

SRIYANI SILVA (WIFE OF JAGATH KUMARA-DECEASED)

v.

IDDAMALGODA, OFFICER-IN-CHARGE,
POLICE STATION, PAYAGALA AND OTHERS

SUPREME COURT

S.N. SILVA, C.J.

BANDARANAYAKE, J., AND

EDUSSURIYA, J.

SC APPLICATION No. 471/2000

29th AUGUST AND 29th NOVEMBER

2001, 25th MARCH, 29th APRIL, 20th MAY, 6th AND 10th JUNE 2002

Fundamental Rights – Articles 11, 13(1) and 13(2) of the Constitution – Death of detainee in Police custody in consequence of alleged torture – Acquired right to enforcement – Locus standi of the widow to prosecute such right – Articles 17 and 126(2) of the Constitution – Time bar – Interpretation of statutes.

On 12.6.2000 the deceased was arrested and kept in custody at the Payagala Police Station where he remained in custody until he was produced before the Magistrate on 17.06.2000 when he was remanded to prison. On 20.6.2000 the detainee died at the Remand Prison. There is *prima facie* evidence including medical evidence to the effect that the deceased was assaulted whilst in police custody and his death resulted by reason of such assault.

A petition was filed on 18.7.2000 on behalf of the petitioner (the deceased detainee). On 23.8.2000 on the day it was for support, the court allowed counsel to amend the petition by substituting the widow of the deceased as the petitioner. The amended petition was allowed by court on 23.10.2000. At the hearing of the application two preliminary objections were raised on behalf of the respondents:

- (a) The petitioner had no *locus standi* to make this application in view of Article 126(2) of the Constitution which provides that the person whose rights are infringed may by himself or by an attorney-at-law apply for relief. The right is personal to the aggrieved person. Hence if he is dead a legal representative cannot initiate proceedings under that Article.
- (b) The petitioner's (the widow's) application is out of time as she came into the case only on 23.8.2000 after the lapse of one month from the death of the deceased.

The petitioner alleged infringement of rights, *inter alia*, under Articles 11,13(1) and 13(2) of the Constitution.

Heid (Edussuriya, J. dissenting):

1. Article 17 of the Constitution provides for the entitlement to relief for infringement of fundamental rights and Article 126 deals with the fundamental rights jurisdiction of the court and its exercise.
2. The deceased detainee who was arrested, detained and allegedly tortured and thereby died acquired a right under the Constitution to seek redress from the Court for violation of his fundamental rights. Hence when there is a causal link between the death of a person and the process, which constitutes the infringement of such person's fundamental rights any one having a legitimate interest could prosecute that right in terms of Article 126(2) of the Constitution. There would be no objection *in limine* to the wife of the deceased instituting proceedings in the circumstances of this case.
3. The golden rule of plain, literal and grammatical construction has to be read subject to the qualification that the language of the statute is not always that which a grammarian would use.

Per Bandaranayake, J.

"It could never be contended that the right ceased and would be ineffective due to the intervention of the death of the person, especially in circumstances where the death in itself is the consequence of injuries that constitute the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survives could vindicate his rights in proceedings before the court, but if torture is so intensive that it results in death, the right cannot be vindicated in proceedings before this court. In my view a strict literal construction should not be resorted to where it produces such an absurd result."

4. The original petition was filed within time. Hence the application is within time as provided by Article 126(2).

APPLICATION for relief for infringement of fundamental rights (Preliminary objections)

Case referred to:

1. *Somawathie v Weerasinghe and Others* (1990) 2 Sri LR 121 (distinguished)
2. *Corocraft v Pan-Am* (1969) Q B 616 at Pg 638

3. *Lyons v Tucker* (1880) 6 Q B D 660 at Pg 664
4. *Baru v Lachchman* 111 PR 1913 at Pg 417
5. *Rananjaya Singh v Baijnath Singh and Others* AIR 1954 S.C. 749, 752
6. *Chatenay v Brazilian Submarine Telegraph Co* (1891) 1 Q B 79, 85
7. *Abel v Lee* (1871) L.R. 6 P 365 at 371
8. *Premalal de Silva v Inspector Rodrigo and Others* (1991) 2 Sri LR 301

J.C. Weliamuna for petitioner.

Manohara de Silva for 1st respondent.

Saliya Peiris for 2nd and 3rd respondents.

Viveka Siriwardena de Silva for 5th to 7th respondents.

Cur.adv.vult

December 10, 2002

SHIRANI A. BANDARANAYAKE, J.

This is an application filed by the wife of a deceased detainee, praying for a declaration that her deceased husband's fundamental rights guaranteed by Articles 11, 13(1) and 13(2) of the Constitution were violated, and claiming for a sum of Rupees One Million as compensation from the 1st to 4th respondents and the State.

The initial petition was filed on 18.07.2000 by an attorney-at-law of the Legal Aid Commission on behalf of the petitioner and was listed for support for leave to proceed on 23.08.2000. On that day, learned counsel for the petitioner, who supported the application moved to amend the caption to read as on behalf of the wife as the legal representative of the deceased. Learned counsel for the petitioner submitted that the prayer to obtain compensation was for the deceased's wife and for the minor child of 2 1/2 years of age. The Court allowed the petitioner to change the caption and the amended petition dated 30.08.2000, filed on 25.09.2000 was sup-

Prison, Kalutara. The petitioner averred that on 18.06.2000, the mother and the sister of the deceased detainee visited the prison, but they were not allowed to meet him. On 19.06.2000, the uncle of the deceased detainee who visited the prison was informed that the detainee was transferred to the Magazine Remand Prison on 18.06.2000. On 21.06.2000, the Payagala Police informed the petitioner that the detainee had died on the previous night at the Magazine Remand Prison.

Several affidavits were filed along with the petition, which indicated that the detainee was severely assaulted during the time he was kept in police custody. I do not wish to venture into the details of the allegation on assault as we are only dealing with the preliminary objections raised by the respondents at this juncture. However, I am of the view that it is necessary to refer to the post mortem report which was called by this Court at the time leave to proceed was granted on this application. This report refers to 20 injuries, which were identified on the Head, Trunk, Upper limbs and Lower limbs of the deceased and the AJMO had given the cause of death as "Acute renal failure due to muscule cutaneous injuries following blunt trauma". The detainee, an averagely built male, was 23 years of age at the time of his death.

It is to be noted that on 17.06.2000, at the time the detainee was brought to the Remand Prison, Kalutara, he made a statement to one of the prison officials informing him that he was assaulted while he was kept at the Payagala Police Station (P6). Again on 18.06.2000 at 2.50 p.m. the detainee had made a statement informing that about 10 officers including the 2nd and 3rd respondents assaulted him at the Police Station.

Learned counsel for the 5th to 7th respondents conceded that factually the instant case could be distinguished from *Somawathie's* case (*supra*). Her position was that Article 126(2) of the Constitution was given a plain grammatical meaning in *Somawathi'es* case (*supra*) and the factual consideration should not play a role in the interpretation of the plain and ordinary words of the provision.

Considering the crux of the arguments raised by learned counsel for the respondents, according to the provisions of the

Constitution, a person other than whose rights are infringed cannot make an application to vindicate the rights of another person, even if that other person on whose behalf the application is made is not among the living. Therefore a relative of a person, whose death was caused by torture, would not be able to obtain redress through the fundamental rights jurisdiction enshrined in our Constitution. I find it difficult to agree with these submissions made by learned counsel for the respondents for the following reasons.

It is to be noted that the sole object in statutory interpretation is to arrive at the intention of the legislature. Donaldson, M.R. in *Corocraft v Pan-Am* ⁽²⁾, said that,

"the duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments."

In *Lyons v Tucker* ⁽³⁾ Grove, J. stated that the golden rule of plain, literal and grammatical construction has to be read subject to the qualification that the language of statutes is not always that which a grammarian would use.

Learned counsel for the petitioner contended that Article 126(2) read with Article 17 of the Constitution provides a right for a victim to seek relief from this Court for an infringement or an imminent infringement of a fundamental right. Learned counsel drew our attention to Bindra, who had stated that,

"If a statute which creates a right does not prescribe a remedy for the party aggrieved by the violation of such a right, a remedy will be implied and the party aggrieved may have relief, in an appropriate action founded upon the statute. The creation of a new duty or obligation or the prohibition of an act formerly lawful carries with it by implication a corresponding remedy to assure its observance." (Interpretation of Statutes, 7th edition, pp. 729-730)

This concept, viz., a right must have a remedy, is based on the principle which is accepted and recognized by the maxim *ubi jus ibi remedium* – "there is no right without a remedy". Thus, one cannot think of a right without a remedy as the right of a person and the remedy based on the said right would be reciprocal.

Further, according to paragraph 36 of the so called amended petition, the present Petitioner's position is that the rights guaranteed under Articles 11, 13 and 17 of the Constitution to the deceased, devolved on the present Petitioner (widow) on the death of her husband and she, the present Petitioner is therefore entitled *to continue* with the first application. Once again I repeat that the first application was one which the Court could not entertain in as much as the person on whose behalf it had been presented was dead by the date of institution, and therefore there is no question of continuing with that application.

Therefore the so called amended petition now before Court is a new petition filed on 25th September 2000 though dated 30th August 2000 (vide the date stamped on the motion accompanying the so called amended petition) over three months after the death of the person whose fundamental rights had allegedly been infringed.

The attorney-at-law for the present Petitioner in fact filed an entirely new petition on 25th September 2000 under the guise of an amendment in an endeavour to overcome the time bar.

For the above mentioned reasons I uphold the preliminary objection raised by the learned State Counsel regarding time bar, in respect of the widow's application and, consequently dismiss this application.

The next question for decision is whether the widow of a person whose fundamental rights had been infringed is entitled to make or continue with an application for redress under Article 126(2) on the basis of devolution on the widow, of the right acquired prior to death by a deceased person whose fundamental rights had been infringed to seek redress.

Article 126(2) reads as follows:

"Where any person alleges that any such fundamental right or language right relating to such person has been infringed by executive or administrative action, he may by himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of Petition in writing

addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."

On a plain reading of Article 126(2) it is clear that where a person's fundamental rights have been infringed, that person by himself or by an attorney-at-law on his behalf can seek redress from the Supreme Court.

The language contained in Article 126(2) is unambiguous as it stands and in my view excludes persons other than those named therein from seeking redress. Article 126(2) does not set out the heirs or the dependants of the person whose fundamental rights have been infringed, as persons who could seek redress.

Counsel for the present Petitioner has cited the following passage from Bindra on *Interpretation of Statutes* in this connection. "If a statute which creates a right does not prescribe a remedy for the party aggrieved by the violation of such right, a remedy will be implied and the party aggrieved may have relief, *in an appropriate action founded upon the statute*. The creation of a new duty or obligation or the prohibition of an act formally carries with it by implication a corresponding remedy to assure its observance".

There is nothing in the Constitution which implies that the widow of a person whose fundamental rights were infringed has a right to relief or redress under Article 126(2). Besides, Article 126(2) provides a remedy to the person whose fundamental rights have been violated. The right to seek redress is only given to those whose fundamental rights have been infringed. Therefore this passage in Bindra on *Interpretation of Statutes* – 7th Edition Page 729–730 has no applicability to the matter presently before us.

In *Somawathie v. Weerasinghe and Others* wherein Amerasinghe J. stated that "...where the words are in themselves precise and unambiguous, and there is no absurdity, repugnance or inconsistency with the rest of the Constitution the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense", and according to the majority decision a

that the intention of the Legislature under Article 126 was to grant relief only to the person whose fundamental rights had been violated.

Article 17 read with Article 126 (2) provides a remedy to those whose fundamental rights have been infringed and Article 126 (2) categorically states that the person whose fundamental rights have been infringed, himself or by an attorney-at-law on his behalf should make an application for redress. There is nothing therein which even remotely suggests that a widow has such a right or that such right devolves on a widow or heirs of a person whose fundamental rights have been infringed.

In the circumstances it would be preposterous on our part to hold that the Legislature intended that the right to apply for redress should pass to the heirs or that the heirs of a deceased whose fundamental rights had been infringed were entitled to apply for relief under Article 126 (2).

In passing I may add that the laws of this country adequately provide for the widow or the dependants of a deceased person who met with this death as a result of a wrongful act of another to seek compensation based on loss of support or maintenance and such compensation has to be calculated on evidence.

Counsel for the present petitioner has drawn the attention of Court to the fact that Sri Lanka has ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and is obliged to grant redress to victims of torture and in the event of the death of a victim of torture the dependants are entitled to compensation, and as such, Article 126 should be construed accordingly.

The International Convention Against Torture was ratified by Sri Lanka in 1994 whereas the Constitution was promulgated in 1978. It certainly cannot be said that one can read into Article 126 (2) of the Constitution of 1978 a Legislative intention in 1978, to grant relief to a widow of a person whose fundamental rights have been infringed because Sri Lanka ratified the

International Convention Against Torture sixteen years later in 1994, containing a provision to grant relief to dependants of victims of torture in the event of the death of a victim as a result of torture.

By this application the widow of the person whose fundamental rights were allegedly infringed has applied for compensation on the basis that the "rights guaranteed under Articles 11, 13 and 17 of the Constitution devolved upon the Petitioner and she is entitled to "continue" with this application seeking relief...." (Paragraph 36 of the amended petition".)

Under Article 17 read with Article 126 of the Constitution, what are the rights that accrue to a person whose fundamental rights or language rights have been infringed or are about to be infringed?

Article 126 (2) sets out that *where any person alleges that a fundamental right or language right relating to him has been infringed or is about to be infringed he may by himself or by an attorney-at-law apply to the Supreme Court for relief or redress in respect of such infringement.*

Therefore the right to relief and the right to apply for relief are vested only in the person whose fundamental rights have been infringed and are personal rights which accrue to him and him alone and therefore those rights must necessarily die with him. However, where an applicant under Article 126 (2) for relief, dies after the Respondents had joined issue with the applicant, that is after *litis contestatio*, then the right to relief will pass to the legal representatives, that is to the estate of the deceased.

In *Premalal de Silva v. Inspector Rodrigo and others*⁽⁸⁾ the applicant Premalal de Silva disappeared subsequently and this Court directed compensation to be paid to the legal representatives of the applicant in the event of it being established that the applicant was dead.

In any event, even if the right to relief which accrued survives the death of the person whose fundamental rights were infringed as claimed by the Petitioner's Counsel, then it is the legal rep-

representative of the deceased representing the estate of the deceased who can claim relief since that right to claim relief (compensation in this instance) that has survived is an asset of the estate of the deceased. In this instance the widow has not filed her petition in this Court as the legal representative of the deceased (*vide caption*), although counsel Weliamuna had stated on 23rd August 2000 (*Vide journal entry 23/08/2000*) that he moves to amend the caption to read "on behalf of K.A. Sriyani as the legal representative of M.K.L. Jagath Kumara the deceased" and for that reason too the present Petitioner cannot maintain this application.

For the above mentioned reasons, I uphold the objection raised by the learned State Counsel that the Petitioner (widow) has no *locus standi* to maintain this application.

I therefore dismiss this application. No costs are ordered solely because the petitioner is a widow.

Preliminary objections overruled.

CELWEERA S.A.
v.
MALSHIP BULKFERT (PVT) LTD

SUPREME COURT
S.N. SILVA, CJ.
ISMAL, J. AND
J.A.N DE SILVA, J.
SC APPEAL No. 16/2001
(HC/ARB/448/2000)
8TH JULY AND 1ST AUGUST 2002

Arbitration - Enforcement of award - Section 31 of Arbitration Act, No. 11 of 1995 - Requirement to file the arbitration agreement or a certified copy thereof - Section 31 (2) (b) (ii) of the Act.

The appellant claimant ("the claimant") applied to the High Court in terms of section 31 (1) of the Arbitration Act, No. 11 of 1995 ("the Act") for enforcement of an award which had been made in London against the respondent. One of