

APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE FOR THE OPERATION OF AN ICE PLANT SERVICE. QUIRINO G. GREGORIO, APPLICANT.

G.R. No. L-550. January 30, 1947

Ponente: TUASON, J.

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TUASON, J.:

This is a petition for a writ of certiorari by Quirino G. Gregorio. The petition seeks to annul an order of the Public Service Commission and to require it "to proceed for the reconstruction and reconstitution of petitioner's original application (case No. 59690)" to operate an ice plant.

The facts that led to the bringing of this action are these. On May 10, 1940, petitioner herein filed with the Public Service Commission an application for a certificate of convenience and public necessity to install, operate and maintain an ice plant service within the municipality of Pasay, Province of Rizal, an application which was docketed as Commission case No. 59690. Following the usual procedure, petitioner published the notice of hearing in the manner provided by law and regulations and took other steps to put the case in shape to be heard. For diverse reasons hearing on the application was postponed several times until war came and caused the case to be shelved indefinitely.

In February, 1945, the records of the Public Service Commission, including that of case No. 59690, were lost or destroyed. The brief for petitioner states that upon the re-establishment of the Public Service Commission, the latter announced that within a period of one year, which later was extended to six months more, the Commission would entertain requests for reconstitution of all records which had been burned. Then the herein petitioner moved for reconstitution of case No. 59690 with a view to having it adjudicated, but, petitioner alleges, the Commission docketed his motion for reconstitution as a new application under a new number and compelled him to pay again P25 as fee as well as to publish anew the notice of hearing. However, the last allegation is not entirely accurate, as we shall have occasion to show.

Petitioner's case and eleven other applications for authority to install and operate ice plants in various places around the City of Manila were set for hearing and taken up jointly on September 17, 1945. Before that hearing started, the Commissioner informed the parties that should he decide to grant certificates for ice plants he would do so for a temporary period only, not more than three or four years. It was also announced that no applications for ice plant service would be considered unless the applicants already possessed complete machineries and equipment ready to be set up. After trial, the applicants who had machineries and equipment were forthwith granted certificates of public convenience valid up to December 31, 1948. There were six of them. Among those who had no ice-making machineries and equipment and whose applications were denied was the present petitioner.

On motion of the applicant for reconsideration, the Commission elaborated on the grounds of the dismissal of his application in an order from which we quote the following passages:

"The reasons for the adoption of this policy are already set forth in our decisions in cases Nos. 307, 417, et al., and case No. 401. It was adopted for the purpose of insuring that applicants for ice plant certificates would render this urgently needed service as soon as possible after their applications are approved, and to discourage possible attempts to apply for and obtain ice plant certificates with no intention of rendering the service but simply for purposes of speculation. Soon after the Commission was organized, numerous applications for ice plant certificates were filed b??t after this policy was announced not a few desisted from prosecuting their applications and all those who showed real disposition to render the service by obtaining the necessary equipment have been granted certificates in the interest of the public and are now operating or about to operate. The policy was laid down in the exercise of the regulatory power which Commonwealth Act No. 146, as amended, confers upon this Commission. It is a policy justified and required by present conditions and circumstances which are totally different from those prevailing before the War."

As stated at the outset, the present petition is one for a writ of certiorari as distinguished from a petition for review. There is a marked and fundamental difference between the two remedies, which are the only remedies provided for by law for the consideration by this Court of orders or decisions of the Public Service Commission. (Section 36, Commonwealth Act No. 146, as amended; *Manila Railroad Co. vs. A. L. Ammen Transportation Co.*, 48 Phil., 266.) The remedy by certiorari is available only in case the Commission has exceeded its jurisdiction or gravely abused its discretion. When no question of jurisdiction is involved but merely an error of law or fact, the appropriate remedy is reveiw and not certiorari. (*Genanichi Ishi vs. Public Service Commission*, 63 Phil., 428.)

But while the only subject of complaint in the petition is the dismissal of the application and the only prayer is to annul the order of the Commission and to direct it "to proceed for the reconstruction and reconstitution of petitioner's original application (case No. 59690)," petitioner in his brief brings up questions having only remote relation with the allegations in the petition and quite foreign to the function and office of certiorari. Moreover, the pleadings and the briefs do not present with reasonable certainty the precise grounds of attack on the Commissioner's order, and petitioner does not cite any law or authority. We have to look through the trends of the arguments to formulate the concrete propositions on which the writ is sought. Building up out of the discussions of the assignment of errors, we assume the following to be the questions on which decision has to be rendered:

(1) Has the Public Service Commission jurisdiction to disregard petitioner's old application and consider his motion for reconsideration as a new application? (2) Has the Commission authority to dismiss petitioner's application on the sole ground that he has no ice-making equipment on hand? (3) Was petitioner "denied his day in court?"

On the first question we may start with the reminder that Act No. 3110, which prescribes the method for reconstitution of records of judicial tribunals, makes no reference to lost or destroyed records of the Public Service Commission. The matter of reconstitution of such records in the Public Service Commission must be governed by section 11 of Commonwealth Act No. 146, as amended, which provides that the Commission shall make needful rules for its government and other proceedings not inconsistent with the provisions of that Act.

Under this section it is our opinion that the Commission has power to decree that an application which has been lost or destroyed need not be reconstituted and the applicant should, instead, file a new application if he desires to proceed on his intention to secure a certificate of public convenience and necessity. This procedure does not contravene the essential requirements of law. It does not constitute illegality, irregularity or an abuse of discretion.

Furthermore, the petitioner himself suggested the conversion of his motion for reconsideration into a new application. In his prayer he asked that "if this (reconstitution) could not be done, that this petition be considered as an application." This precludes petitioner from taking exception to the conversion of which he now complains. It is a well-established rule applicable to appellate proceedings and review on certiorari that objection not raised

in the lower court cannot be relied on in the appellate court. (14 C. J. S., 286.) If then mere failure to object to a supposed erroneous action bars consideration thereof by the reviewing court, how true it must be when that action was the petitioner's own idea or was actively acquiesced in by him.

We also note that the conversion did not cause any wrong. It has been held that in the absence of some substantial injury or manifest injustice to the petitioner the writ of certiorari does not, as a rule, issue. (14 C.J.S., 141.) It results that, aside from petitioner's having incurred the additional expense to be referred to below, the practice pursued by the Commission did not work substantial injury or injustice to him. The Commission did not deprive him of any legal right. There was no right he could have enjoyed under the old application which was denied him under the new. In reality he did not acquire any right under his pre-war application which he now wants restored. When it was burned no action had been taken on that application beyond what was needed to bring it to trial. The result would not have been any different if the original application instead of the substituted one had been considered.

As to the imposition upon the applicant of the burden of paying docketing fee on the new application and making new publication of the notice of hearing, it should be made clear that this objection was not urged with the Commission; it is mentioned in the petition only by way of describing the various steps which were taken in the case. At any rate, petitioner's expressed willingness to have his motion for reconstitution treated as a new application carried with it an implied conformity to defraying the expenses incident to the filing of a new application.

It is said that pre-war applications should not have been brought within the operation of the post-war, temporary policy of the Commission set forth in its order. This brings us to the second question. This branch of the case involves the reasonableness of the Commission's order. Reasonableness, in turn, in its broad aspects, may be said to import proper exercise of discretion.

The petitioner's contention assumes that it was the original application which was dismissed, when, as has been seen, that application was not reconstituted and it was the second application which was denied. However, the petitioner's conclusion would still be wrong even if this premise were correct. In other words, even if the old application had been reconstituted and no new application had been docketed, it was within the authority of the Commission to dispose of it upon the same level as applications of new applicants.

An application for a certificate of public convenience has to be decided in the light of the conditions obtaining, not at the time of its filing but at the time of the hearing or of the decision. This is so because in the exercise of its authority, the Commission's first consideration is public interest and convenience. (Cebu Ice & Cold Stores Corp. vs. Veluz, 57 Phil., 309.) With public interest and necessity as guide, it may go so far as to revoke certificates of public convenience already issued if the circumstances under which they were granted have materially changed. (Section 16 [m] of Act No. 146, as amended; Pasay Transportation Co. vs. Public Service Commission and Perez Samanillo, 59 Phil., 278.) It stands to reason that, if the Commission may annul certificates that ceased to respond to public utility and convenience, it may dispose of an application, which has not yet ripened into a certificate, in pursuance of a new policy which new situations brought about by a disastrous war demand.

Coming down to the main topic of the second question, was the policy of the Public Service Commission by virtue of which the plaintiff's application was dismissed reasonable? Or to put the question in the language of the law on certiorari, did it constitute a grave abuse of discretion?

The pertinent provisions, rules and decisions on this subject are succinctly summarized in Tolentino's Commentaries and Jurisprudence on Commercial Laws of the Philippines. This summary is to the point and we will make use of it.

The Public Service Commission is the entity vested with the power to authorize the operation of public services and to issue certificates of public convenience therefor. (Section 15, Act No. 146, as amended.) In the exercise of this power, the Commission must be guided by public necessity and convenience as the primary consideration. (Manila Electric Co. vs. Pasay Transportation Co., 57 Phil., 825; Manila Electric Co. vs. Pasay Transportation Co., 66 Phil., 36; Manila Railroad Co. vs. Parsons Hardware Co., 66 Phil., 706.) In the granting or refusal of a certificate of public convenience, all things considered, the question is what is best for the interest of the public. (Carmelo and Oriol vs. Monserrat, 55 Phil., 644.) It follows that, when public convenience would not be served, the issuance of a certificate is not in order. As this Court has once held, since the granting of a certificate of public convenience presupposes that it is for the use and benefit of the travelling public, so where it appears that the route over which the certificate is granted is nothing but a proposed road which has not been constructed, the certificate itself is null and void. (A. L. Ammen Transportation Co. vs. De Margallo, 54 Phil., 570.)

Tested by this standard, the order of the Commission under review is not arbitrary. Although no evidence was adduced in support of the order, its underlying bases were matters of public knowledge of which judicial notice may be taken.

We may take judicial notice of the fact that, as a result of the destruction of the various ice plants in Manila and its environs during the war, and the use by the United States Army of what was left of the ice cold storage, there was an acute shortage of ice on the advent of liberation. We do not think the Commission abused its authority when, to ease this situation, applicants who had facilities for making ice were granted certificates of public convenience good up to December 31, 1948, and those who had not were refused authority. The severe scarcity of ice and the confusion that followed in the wake of a wide devastation and holocaust gave justification to a policy which confined the Commission's attention to the immediate production of essential services. It was an emergency measure demanded by a serious crisis. Under the circumstances there was no point in issuing permanent certificates of public convenience to applicants who had no visible means of supplying public needs. Far from promoting public interest and welfare, permanent certificates in the hands of petitioner and others similarly situated could only be of use to the holders for speculative purposes. More than this, they would be likely to create complication and hamper the Commission's freedom of action in the final adjustment of public service operations. One day, as rehabilitation advanced, the Commission would be called upon to map out a definite program. With the return of normalcy, the manufacture and distribution of ice would have to be regulated on a sound and permanent basis. To improve the service and to eliminate wasteful and ruinous competition, operators and holders of certificates might have to be screened, territories might have to be allocated, and the privilege might have to be restricted to those who financially and by administrative ability were in a position to give the best and maximum of service with the minimum of friction and inefficiency.

The Commission was dealing with a transitional situation and was confronted with a complex problem of business, economy and statesmanship. With the formula adopted by the Commission we cannot interfere in the absence of a clear showing that it is arbitrary, unlawful, or outside the jurisdiction of the Commission to make. (Section 35, Com. Act No. 146, as amended.)

The remaining alleged error to be considered is the assertion that the petitioner's application was dismissed without a hearing.

To say that the petitioner was not given a hearing is not quite correct. In a broad sense there was a hearing. There was a session in which the petitioner or his attorney was present for the purpose of determining whether he possessed the machinery required by the Commission as a condition precedent to the granting of an application. In that session questions were asked and statements made relative to the ability of the applicant to manufacture ice. The hearing thus conducted was adequate. It fitted into the scope of the inquiry. If it was lawful for the

Commission to deny petitioner's application for the sole reason that he did not have an ice-making outfit, it committed no error in confining its investigation to this feature of the application, and the hearing afforded the petitioner fulfilled the legal requirements of a fair trial.

The petition is denied and dismissed without costs.

Moran, C.J., Feria, Hilado, Bengzon, and Padilla, JJ., concur.

Briones, J., concurs in the result.

DISSENTING

PARAS, J.:

I cannot acquiesce in the majority opinion in so far as it sanctions the action of the respondent Public Service Commission in summarily dismissing petitioner's application for authority to install, operate and maintain an ice plant on the sole ground that the petitioner did not have as yet the necessary equipment. This is not, under the law, a condition precedent. Assuming that the Commission, in the interest of public service and convenience, may validly impose such a requirement, the petitioner should have been sufficiently alerted, if the Commission wanted to be just and fair to everybody. It is significant that the petitioner is a pre-war applicant whose good faith cannot, therefore, be seriously doubted. The fear that he might be merely speculating is not a valid reason for denying him his day in court, since the law empowers the Commission to cancel any certificate upon failure on the part of the applicant to operate after a certain period. The action of the Commission is a dangerous precedent and virtually authorizes intending operators to first purchase equipment and thereafter obtain the necessary certificate of public convenience which will surely be issued by the Commission as a matter of routine. Any supposition to the contrary would work fraud and difficulties on future applicants who have acquired machineries in advance. In either case, however, the effect is certainly unwholesome.

The Commission should have heard petitioner's application on the merits.

DISIDENTE

PABLO, M.:

Disiento. El solicitante tiene derecho a una vista para presentar pruebas en apoyo de su solicitud.

El 17 de Septiembre de 1945, el Comisionado en sesion abierta anuncio que la vista de las causas en que los solicitantes tenian maquinarias y equipos disponibles para su inmediata instalacion e inspeccion tendria lugar el 15 de Octubre, y la vista de las causas en que los solicitantes no tenian maquinarias y equipos se posponia indefinidamente. El 15 de Octubre de 1945, el Comisionado dijo:

"I will hear the following cases with equipment falling under the first group: 300, 401, 417, 2226, 2492 and 2909. Hearing on the other cases of applicants without equipment, Nos. 70, 136, 253, 254, 299, 307, 439, 466 and 2548, is hereby postponed indefinitely. The Commission will decide what action it will take on said cases of applicants without equipment."

El 4 de Febrero de 1946, el Comisionado, sin vista, y por el solo motivo de que el solicitante en la presente causa No. 446 no tenia, segun el expediente, maquinarias y equipos, para su inmediata instalacion, sobreseyo la solicitud. Lo expuesto demuestra claramente que el solicitante no se le dio debida oportunidad para presentar sus pruebas.

Un solicitante que compra maquinarias y equipos sin saber con seguridad si ha de obtener certificado de conveniencia publica para explotar el negocio o industria que solicita, no obra con prudencia: esta jugando con el azar. Por tal razon, no puede estar en mejor condicion, ni tiene mejor derecho en operar una empresa de tal naturaleza que aquel que primeramente presento su solicitud antes de invertir al azar su capital, o tal vez toda su fortuna.

Obligar al solicitante, como condicion indispensable, que tenga antes de la vista, maquinarias y equipos es obligarle a comprarlos y adquirirlos en el mercado negro y esto conduciria a operaciones absurdas.

Si hay tres solicitantes para un solo municipio pequeño, y se sigue la politica de la Comision, cada uno de los tres solicitantes para poder entrar en vista compraria la maquinaria y equipos necesarios y los montaria inmediatamente para estar preparados para la inspeccion. ¿Concedera entonces la Comision a cada uno de los solicitantes el certificado de conveniencia publica sin tener en cuenta cual de los tres esta en mejores condiciones economicas para operar una empresa para el servicio de hielo y sin tener en cuenta si los tres operadores entrarian en una competencia ruinosa? La teoria adoptada por la Comision es peligrosa.

Cada solicitud debe ser vista en su fondo para que el solicitante tenga oportunidad de demostrar si esta en condiciones o no de prestar el servicio que solicita, sin tener en cuenta si tenia de antemano o no maquinarias y equipos. Ademas, en los certificados de conveniencia publica se pone como condicion, bajo pena de cancelacion, la de que la operacion de la empresa debe comenzar dentro de seis meses desde la fecha de la notificacion de la decision. ¿Por que exigir que el solicitante tenga las maquinarias y equipos antes de la vista? Pero esta condicion no se exigió a Imus Electric Company en la causa No. 58825.

Este Tribunal debe revocar la orden de sobreseimiento y ordenar nueva vista.

PERFECTO, M.:

Concurro con la disidencia del Magistrado Pablo. Tambien encuentro fundada la del Magistrado Paras.

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