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Dismissal of Stay Order of Proceedings 423

IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 78/91

BETWEEN:

SUNBEAM TRANSPORT LTD	APPELLANT
-and-	
TRANSPORT CONTROL BOARD	1ST RESPONDENT
VATUKOULA EXPRESS SERVICE	2ND RESPONDENT

Mr. V. Kapadia for the Appellant
Mr. M. Khan for the 1st Respondent
Mr. G. P. Shankar for the 2nd Respondent

J U D G M E N T

The matter of this application really lies in very small compass and can be dealt with quite shortly.

On or about 23rd April 1991 an application for Judicial Review of what is called a decision by the Transport Control Board (the first Respondent) was filed in the High Court by Sunbeam Transport Limited and numbered 16 of 1991, the Appellant. The decision was said to be a decision by the first Respondent to receive and to proceed with an application for a road service licence lodged with it by a person or partnership trading as Vatukoula Express Service.

Neither the question of whether the application for Judicial Review properly lies nor the matter of the proper parties need be canvassed here. The Vatukoula Express Service will be referred to as the second Respondent.

On 29th November 1991, the High Court refused or dismissed the application.

On 23rd December 1991, a Notice of Appeal to this Court against the decision given on 29th November was filed, numbered 78 of 1991. At or about the same time the Appellant filed a summons or made an application for a stay of proceedings pending the hearing of the Appeal. In substance this application sought some form of order to prevent the first Respondent from proceeding further with the processing of the application of the second Respondent for a licence, application No. 12/9/65.

This application was heard by the same High Court who had heard the application for Judicial Review and on 30th December, 1991 perhaps not surprisingly, His Honour refused to grant a stay. By summons dated 9th January 1992 a stay of proceedings in this Court was sought by the Appellant, and an amended summons seeking an injunction to achieve the same result was filed on 20th January 1992, both on an interim basis pending the hearing of the appeal. It might be that some question of jurisdiction could be argued, but in the view that I have formed it is unnecessary to worry about that.

The application for a licence under the Traffic Act, No. 12/9/65 about which this appeal is concerned may have been an attempt by the second Respondent to amend a previous licence that had been granted to it, namely licence or application No. 12/9/46, or it may have been a new application. While this may become relevant at some stage, for the purpose of this hearing, it can be treated as a fresh application by the second Respondent for a licence. Like previous applications made or licences held by the second Respondent, it applies to a bus service that had at one stage been operating between Suva and Vatukoula by the second Respondent which service I understand is still operating.

The fresh application was made to the first Respondent on 22nd February 1989, and then, or eventually, received a number 12/9/65. The Traffic Act Chpater 176 lays down the procedures to be followed in the making and processing of applications for a road service licence as it is known. Section 65 of the Act, so far as relevant provides:

Section 65(1):-

> "On receipt of an application for a road service licence or for the renewal, transfer or amendment of a road service licence, being an application complying with the provisions of Section 64 and which in the opinion of the Board is not frivolous, scandalous or vexatious, the Board shall give notice in a newspaper published and circulating in Fiji specifying the details of the application and stating that within the next 10 days following the date of the notice, it will receive representations in writing for or against the application and, if the application is for a road service licence or for the renewal thereof, stating also that, within the next 10 days

following the date of the notice, it will receive other applications in respect of the proposed service."

There are certain provisos which obviate the need to give public notice, but they are not relevant here.

Sub-section (3) of Section 65 provides:-

"If any written representations against the granting of the licence or, in a case where other applications may be received, any other application in respect of the proposed service are received by the Board within the time specified in the notice the Board shall, by public notice, specify the name of any applicant for the proposed service and appoint a day, not less than 14 days after the date of the notice, and place for the purpose of receiving in public evidence for or against any application in respect of the proposed service and shall give notice of such time and place to any applicant in respect of the proposed service. Every representation against the granting of the service or other application in respect of such service shall state the grounds in support thereof and, in the case of any other application, the conditions desired to be attached to the proposed licence shall be specified. The Board shall, when giving notice to the applicant as hereinbefore required, furnish the applicant with a copy of the written representations received by the Board."

The Board, after receiving any evidence and representations, has what appears to be an absolute discretion to grant or refuse an application, although it is not necessary for the purposes of this application to form any view as to the width of the discretion of the first Respondent.

As mentioned earliear, the first Respondent received the relevant application from the second Respondent on 22nd February 1989. It appears to have published the notice required

to be published in accordance with Section 65(1), whether it took the further step of giving a public notice pursuant to Section 65(3), is not disclosed by the evidence. It does not matter. The Act does not appear to require it to take any further step within any particular time of publication of the first notice.

In fact nothing seems to have happened in relation to this application for a long period of time. Whether the appellant made any written representations pursuant to the publication is not disclosed in the evidence; it certainly does not seem to have taken any action to restrain the first Respondent from proceeding further with the application, although I am told and I have not the slightest doubt that it was aware of it. I am also told that the second Respondent is and has been for a long time, operating a bus route between Vatukoula and Suva. The precise extent to which, if at all, its present application seeks to vary the route or times it is now operating, and what the likely effect, if any, of any variation of its present services, might have on the Appellant's business, is not in evidence. At least not before the Court in this application.

During 1990, some proceedings earlier brought by the second Respondent may have been discontinued. In March 1991 an application commenced in December 1988 by the Appellant was dismissed. Nothing else seems to have happened.

For some reason which I believe is unexplained in the evidence before this Court, the first Respondent decided on 25th March, 1991 to give the notice referred to in Section 65(3) of a public meeting to be held on 29th April 1991 in relation to application No. 12/9/65, or if such a notice had already been given to "re-list for hearing" the matter of the application at such a public meeting. The first Respondent may have been and I am told was awaiting the outcome of an application for Judicial Review by the Appellant against a previous decision of the first Respondent which had been commenced in December 1988 by the Appellant in relation to another application for a licence by the second Respondent and which was eventually dismissed by the High Court on 12th March 1991.

Anyway the notification of the proposal of the first Respondent to hold a meeting on 29th April 1991 prompted the commencement of proceedings on 23rd April by the Appellant seeking, as I have already said, a Judicial Review in the High Court of the original decision of the first Respondent made back in February 1988 to receive the application No. 12/9/65. The course of the proceedings since then has already been described.

I have no doubt that on an interlocutory basis the Judge who dealt with the first application was correct in the decision made by him on 30th December 1991.

Leave on one side the fact that the summons before me appears to cover in fact, if not in terms, the same territory as that covered in the application dealt with on 30th December, and could be regarded in substance as an appeal from the decision given by His Honour, an application which I could not entertain. I have no doubt that this application fails.

On 22nd February 1989 the first Respondent received the application which was or became No. 12/9/65. There is no evidence that it did not follow the procedure laid down by Section 65(1). I am entitled to infer that the Appellant was aware of the application. It did nothing. It was content to do nothing until the first Respondent took the next step, some two years or more later. That is the first matter.

The facts seem to me to enable at this stage the first Respondent to justify the fact that it took no action on the application over that same period.

There has been commenced in December 1988 an action by the Appellant for Judicial Review by the High Court No. 18 of 1988, of the procedures put in train by the first Respondent in relation to the grant of a licence to the second Respondent to operate a bus service over the same or basically the same route. That application was pending until March 1991 where it was dismissed. The first Respondent had in January 1989, refused to grant a licence for which the second Respondent had applied.

It had received the fresh application in February 1989. On the present facts before me it was perfectly entitled to receive and consider that fresh application, and to defer taking any further action on it until the Appellant's proceedings were dismissed in March 1989. That is the second thing. It might perhaps be noted that the Appellant lodged an appeal against the dismissal of its proceedings, perhaps emphasising the justification for the first Respondent not to have proceeded earlier on the application of the second Respondent of February 1989.

The third thing is that the first Respondent had a right and duty to consider the application No. 12/9/65. It obviously did not regard this application as frivolous, scandalous or vexatious, and therefore it was obliged to take the steps required of it by Section 65 of the Act. The judgments of the learned Judge on the application for Judicial Review and on the application for a stay give perfectly valid reasons why it should not be stopped from doing so. I see no reason why they do not still apply. That is the third matter.

There is no evidence of irreparable harm to the Appellant if a stay or injunction is not granted at this stage. There is an assertion that it will do so, but no evidence. Indeed it would seem to me to be for the benefit of all parties if the application for a licence were permitted to proceed while the appeal in this matter is being got ready and brought on for hearing.

It is not suggested that the first Respondent has no power to deal with the application of the second Respondent. The merits or otherwise of the application can only be considered by the first Respondent. Why should its consideration of that aspect be deferred while this appeal is got ready and brought on for hearing. It seems very sensible to me that it should not be deferred. The first Respondent may decide to refuse the application, in which case much of the cost of proceedings here can be avoided. If it decides to grant the application then I am quite sure that it will not implement that decision until the Appellant has been notified and given an opportunity to amend so as to seek appropriate relief here if it is satisfied for example that the Appellant's business will be significantly and adversely affected. Indeed it might be in the best position to decide whether that will occur. I have no doubt that the Appellant will put all relevant matters on this and any other aspects before it when it commences to take evidence or hear submissions.

Indeed I am quite sure that a responsible body in the position of the first Respondent and the second Respondent would agree to any deferral if a significant adverse effect were predicated provided the Appellant were to offer the usual undertaking as to damages which incidentally it has not done in support of this application. Not only do I believe there are no adequate reasons why the frist Respondent should be prevented from proceeding with its inquiry, but I think it is most appropriate in the interests of all concerned that it does so.

In the result I can see no reason at all to grant this application and I can see benefit by the first Respondent being not hindered from going about its business in the meantime.

I shall make orders accordingly. I dismiss the application.

Cost of both Respondents to be their cost in the Appeal.

MICHAEL M. HELSHAM
PRESIDENT
FIJI COURT APPEAL

31st January 1992