IN THE SUPREME COURT OF THE DEMOCRTICE SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 17 read along with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 278/2008

1. Malalage Chaminda Tissa Peiris,
   601/72/14, Thammanakulama,
   Anuradhapura. (now deceased)

PETITIONER

1A. Malalage Gunadasa Peiris,
No. 41/9, Wijaya Mawatha,
Isurupura,
Anuradhapura,

SUBSTITUTED - PETITIONER

-Vs-

1. Mr. Hettigedara Weerakoon,
   Inspector of Police,
   Police Station, Anuradhapura.

2. T.D.M.S. Nishanka,
   Police Officer in Charge (Traffic),
   Police Station, Anuradhapura.

3. Mr. Hettiarachchi,
   Inspector of Police,
   Police Station, Anuradhapura.

4. Mr. Withana,
   Sub-Inspector of Police,
   Police Station, Anuradhapura.

5. Mr. P.M. Wijeratne,
   Officer in Charge,
   Police Station, Anuradhapura.

6. Mr. Sarath Prema,
   Head Quarters Inspector of Police,
   Police Station, Anuradhapura.

7. Jayantha Wickramaratne,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

8. Hon. Attorney General,
Attorney General's Department,
Colombo 02.

RESPONDENTS

BEFORE	:	Hon. S. Marsoof PC, J, Hon. C. Ekanayake J, and Hon. E. Wanasundera PC, J
COUNSEL	:	Sandamal Rajapaksha for the Substituted-Petitioner. Saliya Pieris for the 1st and 5th Respondents. Chula Bandara for the 2nd, 3rd, 4th and 6th Respondents. A. Navavi, Senior State Counsel, for 7th and 8th Respondents.
ARGUED ON	:	19.06.2013
WRITTEN SUBMISSIONS ON	:	10.07.2013
DECIDED ON	:	25.10.2013

SALEEM MARSOOF J:

The only question that arises for decision in this order is whether the substitution of Malalage Gunadasa Peiris in place of the deceased original Petitioner to this fundamental rights application, which was effected by this Court on 27th July 2012 in terms of Rule 38 of the Supreme Court Rules 1990, is valid in law.

Rule 38 provides as follows:-

> 38. Where at any time after the lodging of an application for……an application under Article 126 ……, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on application in that behalf made by any person interested, or *ex mero motu*, require such……..the Petitioner……. to place before the Court sufficient materials to establish who is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status;
>
> Provided that where the party who has died or undergone a change of status is the Petitioner……, the Court may require …… any party to place such material before the Court.
>
> The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid. Nothing hereinbefore contained shall prevent the Supreme Court itself *ex mero motu,* where it thinks necessary, from directing the substitution or addition of the person who appears to the Court to be the proper person therefore.

The factual background

The original Petitioner to this application, Malalage Chaminda Tissa Peiris had invoked the jurisdiction of this Court seeking relief for the alleged violation of his fundamental rights guaranteed by Article 11, 13(1) and 13(2) of the Constitution, alleging in his petition dated 15th July 2008 *inter alia* that, on or about 23rd March 2008, he was arrested by certain police officers attached to the Anuradhapura Police Station, who tortured

him while in police custody, resulting in severe injuries. On 17th September 2008, this Court granted leave to proceed only with respect to the alleged violation of Article 11 of the Constitution, which provides that no person "shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment".

Although after the filing of objections and counter-affidavits, the case was fixed for hearing on 8th July 2009, hearing had to be postponed several times for various reasons. On 3rd August 2011, when the case was taken up for hearing, learned State Counsel who appeared for the Inspector General of Police and the Attorney General (7th and 8th Respondents) informed Court that a decision had been taken by the Attorney General to indict the Petitioner, and that the indictment was dispatched to the High Court of Anuradhapura in March 2011. There was also some indication that an out of court settlement of the application before court was in contemplation. Hearing was therefore postponed to be mentioned on 14th September 2011. On that date the case was re-fixed to be mentioned on 13th December 2011.

On 13th December 2011, when the case was mentioned, learned State Counsel who appeared for Attorney General, moved for further time to consider whether the "indictment forwarded to the High Court should be recalled". When on 17th January 2011 the case was mentioned again, learned Counsel for the Petitioner brought to the notice of Court that the Petitioner has died, and that he would seek instructions from the family of the deceased Petitioner as regards the continuation of the application. Thereafter, on 16th February 2012, learned Counsel for the Petitioner informed Court that he has instructions to pursue the matter, and time was granted by Court for the filing of substitution papers. Since substitution papers were not ready, on 20th March 2012, further time was granted by Court till 6th June 2012 for the filing of substitution papers, which were eventually filed on 30th May 2012.

When the case came up for support for substitution on 6th June 2012, learned Counsel for the 2nd to 4th, 6th and 7th Respondents indicated that they had not received copies of the application filed on 30th May 2012 for substitution, and learned Counsel for the 1st and 5th Respondents stated that he was furnished with the substitution papers only that morning. In any event, learned Counsel for the applicant for substitution, Malalage Gunadasa Peiris sought the permission of Court to amend the application for substitution already filed in Court, for which permission was granted by Court. The case was re-fixed for support for substitution on 27th June 2012. On 20th June 2012, a motion was filed on behalf of the applicant for substitution, Malalage Gunadasa Peiris, seeking permission to supplement the Petition dated 30th May 2012 with three more affidavits marked respectively X1 to X3 from the mother and two brothers of the deceased Petitioner stating that they had no objection to the said Mallage Gunadasa Peiries being substituted in place of the deceased Petitioner.

In those circumstances, on 27th July 2012, this Court considered the application of the said Malalage Gunadasa Peiris seeking his substitution in place of the deceased original Petitioner Malalage Chaminda Thissa Peiris, and allowed the said application. Thereafter, the case was re-fixed for hearing for 15th January 2013, on which date the application could not be reached, and hearing was re-fixed for 19th June 2013. On 19th June 2013 when this matter was taken up for hearing before this Court, learned Counsel for the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents stated that the Respondents had reserved the right to take up an objection to the substitution of the Substituted Petitioner in place of the deceased Petitioner at the time when the said substitution was effected by Court. Although there was no indication in the minutes of this Court dated 27th July 2012 relating to the order by which the aforesaid substitution was allowed, the learned Counsel for the Substituted Petitioner stated that his recollection was that the Court had indicated that the objection to substitution would be taken up at the hearing of this application and that he is ready to meet such objection.

The Submissions of learned Counsel

Learned Counsel for the 2nd, 3rd, 4th and 6th Respondents has in the course of his submissions on the question of the lawfulness or otherwise of the substitution already effected by Court, stressed that the said

substitution was not valid in law. He submitted that Rule 38 is procedural in nature and sets out the procedure for effecting substitution, but cannot be invoked when the cause of action does not survive. He pointed out that as leave to proceed had been granted in this case only with respect to an alleged violation of Article 11 of the Constitution, which is a fundamental right of a personal nature which does not survive after the death of the person whose fundamental right was allegedly violated, Rule 38 had no application. He further submitted that a fundamental right to life cannot be implied from Article 11 of the Constitution, and even if it did, the right to life was not infringed in this case as there is no evidence which would causally link the death of the original Petitioner to the torture or cruel, inhuman or degrading punishment that had been meted out to him while he was in police custody. He stressed that the causal link had been severed by a voluntary act of the Petitioner, when he committed suicide more than 4 years after the alleged violation of Article 11. He contended that in those circumstances, the Substituted Petitioner lacked *locus standi* to continue with the application filed by his deceased son.

While the learned Counsel of the 1st and 5th Respondents associated himself with the submissions of the learned Counsel for the 2nd, 3rd, 4th and 6th Respondents, Learned Senior State Counsel stated that he would not wish to go into the technical issues but would highlight the fact that serious injuries resulted from the torture alleged to have been caused to the original Petitioner.

Learned Counsel for the Substituted Petitioner submitted that the right to life is capable of being implied from not only Article 11 but from the other articles of the Constitution which guarantee, for instance, the freedom from arbitrary arrest, detention and punishment (Article 13), and further submitted that the medical reports filed of record reveal the extensive and very serious injuries inflicted on the Petitioner while being held under custody. He emphasized that the Petitioner was youthful and unmarried at the time of the violation of his fundamental rights, and that his untimely death has indirectly affected the life of the Substituted Petitioner, who was his elderly father who depended on his earnings. He submitted that while this circumstance alone was sufficient to confer on the Substituted Petitioner the *locus standi* to continue with the application filed by the Petitioner, in any event the death of the Petitioner had occurred long after *litis contestatio*, which in an application of this nature takes place on the closure of pleadings.

The Right to Life and Locus Standi

Learned Counsel for the Substituted Petitioner, the 2nd, 3rd, 4th and 6th Respondents as well as the learned State Counsel have referred us to the decisions of this Court in *Somawathie v Weerasinghe and Others* (1990) 2 SLR 121 and *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others* (2003) 1 SLR 14, which dealt with *locus standi* in the context of the right to life. *Somawathie v Weerasinghe and Others, supra,* was a case in which a wife complained to this Court of the infringement of the fundamental rights of her husband guaranteed by Articles 11 and 13 of the Constitution. The complaint in that case was clearly not based on the violation of the Petitioner's own rights, and it was based on the violation of the rights of her husband. Amarasinghe J (with whom Bandaranayaka J concurred) in interpreting Article 126(2) of the Constitution, which expressly provided that any person alleging any infringement of his fundamental or language rights by executive or administrative action, may by himself or by an Attorney-at-Law on his behalf, apply to the Supreme Court by way of petition for relief or redress in respect of such infringement, observed at page 124 of the judgment that,

> "Where, as in the Article before us, 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……Construed in this way, Article 126(2) confers a recognized position only upon the person whose fundamental rights are alleged to have been violated and upon an attorney-at-law acting on behalf of such a person. *No other person has a right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights.*

> The petitioner is neither the person whose fundamental rights are alleged to have been infringed nor the attorney-at-law of such a person. Therefore the petitioner has no *locus standi* to make this application."(*emphasis added*)

Kulatunga J., in a forceful dissent, took a contrary view, and observed at page 132 of his judgment that, "in circumstances of grave stress or incapacity, particularly where torture resulting in personal injury is alleged to have been committed, next-of-kin such as a parent or the spouse may be the only persons able to apply to this Court in the absence of an Attorney-at-Law who is prepared to act as a Petitioner; and if such application is also supported by an affidavit of the detenu either accompanying the petition or filed subsequently which would make it possible to regard it as being virtually the application of the detenu himself this Court may entertain such application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2)." Justice Kulatunga, in the course of his judgment, highlighted the fact that though the Petitioner in the case was the wife of the victim, and an affidavit of the husband affirmed to while he was in custody had been annexed to the Petitioner's own affidavit filed with the petition. He also considered with sympathy the security situation that prevailed in the special circumstances of this case which resulted in the petition being filed after the expiry of the mandatory period of one month, which delay he was willing to excuse.

The facts on which *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others, supra,* came up for decision were different from those of *Somawathie v Weerasinghe and Others, supra,* in that unlike in *Shriyani Silva*, the person whose fundamental rights guaranteed by Article 11, 13(2) and 17 of the Constitution had alleged to have been violated, had died while he was in remand prison, and the petition was filed by his widow. In this case, there was sufficient evidence to show that the death of the deceased had occurred due to the injuries inflicted on him while in police and remand custody, and Bandaranayake J (with whom S.N. Silva CJ concurred) was prepared to apply the maxim *ubi jus ibi remedium,* meaning there is no right without a remedy, in interpreting Article 126(2) broadly to imply *locus standi*. While Edussuriya J dissented from the majority decision of Court, her ladyship took pains to explain at page 21 of her judgment the basis of the majority decision, in the following words:-

> ".....Chapter III of our Constitution, which deals with the fundamental rights, guarantees a person, *inter alia,* freedom from torture and from arbitrary arrest and detention (Articles 11, 13(1) and 13(2) of the Constitution). Consequently, the deceased detainee, who was arrested, detained and allegedly tortured, and who met with his death subsequently, had acquired a right under the Constitution to seek redress from this Court for the alleged violation of his fundamental rights. It could never be contended that the right ceased and would become 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 this Court, but if the 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. Law, in my view, should be interpreted to give effect to the right and to suppress the mischief. 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, anyone having a legitimate interest could prosecute that right in a proceeding instituted 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."(*emphasis added*)

There could be little doubt that the decision in *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others, supra,* has no application to the facts and circumstances of this case, in the absence of any evidence to establish that the death of the original Petitioner, Malalage Chaminda Tissa Peiris, resulted from the alleged torture to which he was subjected to while in police custody. His death occurred more than

4 years later, long after he was released from custody, and was for all appearances occasioned by his own voluntary act of suicide, which is a *novus actus interveniens*, meaning "an intervenient act" that would sever any pre-existing causal link.

Relevance of litis contestatio

In these circumstances, learned Counsel for the Substituted Petitioner has submitted that insofar as the death of the original Petitioner occurred long after *litis contestatio* meaning "the stage when the case is ready for hearing", the Substituted Petitioner has *locus standi* to continue with the petition. For this purpose, he relies on paragraph 10 of the petition filed by the Substituted Petitioner dated 30th May 2012 wherein he has expressly averred that since the case has reached the *litis contestatio* stage Court has jurisdiction under Article 126 of the Constitution to substitute the Substituted Petitioner "in the room of the deceased Petitioner".

As against this learned Counsel for the 2nd, 3rd, 4th and 6th Respondents have relied on the personal nature of the application made by the Petitioner in this Court in terms of Article 17 read with Article 126 of the Constitution, and contended that in relation to such applications as much as actions for damages for defamation and other injuries (libel, slander, invasions of privacy etc), which are all based on causes bearing a personal flavor, the maxim *actio personalis moritur cum persona,* meaning "the action or suit dies with the person", would apply to prevent continuation of the litigation after the death of the applicant, petitioner or the plaintiff. The principle embodied in the maxim had its origin in Roman-Dutch law, and may be illustrated by decisions such as *Fernando v Livera* 29 NLR 246 (SC), *Podisingho v Jayatu* 30 NLR 169(SC), *Vangadasalam v Karuppan* 79 Vol II NLR 150 (SC), *Jayasooriya v Samaranayake* (1982) 2 SLR 460 (CA), *Atapattu v People's Bank* (1997) 1 SLR 208 (SC), *Leelawathie v Manel Ratnayake* (1998) 3 SLR 349 (SC), *Stella Perera & Others v Margret Silva* (2002) 1 SLR 169 (SC) and *John Fernando & Attorney General v Satarasinghe* (2002) 2 SLR 113 (CA). In *Podisingho v Jayatu* 30 NLR 169 at 171, Drieberg J (with whom Fisher CJ agreed) explained the ambit of the maxim in the following terms:

> "Under the Roman-Dutch law, in the case of delicts of this sort which fell under the *Lex Aquilia,* the right of action does not, as in the case of the action of injury [*actio injuriarum*], lapse on the death of the person injured before *litis contestatio,* but enures to the benefit of his heirs, and they can sue the wrongdoer to recover what is known as 'patrimonial loss'."

It is clear from the above that in proceedings of a personal nature to which category a fundamental rights application such as the present would belong, which would come to an end upon the death of the Petitioner, reaching the stage of *litis contestatio* becomes crucial, as such proceedings would not lapse after reaching that stage. However, we have not been referred to by learned Counsel for any pronouncement of this Court in regard to the point at which *litis contestatio* is reached in fundamental rights proceedings. In my view, the following illuminating explanation provided by Woodrenton CJ in *Muheeth v Nadarajapilla* 19 NLR 461 at 462, can shed light on the question:

> "An action became litigious, if it was *in rem*, as soon as the summons containing the cause of action was served on the defendants; if it was in *personam,* on *litis contestatio,* which appears to synchronize with the joinder of issue or the close of the pleadings."

In *Atapattu v People's Bank* (1997) 1 SLR 208 at 218 M.D.H Fernando J elaborating on these principles observed that, *litis contestatio* in the modern law is deemed to take place at the moment the pleadings are closed, and its effect "is to freeze the plaintiff's rights as at that moment, and thus, in the event of his dying before the action is heard, to confer upon his executor all the rights which he himself would have had if he had lived."

Accordingly, it is necessary to examine whether the stage of *litis contestatio* had been reached in the case at the stage the original Petitioner committed suicide. After leave to proceed was granted in this case on 16th August 2008, the objections of the 2nd, 3rd, 4th and 6th Respondents were filed on 26th January 2009 and the objections of the 1st and 5th Respondents were filed on 17th February 2009. No affidavits were filed by the 7th Respondent (Inspector General of Police). The Petitioner filed his counter-affidavits on 30th June 2009 ahead of the scheduled date of hearing, which was 8th July 2009, but as already noted, the case had not been taken up for hearing until the point of time at which the original Petitioner committed suicide. In my opinion, to cut a pathetic story short, pleadings closed on 30th June 2009 when the counter-affidavits were filed. It is noteworthy that the petition of the Substituted Petitioner seeking his substitution was the only pleading filed after that date.

In the aforesaid circumstances, and for the foregoing reasons, I am of the opinion that the right vested in the deceased original Petitioner in terms of Articles 17 read with Article 126 of the Constitution to seek relief from this Court for the alleged violation of his fundamental rights guaranteed by Article 11 of the Constitution, survive after his death and may be pursued by his heirs who are represented by the Substituted Petitioner.

Conclusions

This Court has already allowed the substitution of the Substituted Petitioner in the room of the deceased original Petitioner subject to objections. Accordingly, while overruling the objections taken up at the hearing against the said substitution and upholding the validity thereof, I proceed to examine the suitability of the Substituted Petitioner to be so substituted.

It is evident from the Certificate of Birth marked P2 and annexed to the Petition and affidavit of the Substituted Petitioner Malalage Gunadasa Peiris dated 30th May 2012, that he was the father of the original Petitioner, and it is further evident from the Certificate of Death, a copy of which marked P1 was annexed to the said Petition and affidavit, that the cause of death of the original Petitioner was “suicide by hanging”. It is also apparent from the said Certificate of Death that the original Petitioner was 34 years old and unmarried at the time of his death which occurred on 31st December 2011. The Substituted Petitioner Malalage Gunadasa Peiris, had solemnly declared in his affidavit that he is a fit and proper person to be substituted in place of his deceased son to prosecute the application filed by him in this Court, which fact is conceded in the affidavits marked respectively X1 to X3 affirmed to by the mother and two brothers of the deceased original Petitioner produced with the motion dated 20th June 2012, in which affidavits they also state that they had no objection to the said Mallage Gunadasa Peiries being substituted in place of the deceased original Petitioner.

Accordingly, I make order upholding the substitution that was effected by this Court on 27th July 2012, and further order that this case be resumed before the same Bench on a convenient early date to be fixed by Court.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE J

JUDGE OF THE SUPREME COURT

EVA WANASUNDERA PC J

JUDGE OF THE SUPREME COURT