

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application for Mandates
in the nature of Writs of Certiorari,
Prohibition and Mandamus under and in
terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

1. Mohomed Nasurullah,
52/5/4, Moor Road,
Colombo 06.

PETITIONER

CA No. CA/Writ/0329/2019

v.

1. National Film Corporation of Sri Lanka,
PO. BOX 88, No. 303, Bauddhaloka
Mawatha,
Colombo 07.
2. Mrs. Anusha Gokula Fernando,
Chairperson,
National Film Corporation of Sri Lanka,
PO. BOX 88, No. 303, Bauddhaloka
Mawatha,
Colombo.
3. Hon. Sajith Premadasa,
Minister of Housing Construction &
Cultural Affairs,
Ministry of Housing Construction &
Cultural Affairs,
2nd Floor, “Sethsiripaya”,

Sri Jayawardanapura Kotte.

4. Mr. Bernard Vasantha,
Secretary,
Ministry of Housing Construction &
Cultural Affairs,
2nd Floor, “Sethsiripaya”,
Sri Jayawardanapura Kotte.

RESPONDENTS

1. Dr. Jayantha Dharmadasa,
Chairperson,
National Film Corporation of Sri Lanka.
PO.BOX 88, No. 303, Bauddhaloka
Mawatha,
Colombo.
2. Hon. Mahinda Rajapakse,
Minster of Baudhdhasasana, Cultural &
Religious Affairs,
Ministry of Baudhdhasasana, Cultural &
Religious Affairs,
155, Srimath Anagarika Dharmapala
Mawatha,
Colombo 07.
3. Mr. M. B. K. Harischandra,
Secretary,
Ministry of Baudhdhasasana, Cultural &
Religious Affairs,
155, Srimath Anagarika Dharmapala
Mawatha,
Colombo 07.
- 3(a). Prof. Kapila Gunawardane,
Secretary,
Ministry of Baudhdhasasana, Cultural &
Religious Affairs,

155, Srimath Anagarika Dharmapala
Mawatha,
Colombo 07.

ADDED-RESPONDENTS

BEFORE : M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL : Saliya Peiris PC., with Susil Wanigapura
for the Petitioner

Sumathi Dharmawardena, ASG, PC., with
Sri Meththa, SC for the Respondents.

ARGUED ON : 21.03.2023

DECIDED ON : 25.05.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings against the Respondents *inter-alia* seeking;

- i. A Writ of *certiorari* quashing the notification marked ‘P 20’.
- ii. A Writ of *certiorari* quashing the decision of the 3rd Respondent Minister’s predecessor marked ‘P 14’.
- iii. A Writ of *certiorari* quashing the decision of the 3rd Respondent Minister’s predecessor marked ‘P 15’.

- iv. A Writ of *certiorari* quashing the decision/direction/regulation given by the 1st and 2nd Respondent in terms of the document marked 'P 20'.
- v. A Writ of prohibition preventing 1st to 4th Respondents from implementing/acting in furtherance/ pursuance of the 1st and 2nd Respondent marked 'P 14', P 15' and 'P 20'.
- vi. A Writ of prohibition preventing 1st to 4th Respondents from enacting any direction/ decisions/regulations/enforcing in criteria relating to importation, distribution, and exhibition of films in contravening policy guideline in 'P 5(i)'.
- vii. A Writ of prohibition 1st to 4th Respondents from interfering in the process of importation, distribution, and exhibition by the Petitioners.
- viii. A Writ of prohibition preventing 1st to 4th Respondents from interfering in the process of importation, distribution, and exhibition, without first formulating regulations, criteria, or standards relating to the distribution of films.
- ix. A Writ of prohibition preventing 1st to 4th Respondents from enacting any direction, regulation, or enforcing any criteria or standards as such without first affording the petitioners and other stakeholders an opportunity or representation.
- x. A Writ of *mandamus* directing the 1st to 4th Respondents to duly consider and evaluate the representations made by the Petitioners and other stakeholders.

The Respondents filed their statement of objections seeking dismissal of the Petition on the grounds;

- (a) The Cabinet decision on which the Circular marked 'P 5(i)'/P5(ii)' titled 'National Film Policy and Guidelines' was issued has been cancelled by the subsequent Cabinet decision '1 R 1'.

- (b) As such, all subsequent decisions taken in respect of the private distribution of films in Sri Lanka must be taken in accordance with the Cabinet decision marked ‘1 R 1’.
- (c) The Cabinet decision ‘1 R 1’ is not challenged in this application and as such, this application has become futile in terms of law.
- (d) In any event, in terms of Section 5 (d) and Section 57 of the National Film Corporation Act of Sri Lanka, as amended, (hereinafter sometimes referred to as ‘NFC Act’) the exclusive right to distribute, import, and exhibit films are vested with the 1st Respondent Corporation.
- (e) As such, the Circular titled ‘National Film Policy and Guidelines’ marked ‘P 5(i)/P 5(ii)’ and all decisions taken pursuant to the Circular are in violation of the provisions of the NFC Act.

When this matter was taken up for argument before this Court on the 21st March 2023, the learned Additional Solicitor General for the Respondents raised the following two preliminary objections;

- i. In view of the Cabinet decision marked ‘1 R 1’, the relief sought in this application has become futile.
- ii. Some of the relief sought in this application are based on contracts entered into between the two parties and as such no writ lies to remedy the grievances of the Petitioner.

Consequently, both parties were allowed to file written submissions on the preliminary objections. Accordingly, the Petitioner as well as the Respondents filed their respective written submissions.

Relevant facts

Petitioner admits that with the introduction of the State Film Corporation Act No. 47 of 1971, under Section 57, the authority in controlling the film industry was exclusively vested with the National Film Corporation of Sri Lanka (the 1st Respondent). The Petitioner also stated that in terms of Section 5 (d) of the principal enactment, the 1st Respondent National Film Corporation was vested with the exclusive right to **import, sell, hire, supply, and distribute films,**

equipment, and raw materials necessary for the production and exhibition of films¹. According to the Petitioner, due to the reasons stated in paragraphs 15 to 21 of the Petition, a Cabinet Memorandum setting out the ‘National Film Policy and Guidelines’ (‘P 4’) was presented to the Cabinet and approved on the 5th May 1999. Subsequent to the said Cabinet decision, ‘National Film Policy and Guidelines’ were issued as a Circular dated 17th June 1999 (‘P 5(i)/ P 5(ii)’) by the Secretary to the Ministry of Finance and Planning. Accordingly, the rights over the importation and distribution of film were granted to the private sector. Consequently, several Circulars were issued for the implementation of the National Film Policy and Guidelines².

Thereafter, private distribution circuits had entered into formal agreements with the 1st Respondent³. As a result, those circuits were allowed to import and distribute films in Sri Lanka.

Accordingly, based on the above policy of the government, the Petitioner has entered into agreements with distributors, international studios, producers, and local producers. Further, it is submitted that the Petitioner has heavily invested their funds in the industry. According to the Petitioner, when the matter remains as such unexpectedly the 1st Respondent, by letter dated 19th June 2018 (‘P 14’) informed the Petitioner to immediately stop its operation of distribution of films⁴. Further, the 1st Respondent had issued a letter dated 20th June 2018 notifying theatres island-wide of the NFC’s sole authority pertaining to the distribution of films.

Thereafter, four other distributing circuits filed the District Court action bearing No. DSP 99/2018 (‘P 16’) against the 1st Respondent, in the District Court of Colombo on the 26th June 2018, on the basis of violation of the contract with the 1st Respondent, seeking *inter-alia* enforcement of the said agreement. The learned District Judge had first issued an enjoining order but, refused to issue an interim injunction restraining the 1st Respondent, NFC, from giving effect to the letter dated 19th June 2018 (‘P 14’). According to the Petitioner, the order of the District Judge is appealed to the Civil Appellate

¹ Paragraph 12 & 13 of the Petition.

² P 6.

³ P 8.

⁴ Paragraph 38 of the Petition.

High Court and the Civil Appellate High Court has already granted an interim order restraining the operation of 1st Respondent's letter 'P 14'. Hence, it is clear that the same matter pertaining to 'P 14', the authority of the NFC to distribute and supply films in Sri Lanka under the NFC Act is being agitated before the District Court as well. Later on, the Petitioner has come to know that the impugned decision of the 1st Respondent marked 'P 14' was communicated to the NFC pursuant to a direction given by the Minister of Cultural Affairs⁵. This is an admitted fact by the Respondent⁶.

As I have already stated above, the Petitioner's contention is that the decision to revoke the importation, sale, distribution, and supply of films by the circuits is illegal and bad in law.

The Respondent's contention is that the relief sought by the Petitioner in this application has been rendered futile by the Cabinet decision marked '1 R 1' and also that writ jurisdiction cannot be invoked in respect of the termination of a contract between the parties.

Analysis

Section 5 (d) and Section 57 of the National Film Corporation of Sri Lanka Act reads as follows;

5(a) & (b) (...)

(bb) (...)

(bbb) (...)

(c) (...)

(d) exercise the exclusive right to import, sell, hire, supply, and distribute films, equipment, and raw material necessary for the production and exhibition of films;

(e) to (o) (...)

57. (1) Subject to the provisions of section 58, on or after such date (hereinafter in this Act referred to as the 'relevant date') as the

⁵ *Vide* 'P 20'.

⁶ Paragraph 10 (iv) of the Respondent's written submission.

Minister may specify by Order published in the Gazette, no person shall import into Sri Lanka or sell, supply or distribute within Sri Lanka any films, photographic equipment or any material, equipment or accessory necessary for the production or exhibition of films, without the written authority of the Chairman.’

(2) (...)

(3) (...)

It is clear that in terms of Sections 5 (d) and 57 of the NFC Act, as amended, the exclusive right to distribute, import, and exhibit films is vested with the 1st Respondent Corporation. However, pursuant to the Circular marked ‘P 5 (i)/ P 5(ii)’, issued by the Secretary to the Ministry of Finance and Planning as per the Cabinet Memorandum marked ‘P 4’, the rights over the importation and distribution of films were granted to private circuits.

Thereafter, the private circuits carried on the importation, sale, distribution, and supply of films in Sri Lanka for nearly two decades. On the 18th of June 2018, the Secretary to the Ministry of Higher Education and Cultural Affairs informed the Chairman of the 1st Respondent Corporation that the 1st Respondent NFC entered into agreements with the circuits for the distribution of films in contravention of the provisions of the NFC Act. The letter further states that those agreements itself state that those were entered into subject to the condition that a system will be introduced in due course by amending the Act. But no subsequent amendments were made to the NFC Act. The letter states that the purported agreements have no force or avail in law. Accordingly, the Secretary to the Ministry has communicated under the command of the Minister to the Chairman of the NFC to inform the circuits that the agreements are null and void; the circuits to stop the distribution of films in the future and all the powers granted to the National Film Corporation under the Act would be exercised by the NFC itself.

Above all, on the Cabinet decision dated 26th March 2020, the Cabinet of Ministers has arrived at a decision to cancel both the previous Cabinet decision and Circular ‘P 5 (i)/ P 5(ii)’, changing the previous national policy on distribution and supply of films.

The Appellant's contention is that the agreements between NFC and private circuits are formulated in accordance with the provisions of the NFC Act No. 47 of 1971. Accordingly, the petitioner submitted that those agreements cannot be interpreted as a violation of the provisions of the NFC Act.

The Respondents submitted that the Cabinet decision pursuant to Cabinet Memorandum 'P 4' and the Circular ('P5 (i)/P 5(ii)') which the Petitioners relied on are contrary to the provisions of the NFC Act. Consequently, the agreement marked 'P 8' and the other agreements are also *ab initio-void*.

According to Section 5 (d) and 57 of the NFC Act, the exclusive right to import, sell, hire, supply, and distribute films is vested with the NFC and non-other. The only exception was the written authority granted by the Chairman. However, the Petitioner has not submitted to Court any such authority granted by the Chairman of the NFC. The agreement does not indicate whether it had been signed by the Chairman himself. The Petitioner also does not state as such. Therefore, in my view, the agreements are *ex-facie* in contravening the provisions of the NFC Act. According to the Respondent, the Cabinet decision entered pursuant to the Cabinet Memorandum 'P 4' and the Circular on 'National Policy of Films and Guidelines' ('P 5 (i)/ P 5(ii)') has been cancelled by the subsequent Cabinet decision marked '1 R 1' dated 26th March 2020. Accordingly, the Cabinet decision pursuant to the Cabinet Memorandum marked 'P 4' stands specifically revoked upon the Cabinet decision marked '1 R 1'.

Is the Petitioner's application now futile?

As it was correctly, submitted by the Respondents '1 R 1' is not challenged in this application. Even if this Court grants a writ of *certiorari* quashing the paper notification published by the 1st and 2nd Respondent marked 'P 20'; the directive of the 3rd Respondent Minister's predecessor, communicated to the Chairman of the NFC through the Secretary to the Ministry by letter 'P 20'; the decision of the 3rd Respondent's predecessor marked 'P14' and 'P15'; National Policy of Films and Guidelines marked 'P5 (i)/ P 5(ii)' is null and void, the Cabinet decision '1 R 1' will remain intact. On the same basis, the writs of prohibition prayed for in the Petition which flows on the decision of this Court on the above matter will also fail. Accordingly, the relief sought by the Petitioner had become futile by the subsequent Cabinet decision marked '1 R 1'.

Another matter which needs the attention of this Court is the fact that the Cabinet approved the rescinding of the agreements subject to the approval of the Attorney General and without prejudice to the actions already taken in terms of Circular ‘P5 (i)/ P 5(ii)’. It is true that Respondents have failed to disclose any document to the effect that the Attorney General has concurred with the imputation of the policy of the Cabinet of Ministers. However, in paragraph (a) 1 of the Cabinet Memorandum dated 13th March 2020, under the heading of ‘observations’, it is specifically stated that the Attorney General has advised the NFC to cancel the Circular mentioned in proposal No. 4.1, Circular No. DMS/360/NFC/P dated 17th June 1999 under the heading of ‘National Film Policy and Guidelines’, issued by the Secretary to the Ministry of Finance and Planning. Accordingly, the above submission of the Petitioner is devoid of merit. Moreover, the Cabinet decision dated 5th May 1999 upon which Circular ‘P 5 (i)/ P 5(ii)’ was issued had also been cancelled by the subsequent Cabinet decision ‘1 R 1’.

Another potential argument is that even if the concurrence of the Attorney General is obtained the agreement entered into by the NFC with private circuits falls within the phrase ‘*actions already taken in terms of the said Circular*’ in the Cabinet decision. The Cabinet decision ‘1 R 1’ states that the said decision should be without prejudice to the actions already taken *in terms* of the Circular. Obviously, this should be any action already taken under the agreements entered pursuant to Circular P 5(i)/P 5(ii). In my view, any one should not be allowed to interpret the agreement itself as an action under Circular ‘P 5 (i)/ P 5(ii)’, concerning the Petitioners.

In light of the foregoing analysis, I am of the view that Petitioner’s application has become futile.

In the case of *Rathnasiri and others v. Ellawala and others* Marsoof J., observed that ‘*a Writ will not issue where it would be vexatious or futile*’

In *Siddeek v. Jacolyn Seneviratne and others*⁷ Soza J., observed that the ‘*the writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice, and illegality*’

⁷ [1984] 1 S.L.R. 83 at p. 90.

Yet, I am mindful that an application for writ should not be dismissed merely because it has become futile pending the determination of the application⁸.

However, the facts of the present case are quite different from the cases referred to in the preceding paragraph, and in my view, the facts of this case do not warrant the continuation of this application. This is not an appropriate case to convey a message to other public officers.

The Petitioner has also sought a writ of *mandamus* directing the 1st to 4th Respondents to duly consider and evaluate in full representations by the Petitioners and other concerned parties in connection with any proposed regulation criteria or standards relating to the importation and/or distribution and/or exhibition and/or decisions affecting the Petitioners. However, in the circumstances, Petitioner's application has become futile, a writ of *mandamus* will also not be available against the Respondent⁹.

Is the Petitioner's application based on a contract?

The Petitioner has sought to quash the letter of the Chairman of the 1st Respondent corporation ('P 14' and 'P 15') issued under the directions of the 3rd Respondent Minister. By the said letters, the Chairman of the 1st Respondent corporation has informed the private circuits and the owners of cinemas that the agreements entered between the NFC and the private circuits are null and void. It is an admitted fact that the some of the private circuits have already instituted an action in the District Court bearing No. DSP 99/2018 ('P 16') seeking relief regarding the agreement between the NFC and the private circuits. According to 'P 16' the reliefs sought *inter-alia* are that the agreements are valid, binding, operative, and in force. Further, a declaration that the agreements cannot be unilaterally terminated and/or unilaterally declared null and void. Hence, it appears that the private circuits have already sought relief from the District Court with respect to the same agreements, the matter in issue in the instant case. Accordingly, the private circuits, the affected parties themselves have acknowledged that the relationship between the NFC and the private circuits is contractual and resorted to the alternative remedy available.

⁸ *Mohan Lal v. Seneviratne and other*, CA Writ 243/2015; *Sudakaran v. Bharathi*, [1989] 1 S.L.R. 46; *Nimalsiri v. Divisional Secretary Galewala*, [2003] 3 S.L.R. 85 at 88.

⁹ *Selvamani v. Dr. Kumaravelupillai and others*, [2005] 2 SLR 99.

In the case of *Jayaweera v. Wijeratne*¹⁰ His Lordship G.P.S. de Silva J., (as His Lordship then was) observed, ‘*Where the relationship between the parties is a purely contractual one of a commercial nature neither certiorari nor mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of natural justice even if one of the parties is a public authority.*’

Further, it was observed that ‘*the fact that the parties are amenable to writ jurisdiction would not change the character of the decision if the decision is made in exercise of the power springs from contract*’.

In *Weligama Multi Co-operative Society v. Daluwatte*¹¹ it was held that ‘*The Writ will not issue for private purposes, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by ordinary contractual remedies such as damages, specific performance, or injunction. They are not enforceable by Mandamus which is confined to public duties and is **not granted where there are other adequate remedies.***’

Further, in *Gawarammana v. The Tea Research Board*¹² it was held that ‘*powers derived from contract are matter of private law. The fact that one of the parties to the contract is a public authority is not relevant since the decision sought to be quashed by way of certiorari itself was not made in the exercise of any statutory power*’.

It was observed in the case of *De Silva v. Sri Lanka Telecom*¹³, ‘*Neither Certiorari nor Mandamus will lie to remedy the grievances arising from an alleged breach of contract*’.

It is trite law that prerogative writs are discretionary remedies, and therefore, not entitled to invoke when there is an alternative remedy available.

¹⁰ [1985] 2 SLR 413.

¹¹ [1984] 1 SLR 195 at 199.

¹² [2003] 3 SLR 120.

¹³ [1995] 2 SLR 38.

In *Ishak v. Laxman Perera, Director General of Customs and others*¹⁴ it was held that, ‘*where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review*’.

‘*the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort.*’

I am mindful that there had been instances where our Courts have provided relief through writs where the *contractual or commercial character of the transaction is overshadowed by an administrative malady that needs to be remedied*¹⁵. But this is not such a case. The impugned decision, in this case, is based on the interpretation of the statute, NFC Act, and on the change of government policy upon Cabinet Decision ‘1 R 1’.

Conclusion

Having considered the arguments presented to this Court by all the parties, I am of the view that the reliefs sought by the Petitioners have become futile by the subsequent Cabinet Decision ‘1 R 1’.

Furthermore, in the instant case, prerogative remedies cannot be invoked in respect of the termination of the contract.

The application of the Petitioners is therefore dismissed. No costs.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL

¹⁴ [2003] 3 SLR 18.

¹⁵ *Fernando and two others v. Timberlake International (Pvt.) Ltd*, 2010 [B.L.R.] 124.