PL 4 — 18, 1952

No. 20 of 1951

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

PERADENIYA SERVICE BUS COMPANY LIMITED
of No. 700 Peradeniya Road, Kandy (Petitioners) . *Appellants*

AND

SRI LANKA OMNIBUS COMPANY LIMITED of
10 41 (1/6) Victoria Buildings, Norris Road, Colombo *Respondents.*

Case for the Appellants.

RECORD.

1. This is an appeal by special leave granted by Order in Council dated the 25th April 1950 from a Judgment of the Supreme Court of p. 23. Ceylon dated the 5th December 1949 rejecting the Appellants' appeal by p. 19. way of Case Stated from a Tribunal of Appeal constituted under the Motor Car Ordinance (No. 45 of 1938) and the Omnibus Service Licensing Ordinance (No. 47 of 1942).

2. The appeal relates to the licensing of passenger omnibus services in Ceylon and the questions which arise may be shortly summarised as
20 follows, namely :—

(A) whether objections made by the Supreme Court to the form of the Case Stated were valid ;

(B) whether it was any part of the Supreme Court's function to lay down a procedure to be followed by Tribunals of Appeal under the above-mentioned Ordinances ;

(C) whether on the materials before the Tribunal of Appeal there were any grounds for refusing the application made by the Appellants.

3. Regulations governing the use of omnibuses on highways in
30 Ceylon and providing for a system of licensing were contained prior to 1942 in the Motor Car Ordinance No. 45 of 1938. In practice however

this system enabled different operators to run omnibuses for hire on the same route and this led to wasteful running and unnecessary overlapping of services and unhealthy competition. The Omnibus Service Licensing Ordinance No. 47 of 1942 was accordingly passed in order to establish a new system by which, instead of vehicles being licensed, exclusive licences were granted to operators to provide a service for a particular route. Under this Ordinance, applications containing a wealth of particulars have to be submitted to a Commissioner of Motor Transport who, when an application is objected to by another operator or where rival applications for the same route are submitted, holds an inquiry at which evidence, usually in documentary form, is submitted and argument as to the merits of the claims and the needs of the public is put forward. The Commissioner is directed by Section 4 of the Ordinance to have regard to certain specific matters, namely :—

" (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 also " to 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." The overriding requirement in the Ordinance is in Section 7 which provides as follows :—

" (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."

4. From the decision of the Commissioner an appeal lies to a Tribunal of Appeal which is the same as under the earlier 1938 Ordinance. Their decision is declared to be final subject to the proviso that an application can be made to the Tribunal to state a case for the opinion of the Supreme Court and, for the purposes of the 1942 Ordinance, fact as well as law can be thus appealed to the Supreme Court. Regulations have been made for procedure before a Tribunal of Appeal giving the parties and their representatives the right of being heard and also empowering the Tribunal to call for evidence if they think necessary.

5. The Appellants and the Respondents are both omnibus operators in Ceylon and, prior to the application hereinafter mentioned, the routes for which they held licences were as follows: The Respondents held a p. 3.
licence to run a service along the main road from Kandy to Colombo. This road runs roughly due East and West and passes on its way West from Kandy a point known as Peradeniya Bridge, and later a place called Embilimeegama and then on to Kadugannawa, Kegalla and Colombo. The Appellants held a licence to run a service along the same main Kandy-Colombo road as far as Peradeniya Bridge, at which point their route diverged to the South to a place called Daulagala. Originally this had been their terminus, but on subsequent applications the route had been extended so as to run North-West from Daulagala until it came back to within half a mile of the Kandy-Colombo Road South of Embilimeegama. In short, apart from the section of the Kandy-Colombo Road operated in common, it covered two sides of a triangle having as base the Kandy-Colombo Road from Peradeniya Bridge to Embilimeegama and as apex Daulagala, apart from the half-mile gap. It was in order to close this gap that the relevant application was made to the Commissioner.

6. The area covered by the Appellants' said route is as a matter of common knowledge—and there was no dispute about it—fairly thickly populated. At Daulagala itself there is a bazaar, a rural Court, the office p. 8, ll. 11–17.
of the Revenue Office, a hospital and a school, all of which serve the p. 13, ll. 5–10.
residents in the area between Daulagala and Embilimeegama in which a number of estates are situated. In addition there are near Daulagala three ancient temples to which pilgrims resort from all parts of the Island.

7. On the 11th April 1947 the Appellants submitted to the Commis- pp. 1–5.
sioner their application for a licence to run an omnibus service, of which full details with timetable and fares were given, from Embilimeegama junction to Kandy via Daulagala and Peradeniya Bridge. As all this route apart from the above-mentioned half-mile gap was already covered by licence, the application was merely to close this gap and link up with the main Kandy-Colombo Road. Notice of the application was on the 4th July p. 6.
1947 given by the Commissioner to the Respondents who promptly p. 7.
objected, and they themselves seem to have filed an application for a p. 9, l. 37. p. 17, l. 11.

licence for the route from Kandy to Embilimeegama and then South into Daulagala. In other words they wished to cover not merely the half-mile gap then unserved, but also the whole stretch from the half-mile post to Daulagala already being adequately served by the Appellants.

pp. 8–10. 8. An enquiry was then held by the Commissioner on the 3rd February 1948, the Appellants and the Respondents both appearing by Counsel. The factual situation was fully gone into and explained, but no indication was given by the Commissioner that he required any fuller information or more formal proof. No doubt he was already not unacquainted with the area under consideration and he may well have been minded to check up for himself on the spot. The main objection by the Respondents seems to have been that in the past extensions of the Appellants' route had been granted without notice to the Respondents. This, however, even if it was the case, was, it is submitted, not a matter which was before the Commissioner at all and had no bearing on the issue. The cross application by the Respondents also seems to have been in part an attempt to undo these earlier licences. Alternatively the Respondents sought to justify there being a common route over a side road by reference to the proportion it bore to the route as a whole. This also was beside the point.

p. 8, ll. 31–40.
p. 9, ll. 1–9.
p. 8, l. 40.
p. 9, l. 40–p. 10, l. 11.

p. 10, ll. 37–41. 9. The Commissioner's decision on the Appellants' application was communicated to them on the 27th February 1948. It was in the following form :—

> " I see no real necessity for this route that is now applied. There is a bus running from Kadugannawa to Kandy through Pilimatalawa and another running from Daulagala through Peradeniya junction. If any people wish to get to Daulagala from Pilimatalawa they can easily walk the half mile."

p. 17, ll. 17–19.
p. 12.
p. 17, l. 17.
p. 13. 10. The Appellants appealed to the Tribunal of Appeal and the Respondents seem to have done likewise. The Appellants' Statement of Appeal was dated the 3rd March 1948. The Respondents' appeal was rejected on the ground that the Petition of Appeal did not give any ground of appeal. The only matter therefore competently before them was the Appellants' appeal. This was on the 21st August 1948 rejected, the order being as follows :—

> " 1. We think there should be a bus service leaving no gap since it is often necessary to convey sick folk. That is to say we are not prepared to dismiss this appeal on the ground stated by the Commissioner.
>
> 2. But the Respondent has a bus service running on the main road half a mile away and the extension sought by Appellant will affect his custom. The Respondent probably has as good a claim to extend his service part of the way from Embilimeegama junction to Deliwala " (a place half way to Daulagala) " as Appellant has to extend it towards Embilimeegama. We dismiss the Appellant's appeal."

11. The Tribunal of Appeal therefore decided in the Appellants' favour the only point involved in the appeal, namely, was there a need for a service over the half-mile gap. Their grounds for rejecting the appeal notwithstanding this finding will not, in the Appellants' submission, bear examination for one moment. The Respondents were servicing the main Kandy-Colombo road and their customers were people using this road. The Respondents never had serviced Daulagala and it was only in connection with a Daulagala service that the half-mile gap was relevant (as indeed the Commissioner had recognised by saying that people could walk) : it had nothing to do with the main road service at all. Indeed, so far from their custom being affected prejudicially, they would in fact benefit because nobody in the half-mile section wanting to go to Kandy would choose to go the longer, and more expensive, way round via Daulagala, so that the new addition would help to feed their main road service. The further statement that " the Respondent has probably as good a claim to extend his service " is at best hypothetical, and in any case irrelevant because, as above stated, there were no grounds wnatever for allowing the Respondents, contrary to the express terms of Section 7 of the Ordinance, to impinge upon the Appellants' existing licensed service.

12. Being dissatisfied with the Tribunal's said decision the Appellants on the 30th September 1948 duly applied for a case to be stated to the Supreme Court on questions of law and fact formulated in paragraph 10 of their application as follows :— pp. 14–16.

" (A) Whether the Tribunal of Appeal, once it was satisfied that the half mile between Embilimeegama Junction and Gadaladeniya should in the interests of the public be served by a bus service, should not have set aside the order of the Commissioner of Motor Transport refusing the Appellant's application and have granted the route to the Appellant. p. 15, l. 24–p. 16, l. 12.

(B) Whether it was correct for the Tribunal of Appeal to express an opinion as to the rights of parties not at issue with the Appellant, and to consider the possible prejudice which may be caused to any objector who—

(i) is not serving the same route ; and

(ii) has not made an application for the route ; and

(iii) has also failed to place any evidence of possible prejudice being caused by the grant of the route to the one and only applicant namely the Appellant.

(C) Whether the interests of the public is the primary factor to be considered in the granting of an application of this nature. If so, in the circumstances of this case the Tribunal ought to have allowed the Appellant Company's application in view of the fact—

(i) that there was no other competing applicant ; and

(ii) that the Appellant Company was best able to serve the needs of the public.

(D) Whether it is correct for the Tribunal of Appeal to take into consideration the supposed claims of the Sri Lanka Omnibus Company Limited not actually before the Tribunal but such claims

as may be urged if and when the Sri Lanka Omnibus Company Limited may make an application in future to run services between Kandy and any point on the Embilimeegama-Daulagala Road."

p. 16, ll. 31–3. 13. By Order dated the 4th December 1948 the Tribunal at one and the same time agreed to state a case, recording that the Respondents agreed to a case being stated, and proceeded to state it as follows :—

p. 17. "1. The Appellant Company, the P.S. Bus Co., held a licence to ply buses from Kandy to Daulagala via Peradeniya, a distance of about 10 miles ; it next obtained an extension of that route to a point midway between the 2nd and 3rd mile posts on the road from Daulagala to Embilimeegama on the main road, and thereafter obtained a further extension to a point half mile distant from Embilimeegama. These extensions were decided without notice to the Respondent, the Sri Lanka Bus Co., which holds the licences to run buses on the main road from Kandy to Embilimeegama and thence to Colombo. Appellant argues that no notice was necessary.

2. Finally, the Appellant Company applied for an extension from that half-mile post on to Embilimeegama. The Respondent Company also applied for a licence to run buses from Kandy via Embilimeegama to Daulagala. The Commissioner considered it to be wasteful competition to allow either Company to run buses on that half mile of road and dismissed the Appellant's application on that ground. He dismissed Respondent's application on various grounds and both Appellant and Respondent appealed.

3. Respondent's appeal has been dismissed by this Tribunal because it contained no statement of the grounds of appeal. Appellant's appeal has been dismissed on the grounds (1) that to grant Appellant this licence would encroach on the custom now enjoyed by Respondent (2) that Respondent has as good a claim to hold the licence in issue as the Appellant. We disagree with the Commissioner's view that this half mile should be left unserved, since we had in mind the needs of the sick and the aged as well as the general public.

4. The points for decision are (1) whether this Tribunal was entitled to consider any counter-claim after the Respondent's appeal had been dismissed (2) whether it was not bound to grant the application of the Appellant as the only applicant in the field (3) whether the Tribunal was not bound to set aside the Commissioner's Order and allow the appeal on the grounds stated in paragraph 10 (A) to (D) of Appellant's present application or whether the needs of the public are or are not best served by the decision as it stands, under which all parties may make fresh applications and call further evidence.

5. Let the Commissioner forward these proceedings with the present application and the proceedings at the previous hearing of this appeal and at his inquiry with all documents then produced."

It is to be noted that no grounds are given for departing from the formulation of the questions of fact and law involved which had been duly recorded by the Appellants.

14. Due notice of the appeal to the Supreme Court was given on the 20th January 1949 both to the Respondents and to the Commissioner and on the 8th September 1949 the stated case came on for hearing before the Supreme Court in the person of Basnayake, J. In his Judgment delivered on the 5th December 1949 the learned Judge referred shortly to the history of the application and read the Case Stated. He then proceeded :— p. 18. p. 19, l. 15. pp. 19–22.

" The stated case is open to several objections. In the first place it is signed only by the member elected to be the Chairman of the sitting and not by all the members of the Tribunal. The Statute (Section 4 (6) (*a*) of the Motor Car Ordinance No. 45 of 1938) imposes the duty of stating a case on the Tribunal and not, as some English statutes do, on the Chairman alone. p. 20, ll. 37–43. p. 21, ll. 1–20.

In the next place the stated case does not set forth the facts. Under the Omnibus Service Licensing Ordinance a party is entitled to make an application for a stated case on questions of both law and fact (Section 13 (8)). The stated case should therefore set out in full the facts relied upon by each party to the hearing before the Tribunal and its findings on those facts.

Lastly the questions on which the opinion of this Court is asked do not arise on the stated case. Having applied for a road service licence under the Omnibus Service Licensing Ordinance the applicant was entitled to have his application considered both by the Commissioner and by the Tribunal of Appeal on its merits. Some of the considerations that should influence the decision of the Commissioner in dealing with an application for a road service licence are set out in Section 4 of the Omnibus Service Licensing Ordinance. It is proper for a Tribunal of Appeal to take into account those same considerations among others when dealing with an appeal.

It is not correct for the Tribunal to treat an appeal, as it appears to have been done in the case of the applicant's appeal, as a counter-claim to another appeal, viz., the appeal of the Sri Lanka Omnibus Company. Nor should it regard itself bound to allow an appeal on the ground that the appellant is the sole applicant for a licence. A Tribunal is not entitled to submit questions of policy nor is it entitled, as it appears to do in question 3, to shift the entire responsibility of deciding an appeal to this Court."

15. The Appellants submit that, these being the grounds for dismissing the appeal, they are all open to objection. Section 4 (6) (*b*) of the Ordinance of 1938 provides that " 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 ", and in Section 4 (6) (*a*) it is stated that " 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." These provisions do not however, it is submitted, mean that every member of the Tribunal has to sign the case : it is sufficient if it is authenticated as coming from the Tribunal if the Chairman as chairman and on behalf of the Tribunal signs

it. In any case an appellant should not be prejudiced by a technical defect which can easily be remedied by the case being remitted so as to be put in order. As regards the setting out of the facts, it is important to observe that the provisions of Section 4 (6) of the 1938 Ordinance set out above by virtue of Section 13 (8) of the 1942 Ordinance " 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." It is difficult to see how a fact can be set forth when it is one of the questions to be determined on the appeal. In any case the closing paragraph of the case was plainly intended to incorporate the documents in relation to the application, and in them the facts—and substantially they were not disputed—were plainly set out, whatever the inferences from them might be. And again, if that was all that was the matter with the case, it should have been remitted for correction. To say, as the learned Judge did at the end of his Judgment, that " the Applicant finds himself stated out of Court " is utterly wrong. That happens when the only issue appealable is a question of law and a tribunal finds the facts in a way which prevents that question of law arising; that a litigant with a right of appeal on fact should be prejudiced by a failure of a tribunal to put the material adequately before the appellate Court is contrary to the very elements of justice. With regard to the learned Judge's final remarks above quoted, it is to be observed that it was the Tribunal and not the Appellants who referred to the application as though it were a counter-claim (the only counter-claim having in fact been put forward by the Respondents), and if they failed to approach the matter properly, all the more reason for the Supreme Court, to whom facts as well as law were open, to put the matter right. Nor again was it the Appellants who ever suggested that the Tribunal was bound to allow an appeal on the ground that the Appellant was the sole applicant for a licence: all that the Appellants urged and still urge is that a Tribunal is bound to allow an appeal if there are no valid grounds in fact or law for rejecting it. As to shifting the entire responsibility of deciding an appeal to the Supreme Court, that was done not by the Tribunal but by the Legislature when it passed Section 13 (8) of the 1942 Ordinance.

p. 21, l. 21–p. 22, l. 28.

16. The latter half of the learned Judge's Judgment was devoted to discussion of " the procedure by which Tribunals acting under the Omnibus Service Licensing Ordinance should be guided." After pointing out that the functions of the Commissioner are quasi-judicial and that proper record should be kept of the material on which he bases his decision the learned Judge proceeded thus :—

> " The Rules (Regulations made under Section 4 of the Motor Car Ordinance No. 45 of 1938) which govern the proceedings before a Tribunal of Appeal provide that the Tribunal shall hear the parties who are given the right to be present and to be heard either in person or by representative. The hearing before the Tribunal of Appeal should, except where the Tribunal considers it necessary to call for evidence oral or documentary, be confined to the material in the record of the Commissioner. The Tribunal of Appeal should maintain a record of such evidence oral or documentary as it deems necessary to call for in the exercise of its powers (Regulation 11 of the regulations made under Section 4 of the Motor Car Ordinance

No. 45 of 1938), and should give reasons for its decision. When the Tribunal states a case on an application for a stated case it should set out fully the facts on which it bases its decision, its findings thereon and its decisions on the questions of law argued before it (*Great Western Railway Co.* v. *Bater*, 8 Tax Cases 231, at 245 and 257). It should also state the questions on which the opinion of this Court is desired (*Farmer* v. *Trustees of the late William Cotton*, 6 Tax Cases 600). Questions of policy and hypothetical questions should not be put. Neither the Commissioner's record nor the record of the Tribunal need be sent up to this Court unless the stated case invites reference to any statement of fact or any document therein. The official reports of the Income Tax cases of England contain excellent examples of cases stated under the Income Tax Acts on which cases stated under the Motor Car Ordinance No. 45 of 1938 and the Omnibus Service Licensing Ordinance can with advantage be modelled.

I wish to add that evidence adduced before quasi-judicial tribunals like the Commissioner or the Tribunal of Appeal should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties before the Tribunal reaches its decision (*In re Moxon* [1945] 2 All E.R. 124, at 130).

In the instant case the form in which the case has been sent up prevents me from expressing my opinion on the specific questions raised. The result is that the Applicant finds himself stated 'out of court' (*The American Thread Co.* v. *Joyce*, 6 Tax Cases 21). I regret I can do nothing for him.

This is a case in which each party should bear his own costs."

These observations are also, it is submitted, open to serious objection, being based fundamentally on authorities dealing solely with the position where an appeal lies by way of case stated solely on questions of law. They would also tend, followed strictly, to deter the Commissioner and the Tribunal of Appeal from applying, as they have always done without any objection from anyone, their own knowledge and observation of traffic requirements and thus seriously impair the work they do. With regard to the closing remarks, as already submitted above, any defect in form of the case stated could and should have been cured by remission to the Tribunal for that purpose.

17. The Appellants in due course lodged with the Judicial Committee of the Privy Council a Petition for special leave to appeal to His Majesty in Council against the said Judgment of the Supreme Court of Ceylon. This Petition having come on for hearing on the 24th March 1951, it was directed by their Lordships that notice of the appeal to His Majesty in Council be served upon the Commissioner of Motor Transport as well as upon the Respondents, so that the Commissioner might, if he was so minded, be present and heard upon the hearing of the appeal. Such notice has been duly given.

p. 23. 18. By the said Order in Council dated the 25th April 1950 His Majesty in Council ordered that the Appellants be granted special leave to appeal to His Majesty in Council against the said Judgment of the Supreme Court of Ceylon dated the 5th December 1949.

19. The Appellants submit that the said decision of the Supreme Court of Ceylon dated the 5th December 1949 should be set aside and the Appellants granted the relief claimed by them in their Petition herein for the following amongst other

REASONS.

(1) BECAUSE the verification of the case stated by the Chairman's signature was sufficient in law.

(2) BECAUSE if the signature of other members of the Tribunal was in law required, the case stated ought to have been sent back to the Tribunal so that this technical defect could be made good.

(3) BECAUSE all the material facts were adequately contained in the case stated and its annexures.

(4) BECAUSE it was the duty of the Supreme Court on the materials before it to make any necessary findings of fact.

(5) BECAUSE if any further evidence as to facts was necessary, the case stated should have been sent back to the Tribunal so that this technical defect could be made good.

(6) BECAUSE the questions for the determination of the Supreme Court were adequately indicated in the materials before them.

(7) BECAUSE if the case stated did not adequately indicate the questions for the determination of the Supreme Court, the case stated should have been sent back so that this technical defect could be made good.

(8) BECAUSE it was in law the duty of the Supreme Court to take any necessary steps to secure that the Appellants' claim received a full and proper hearing on its merits.

(9) BECAUSE, once it had been found that the public interest required a bus service over the portion of road in question, there were no grounds for rejecting the Appellants' application.

(10) BECAUSE there were no grounds for the view that the extension sought by the Appellants would affect the Respondents' custom.

(11) BECAUSE there were no grounds for the view that the Respondents had probably as good a claim to extend their service over a route covered by the Appellants as

the Appellants had to extend their service over a route covered by nobody, the Respondents having in fact allowed their claim to go by default when they lodged no statement of grounds for their appeal.

(12) BECAUSE the questions of fact and law set out in the Appellants' application for a case stated ought to be answered in their favour.

(13) BECAUSE the suggested procedure for Tribunals laid down by the Supreme Court was both unauthorised and inappropriate: nor was it in any substantial respect infringed.

(14) BECAUSE the decision of the Supreme Court was wrong.

STEPHEN CHAPMAN.

No. 20 of 1951.

In the Privy Council.

ON APPEAL

From the Supreme Court of Ceylon.

BETWEEN

PERADENIYA SERVICE BUS COMPANY LIMITED (Petitioners) . *Appellants*

AND

SRI LANKA OMNIBUS COMPANY LIMITED . *Respondents.*

Case for the Appellants.

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