundabout to Pettah and that if it were given a serious impasse would be created. I am clear in my mind that a contingency such as this ought not have influenced the Tribunal.

On an examination of the reasons given by the majority I am satisfied that they have erred in setting aside the order of the Commissioner. I do not think it is necessary to examine in detail the reasons given by the Chairman for affirming the Commissioner's order. He rightly places emphasis on the Commissioner's function to select a route in his discretion and to give the licence to an operator who will best serve the needs of the public. I cannot say that the Chairman was wrong in drawing the inference that, because South Western had as many as 138 new buses of the Nelson type and 48 old of the same type as against High Level's 45 Nelson of the new type and 57 of the old type, the former could render a more efficient service than the latter. I note that in granting route No. 2 to High Level the Tribunal were unanimous in asserting that one of the reasons for preferring High Level to Gamini was that the former had a larger number of buses of the Nelson type. I agreed with that view in my judgment on route No. 2.

The Chairman thinks that High Level's employees may be guilty of evasion of the law in picking up passengers on the Slave Island section and that would be a reason for preferring South Western. Taken by itself I do not think it is a good reason, but the fact that South Western is already providing a service on the Slave Island section of route No. 3 is a point in their favour and to that extent I agree with the Chairman.

In the result I find that the Tribunal was not justified in reversing the order of the Commissioner granting the licence to the South Western Bus Company Limited.

There is no Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, to whom I can remit these cases stated. I do not think I have the power to do so under section 246 (4) (a) of the Motor Traffic Act, No. 14 of 1951, as it deals only with "appeals" and that can mean only appeals to the Tribunal and not cases stated under section 4 (6) (a) of the Motor Car Ordinance, No. 45 of 1938. My determination on these cases stated is that the application of South Western for a road service licence under Ordinance No. 47 of 1942 in respect of the third route determined by the Commissioner, but subject to the modification of the southern sector indicated by the unanimous opinion of the Tribunal, should be granted with the result that I direct the Commissioner of Motor Traffic to grant to the South Western a stage carriage permit under section 246 (5) of the Motor Traffic Act, No. 14 of 1951. I am aware that there is no express provision authorising me to direct the Commissioner to grant a stage carriage permit; but as the duty to grant the permit is laid down in mandatory terms in sub-section 5 I do not see any legal objection to issuing the direction. It has at least the advantage of avoiding new and fruitless litigation in Ceylon over this route.

As arranged by Counsel the question of costs is left over for further argument.

Order of Tribunal of Appeal set aside.