



THE

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# DIGEST

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**Azath Salley Vs Colombo Municipal Council And Others**

## AZATH SALLEY VS COLOMBO MUNICIPAL COUNCIL AND OTHERS

SUPREME COURT

DR. SHIRANI BANDARANAYAKE, J

AMARATUNGA, J AND

BALAPATABENDI, J

S. C. (F. R.) APPLICATION: 252/2007

JULY 1<sup>ST</sup> 2008

*Fundamental Rights – Constitution – Article 3, 17, 12(1), 28(b) – Violation of fundamental rights guaranteed under Article 12(1) of the Constitution – Equality before law and equal protection of the law to all persons – Article 126(2) of the Constitution – The Judicial review of violations of fundamental rights by executive or administrative action – Article 17 of the Constitution – Remedy for the infringement of fundamental rights by executive action. - liberal interpretation? - Entrenched provisions in the Constitution.*

The petitioner, a former Deputy Mayor of the Colombo Municipal Council and a rate payer to the Colombo Municipal Council complained of infringement of his fundamental rights and of the residents of the Colombo Municipality area guaranteed in terms of Article 12(1) of the Constitution due to the failure of the respondents to remove a large number of unauthorized hoardings erected, and granting of purported approval for the erections of hoardings and the display of advertisements, in violation of the By – laws and guidelines of the Colombo Municipal Council.

### **Held**

- (1) Article 126(2) of the Constitution must be given a broad and expansive interpretation keeping in line with the development that had taken place in the arena of Public Law.

Per Dr. Bandaranayake, J. –

“A strict interpretation of Article 126(2) of our Constitution would no doubt indicate that the judicial review of violations of fundamental rights by executive or administrative action is restricted, and there is no *locus standi* for an outsider to obtain

relief in terms of the Articles of the Constitution. Such a strict interpretation would undoubtedly restrict the applicability of the fundamental rights jurisdiction, and in my view, time is opportune to forge and adopt a liberal interpretation for the purpose of making fundamental rights more meaningful for the majority of the people.”

- (2) As Article 126(2) of the Constitution refers to the infringement of a fundamental right of a ‘person’, it must be read with Article 17 of the Constitution, which is an entrenched provision and deals with the remedy for the infringement of fundamental rights by executive action.
- (3) The concept of public trust, is an accepted doctrine that the resources of the country belong to the people; Sri Lanka’s sovereignty is in the people in terms of Article 3 of the Constitution and is inalienable and includes the powers of the government, fundamental rights and the franchise, and the people have committed the care and preservation of their resources to the organs of the State, which are their guardians or trustees.
- (4) It is the fundamental duty of the 1<sup>st</sup> to 5<sup>th</sup> respondents to preserve and protect public property and combat misuse and waste of public property as specified in Article 28(d) of the Constitution.
- (5) The failure of the 1<sup>st</sup> to 5<sup>th</sup> respondents to remove unauthorized hoardings erected and granting of purported approval for the erection of hoardings within the city limits of the 1<sup>st</sup> respondent council, contrary to applicable by-laws and guidelines had infringed the fundamental rights of the petitioner’s and of the residents’ of the Colombo Municipal Council area guaranteed in terms of Article 12(1) of the Constitution.
- (6) Conditions applicable to hoardings situated in public places would be applicable to hoardings erected on private places if such hoardings are fronting the public street and are exposed to public view.
- (7) Failure to remove unauthorized hoardings and granting approval without giving due consideration to the by-laws and guidelines which were applicable at the time material had constituted an infringement of the fundamental rights of the petitioner and the residents of the Colombo Municipal Council area by ‘executive

and administrative action' within the meaning of Article 126 of the Constitution. Accordingly, 1<sup>st</sup> to 5<sup>th</sup> respondents are responsible for the said violation of the fundamental rights of the petitioner's and the residents' of the Colombo Municipal area by 'executive and administrative action' guaranteed in terms of Article 12(1) of the Constitution.

**Cases referred to:**

- (1) *Bandhua Mukti Vs. Union of India*, AIR (1984) S. C. 802
- (2) *Maharajah Singh Vs. Uttara Pradesh*, AIR (1976) S. C. 2602.
- (3) *S. P. Gupta Vs. Union of India*, AIR (1982) S. C. 149
- (4) *People's Union for Democratic Rights Vs. Union of India*, AIR (1982) S. C. 617
- (5) *R Vs. Inland Revenue Commissioner's ex-parte National Federation of Self Employment and Small Business Ltd.* (1982) A. C. 617
- (6) *R. Vs. Greater London Council ex-parte Blackburn* (1976) 1 W. L. R. 550
- (7) *R vs. Secretary of State for Foreign and Commonwealth Affairs Ex-parte Rees – Mogg*, (1994) Q. B. 552
- (8) *Somawathie Vs. Weerasinghe and others*, (1990) 2 SLR 121
- (9) *Bulankulama and others Vs. Secretary, Ministry of Industrial Development and others* (2000) 3 Sri L. R. 243
- (10) *Sriyani Silva Vs. Chanaka Iddamalgodha and others*, (2003) 1 SLR 14 and S. C. (Application) No. 471/2000 – S. C. minutes of 8.8.2002
- (11) *Yabbicom Vs. King* (1899) 1 Q. B. 444
- (12) *E. P. Royappa Vs. State of Tamil Nadu*, (1974) AIR 555
- (13) *Westminster Corporation Vs. London & North Western Railway* (1905) A. C. 426
- (14) *Breen Vs. Amalgamated Engineering Union*, (1971) 2 Q. B. 175
- (15) *Padfield Vs. Minister of Agriculture, Fisheries and Food*, (1968) A. C. 997
- (16) *Saghir Ahmad Vs. The State of Uttar Pradesh*, (1955) S. C. R. 707

(17) *C.S.S. Motor Services Vs. State of Madras*, (1952) 2 M. L. J. 894

(18) *Links Advertisers and Business Promoters Vs. Commissioner, Corporation of City of Bangalore* (1977) A. I. R. 1977 S. C. 1646

**APPLICATION** complaining of infringement of the fundamental rights.

*J. C. Weliamuna with Mudurange Ratnayake* for Petitioner

*Uditha Egalahewa with Ranga Dayananda* for 1<sup>st</sup> to 5<sup>th</sup> Respondents.

*M. M. Mohideen* for 6<sup>th</sup> and 7<sup>th</sup> Respondents.

*Cur.adv.vult.*

March 04, 2009

**DR. SHIRANI BANDARANAYAKE, J.**

The petitioner, a former Deputy Mayor of the Colombo Municipal Council and a rate-payer to the Colombo Municipal Council (hereinafter referred to as the CMC) had made this application on his own behalf and in the public interest of the residents of the CMC area, that due to the failure of the respondents to remove a large number of unauthorized hoardings erected, granting of purported approval for the erection of hoardings and the display of advertisements, in violation of the By-laws and guidelines of the CMC, the 1<sup>st</sup> to 5<sup>th</sup> respondents have violated the fundamental rights of the petitioner and the residents of the Colombo Municipality area, guaranteed in terms of Article 12(1) of the Constitution, for which this Court had granted leave to proceed.

The petitioner's case, as submitted by him, *albeit* brief is as follows:

Displaying of Advertisements within the Colombo Municipality is regulated by the Advertisement, Decoration and Posters by – law 1991 of the CMC. Section 2 of the said By-law, stated that,

“No one shall display any advertisement or cause any advertisement to be displayed so as to be visible from any street, road, canal, lake, sea or the sky except under the authority of a license issued in that behalf.”

Section 2 of the said by-law is subject to the exceptions set out in section 3 of the by-law, which deals with the non-commercial advertisements, notices, etc. In terms of the said by-laws the 3<sup>rd</sup> respondent was vested with powers to entertain and approve applications and to issue licenses for displaying of advertisements.

In 2005, the 2<sup>nd</sup> respondent's predecessor, the 3<sup>rd</sup> respondent and the petitioner in his capacity as the then Deputy Mayor had taken a decision to allow the Municipal Engineers to decide the locations for hoardings. It was also decided to remove all unauthorized hoardings and in fact 386 such hoardings were demolished in 2005.

During that period, as the CMC was in the process of identifying unauthorized hoardings for the purpose of removal, several cases were filed in the Court of Appeal and in one application, the matter was settled on the basis that the advertiser would be allowed to display the advertisements until 31.12.2005, provided any arrears of payment due to the CMC was paid (P3). Thereafter, several fundamental rights applications were filed in this Court challenging *inter alia*, the authority of the 1<sup>st</sup> respondent to remove hoardings. In the mean time CMC had introduced guidelines in respect of hoardings on which this Court had made order permitting CMC to remove hoardings, which were in violation of the said guidelines (P4 and P5). Moreover, when these applications were considered on 18.09.2006, learned Counsel for the petitioners in those applications had moved to withdraw them, considering the guidelines that have been formulated. It had also been submitted to Court on behalf of the respondents,

in the aforementioned matters, that steps would be taken in respect of hoardings, which were not in conformity with the by-laws of the CMC and the guidelines, to be removed (P5a). Accordingly, the said applications were dismissed by this Court.

Irrespective of the aforementioned orders made by Court and the undertaking given by CMC, the petitioner alleged that the Municipality had failed to take effective steps whatsoever to remove unauthorized or illegal hoardings displayed in the Colombo Municipality area.

Table I

<b>Guidelines - Clause 1</b>	<b>The maximum size of a hoarding should be 20 feet × 10 feet.</b>  There are several over-sized hoardings at the Maradana Junction and the Green Path Junction. Further the recently erected large hoarding opposite Elphinston Theatre seriously undermines the scenic value of the historical buildings at the Maradana Junction.
<b>Guidelines - Clause 2</b>	<b>Hoardings should only be erected on uni-poles (single poles).</b>  The majority of the hoardings are erected on two or more poles.
<b>Guidelines - Clause 3</b>	<b>No hoarding should be erected within road reservations of Independent Mawatha, Baudhaloka Mawatha, Ananda Coomaraswamy Mawatha and Galle Face Centre Road</b>  There are a large number of hoardings erected on the said roads.



<p><b>Guidelines - Clause 4</b></p>	<p><b>No hoarding should be erected at the Independent Square, frontage of Sports Ministry Grounds, alongside cemeteries and Viharamahadevi Park</b></p> <p>There are several hoardings alongside the Borella Public Cemetary.</p>
<p><b>Guidelines - Clause 6</b></p>	<p><b>No hoardings should be erected on property frontage of religious places of worship, schools, universities, other educational institutions, buildings of national importance, places of visual quality and diplomatic missions.</b></p> <p>There is a hoarding at Horton Place - Kynsey Road Junction outside Libyan Embassy. On Reid Avenue there are eight (8) hoardings alongside the property frontage of the University of Colombo. There are several hoardings alongside the property frontage of Devi Balika Vidyalaya, St. Bridget's Convent and Royal College. There are hoardings on the property frontage of the Church and the Mosque in Cinnamon Gardens.</p>
<p><b>Guidelines - Clause 7</b></p>	<p><b>No hoarding should be erected alongside sites of monuments within 10 meters thereof obliterating such monuments.</b></p> <p>There are hoardings in violation of the said Clause 7 on either side of the statue of Hon. Dharmasiri Senanayake at the Devi Balika Vidyalaya Junction and near the statue of Hon. Lalith Athulathmudali at the Royal College roundabout.</p>

<b>Guidelines - Clause 8</b>	<p><b>No hoarding should be erected violating the rights of property owners to enjoy reasonable property frontage, ventilation and natural light.</b></p> <p>Hoardings have been erected in violation of the said Clause 8</p>
<b>Guidelines - Clause 9</b>	<p><b>No hoarding should be erected on top of another hoarding.</b></p> <p>Hoardings have been erected in violation of the said Clause 9</p>
<b>Guidelines - Clause 10</b>	<p><b>Only one hoarding should be allowed to display within 100 meters from the centre of an intersection with three arms and with traffic signals. Only three (3) hoardings shall be allowed to display within 100 meters from the centre of an intersection with more than three (3) arms with traffic signals. This regulation shall be applicable to roundabouts also. Such advertisements shall not be illuminated and shall not be backed by a front of a traffic signal head.</b></p> <p>There are hoardings at almost all the roundabouts and traffic signal heads in the Colombo city.</p>
<b>Guidelines - Clause 11</b>	<p><b>No hoarding should be erected within roundabouts, traffic diversion islands, public parks and centre median.</b></p> <p>Hoardings have been erected at many places violating the said Clause 11</p>
<b>Guidelines - Clause 12</b>	<p><b>No hoarding should be erected without displaying municipal reference number, contact telephone number of applicant of advertisement and the phrase <i>city complaints www.cmc.lk</i> on the right</b></p>

	<p><b>hand bottom corner of the front face of the advertisement. This information of the advertisement should be clearly visible and readable to the public. This information should be written on either side of the advertisement in case of double side display. Only reference number of the advertisement shall be written on a 3 feet × 2 feet directional signboard.</b></p> <p>Almost all the hoardings are in violation of the said Clause 12.</p>
<b>Guidelines - Clause 13</b>	<p><b>No hoarding should be erected on a land or a property maintained by the council in the following manner-</b></p> <ul style="list-style-type: none"> <li><b>(a) parallel to a property frontage;</b></li> <li><b>(b) at an angle less than 45 degrees to property frontage;</b></li> <li><b>(c) with less than 2.5 meters ground clearance;</b></li> <li><b>(d) within three meters of vehicular access to premises;</b></li> <li><b>(e) overhanging a carriageway;</b></li> <li><b>(f) where the width of the foot path is less than or equal to 1.0 meter. Where the width of the foot path is more than 1 meter, any part or column of the structure shall not lie within the effective area of foot path;</b></li> <li><b>(g) on electricity posts and tele-communication posts.</b></li> </ul> <p>Hoardings have been erected in violation of the said clause 13.</p>

<b>Guidelines - Clause 14</b>	<p><b>A cluster of hoardings should not exceed three numbers. Gap between two hoardings in a cluster forming a row shall be one meter. Distance between two free-standing hoardings shall not be less than 10 meters. Distance between two clusters of hoardings shall not be less than 20 meters.</b></p> <p>Hoardings have been erected in violation of the said Clause 14.</p>
<b>Guidelines - Clause 15</b>	<p><b>Visuals displayed shall be approved by the Commissioner. No visual shall display material of disrespect to religious beliefs, depicting nudity, seminudity, cruelty of any nature including animals.</b></p> <p>Hoardings have been erected in violation of the said Clause 15. (P6(a), P6(b), P6(c), P6(d), P6(e), P6(f) and P6(g))</p>

Accordingly it was submitted that most of the new hoardings that have been approved do not display certification with regard to structure safety and suitability, thus violating Clause 16 of the said guidelines and as a result, when there was heavy rain in the city of Colombo recently, nearly 40 such hoardings collapsed causing damage to property. The petitioner alleged that some of the hoardings have been erected in a structurally hazardous and unsafe manner and cited as an example the hoarding opposite the Elphiston Theatre at the Maradana Junction (P6(a)), which has not only been erected in violation of the said By-law and the guidelines, but also causing structural damage to the bridge and as for the purpose of the erection of the said hoarding the ground had been dug and a large number of steel poles have been fixed to the ground on concrete slabs.

It was also submitted that several newspapers have carried articles bringing to light the issue of hoardings being indiscriminately erected on roads and streets being a public nuisance and also impacting on the aesthetic impression of the city of Colombo (P7).

Several residents in the city of Colombo have made complaints to the Mayor of Colombo regarding the hoardings and the University of Colombo too has complained to the 3<sup>rd</sup> respondent with regard to such hoardings (P8 (a), P8 (b) and P8 (c)).

The petitioner also alleged that aside from the arbitrary granting of approval of hoardings in violation of the law, as the 1<sup>st</sup> and/or 2<sup>nd</sup> and/or 3<sup>rd</sup> respondents have failed to evolve a transparent and an accountable mechanism of receiving revenue by advertisement hoardings, the CMC has lost an enormous amount of revenue. Such action had led to corrupt practices particularly in the process of approving hoardings as there is a greater demand for advertising at key locations in the city of Colombo. According to the petitioner if hoardings were auctioned, a single hoarding in the city of Colombo, being the commercial capital of the country, would have fetched an annual income of Rs. 500,000/- to Rs. 1,000,000/- whereas most of the hoardings have currently been licensed for an annual fee, which is as unrealistically low as Rs. 20,000/-. The petitioner cited the Road Development Authority which had adopted a competitive bidding process by way of auction in awarding hoardings that had been able to collect as revenue the true market value of such hoardings (P9(a), P9(b), P9(c), P9(d) and P9(e)).

The petitioner therefore claimed that the failure of the 1<sup>st</sup> to 5<sup>th</sup> respondents to remove a large number of unauthorized hoardings erected in the city of Colombo and their granting of purported approval for the erection of said hoardings is

illegal, irrational, contrary to by-laws of the CMC, and Advertisement guidelines and constituted an infringement of the fundamental rights of the petitioner's and the residents' of the CMC area guaranteed in terms of Article 12(1) of the Constitution.

The petitioner had prayed from this Court to direct, *inter alia*, the respondents to remove all unauthorized hoardings, strictly enforce the said by-laws and guidelines and grant an interim stay order restraining the respondents from granting approval for new advertising hoardings.

Prior to this matter being taken up for support for interim relief as prayed for by the petitioner, the respondents had filed their objections. After considering the submissions by both parties, this Court issued a limited interim order to the effect that the 1<sup>st</sup> respondent council to consider all the applications made for erection of hoardings for advertisements in terms of their guidelines (P4). Thereafter the said interim order was extended until the final hearing and determination of this application with the consent of the 1<sup>st</sup> to 5<sup>th</sup> respondents.

Learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents took up the objection that the petitioner did not have *locus standi* to make this application as he had failed to reveal as to how his fundamental rights were violated.

Learned Counsel for the petitioner contended that the petitioner, a rate payer and a resident of the CMC area had filed this case in the 'public interest' seeking relief that the guidelines governing hoardings would be implemented while protecting the revenue of the Council.

The fundamental rights jurisdiction and its exercise is spelt out in Article 126 of the Constitution. Article 126(2) of the Constitution, which refers to the exercise of the fundamental

rights, clearly states that a person, whose fundamental right has been infringed or is about to be infringed by executive or administrative action, may himself or by an Attorney-at-Law on his behalf, apply to the Supreme Court by way of a petition praying for relief. The said Article reads as follows:

**“Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may 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. . . .”  
(emphasis added).

Thus as stated earlier, our Constitution had made provision only for the person, who has suffered injury by reason of the violation of his fundamental right or for an Attorney-at-Law, on his behalf, to be entitled to seek redress from the Supreme Court in terms of the fundamental rights jurisdiction under Article 126(2) of the Constitution.

A strict interpretation of Article 126(2) of our Constitution would no doubt indicate that the judicial review of violations of fundamental rights by executive or administrative action is restricted, and that there is no *locus standi* for an outsider to obtain relief in terms of the said Article of the Constitution. Such a strict interpretation would undoubtedly restrict the applicability of the fundamental rights jurisdiction, and in my view, time is opportune to forge and adopt a liberal interpretation for the purpose of making fundamental rights more meaningful for the majority of the people. As rightly pointed out by Bhagwati, J. (as he then was), in *Bandhua Mukti Morcha v. Union of India*,<sup>(1)</sup>

“But if we want the fundamental rights to become a living reality and the Supreme Court to become a real Sentinel on the *qui vive*, we must free ourselves from the shackles of outdated and out mode assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.”

This position was observed by the Supreme Court of India which had been broadening the applicability of the concept of *locus standi* and was clearly laid down in *Maharajah Singh v. Uttara Pradesh*<sup>(2)</sup> which stated that,

“Where a wrong against community interest is done, no ‘*locus standi*’ will not always be a plea to non-suit an interested public body chasing the wrong doer in court. . . . *Locus standi* has a larger ambit in current legal semantics than the accepted individualistic jurisprudence of old.”

A few year later in *S. P. Gupta v. Union of India*<sup>(3)</sup>, the Indian Supreme Court had determined that any member of the public can maintain an application for an appropriate direction or order or writ and had stated that,

“Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any fundamental right to this Court under Article 32.”

An examination of the Indian Case Law clearly indicates that a petition in terms of Article 32 of the Indian Constitu-



tion can be filed only by a public spirited individual, who acts in a *bona fide* manner, without personal gain or profit or out of political motivation in cases, where there has been a breach of a public duty or breach of a constitutional provision causing injury to the general public.

A careful examination of the case law indicates that public interest litigation is a special 'juridical device' that could be used to settle disputes in contemporary society. It has been introduced by Justice Bhagwati (as he then was), as 'a strategic aim of the legal-aid movement, which was intended to bring justice within the reach of the poor masses' and its purpose is to promote and vindicate public interest, which demands that violations of constitutional or legal rights of a large number of people should not go unnoticed and unredressed (*Peoples' Union for Democratic Rights v Union of India*<sup>(4)</sup>).

It is not disputed that Article 126(2) of our Constitution cannot be compared with Article 32 and/or 226 of the Indian Constitution. However, it also cannot be disputed that the concept of *locus standi* had faced changes in the recent past as measures were taken to expand its applicability.

This broadening of the concept of *locus standi* could be even seen in the English Courts, where steps have been taken to relax the rules applicable to standing in recent years. The said 'change in legal policy' came into being in the well known case, popularly known as the Inland Revenue Commissioners Case (*R v. Inland Revenue Commissioners' ex-parte National Federation of Self Employment and Small Businesses Ltd.*)<sup>(5)</sup>. Approving the concept that in suitable cases, a citizen's action or *actio popularis*, must be allowed, Lord Diplock in the *Inland Revenue Commissioner's* case stated that,

“It would, in my view be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

Lord Diplock in *Inland Revenue Commissioners’ case* (*supra*) also referred to the words of Lord Denning M. R. in *R v. Greater London Council ex-parte Blackburn*<sup>(6)</sup>, where he had stated that,

“I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty’s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the court in their discretion can grant whatever remedy is appropriate.”

These decisions clearly enumerate the new concept adopted by English Courts on the test of standing. The attitude of those Courts has been to consider the merits of the application than the standing of the applicant. Considering these decisions, Professor Wade (Administrative Law, 9<sup>th</sup> Edition, pp. 692-693) had succinctly spelt out the present trend of the English Courts in deciding the question of standing, which reads as follows:

“The essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have insufficient interest to be allowed to pursue it. The House of Lords’ new criterion would seem virtually to abolish the requirement of standing in this sense. **However remote the applicant’s interest, even if he is merely**

**one taxpayer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest.** (emphasis added)”

The English Courts had taken a similar view in deciding cases filed in the public interest. For instance in *R v. Secretary of State for Foreign and Commonwealth Affairs Ex-parte Rees – Mogg*<sup>(7)</sup> it was held that a member of the House of Lords had standing to challenge the decision of the Secretary of State for Foreign and Commonwealth Affairs to proceed to the ratification of the *Treaty on European Union* ‘because of his sincere concern for constitutional issues’.

The scope of Article 126(2) of our Constitution, on the basis of the question of *locus standi*, was examined by this Court in *Somawathie v Weerasinghe and others*<sup>(8)</sup>. In that matter the petitioner was complaining of the violation of her husband’s fundamental rights and the alleged infringements including unlawful arrest, detention and assault, whilst he remained in police custody. In deciding that the petitioner had no *locus standi* to maintain the application, Amerasinghe, J. pronouncing the majority view, construed the provision contained in Article 126(2) of the Constitution. According to Amerasinghe, J.,

“How should the word of this provision of the Constitution be construed? It should be construed according to the intent of the makers of the Constitution. 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.”

However, Kulathunge, J., while dissenting with the majority opinion, expressed the view that in circumstances of grave stress or incapacity, particularly where torture resulting in personal injury has alleged to have been committed; next-of-kin such as a parent or the spouse should be able to apply to this Court and this Court could entertain such an application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2) of the Constitution.

The question of standing again arose in *Bulankulama and others v Secretary, Ministry of Industrial Development and others*<sup>(9)</sup>. In that case the representative of the Government and Freeport Mac Moran of USA and its officiate Imco Agrico initiated the final drafts of the Mineral Investment Agreement and subsidiary documents in respect of a deposit of phosphate rock at Eppawela in the Anuradhapura District. The proposed agreement granted the Company the sole and exclusive right to search and explore the phosphate and other minerals in the exploration area, to conduct test or pilot operations at any location within the contract area and to develop and mine under Mining Licenses any phosphate deposits (including associate minerals) found in the exploration area.

The petitioners, being residents of Eppawala engaged in cultivation and owning lands there, one of whom was the Viharadhipathi of a temple, complained of infringement of their rights under Articles 12(1), 14(1)g and 14(1)h of the Constitution by reason of the proposed agreement. They relied on the analysis of several professional experts and reports of the National Academy of Science and the National Science Foundation, who were of the opinion that the proposed agreement will not only be an environmental disaster, but also an economic disaster. The court held that there is a imminent infringement of the petitioners' fundamental rights guaranteed under Articles 12(1), 14(1)g and 14(1) h of the Constitution.

Several preliminary objections were taken at the hearing of that case and one of those were based on the question of public interest litigation, where the learned Counsel for the 5<sup>th</sup> and 7<sup>th</sup> respondents had submitted that the application should not be entertained under the provisions of the Constitution. Thus the question at issue had been whether the individual petitioners had standing to pursue their rights in terms of Articles 17 and 126(1) of the Constitution and whether they are qualified on the ground that it is public interest litigation. For this question Amerasinghe, J., had answered in the affirmative and had stated that,

“Learned Counsel for the 5<sup>th</sup> and 7<sup>th</sup> respondents submitted that, being an alleged ‘public interest litigation’ matter, it should not be entertained under provisions of the Constitution and should be rejected. **I must confess surprise, for the question of ‘public interest litigation’ really involves questions of standing and not whether there is certain kind of recognized cause of action.** The Court is concerned in the instant case with the complaints of individual petitioners. On the questions of standing, in my view, the petitioners as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court” (emphasis added).

The question of standing in regard to applications made under Article 11 of the Constitution was considered in the decisions (application for leave to proceed and the hearing) in *Sriyani Silva v Chanaka Iddamalgodha and others* <sup>(10)</sup>. It was decided by this Court that Article 126(2) of the Constitution must be interpreted broadly in order to grant constitutional remedy expansively and that Article 17 recognizes that every person is entitled to make an application under Article 126 in respect of the infringement of a fundamental right.

As stated earlier, Article 126(2) of the Constitution refers to the infringement of a fundamental right of a 'person'. Article 126 of the Constitution must be read with Article 17 of the Constitution, which is an entrenched provision and deals with the remedy for the infringement of fundamental rights by executive action. The Constitution of this Island Republic clearly stipulates that sovereignty includes fundamental rights and it is in the People, which is inalienable. Article 4 of the Constitution deals with the exercise of sovereignty and Article 4(d) clearly states that the fundamental rights, which are by the Constitution declared and recognized, shall be respected, secured and advanced by all the organs of government. This Article further stipulated that such fundamental rights 'shall not be abridged, restricted or denied' to the People.

Considering the provisions contained in the Constitution dealing with the fundamental rights jurisdiction and the applicability of Article 126(2) read with Article 3,4(d) and 17, it is apparent that Article 126(2) should be interpreted broadly and expansively. Where a person therefore complains that there is transgressing the law or it is about to transgress, which would offend the petitioner and several others, such a petitioner should be allowed to bring the matter to the attention of this Court to vindicate the rule of law and to take measures to stop the said unlawful conduct. Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public.

The petitioner as has been stated earlier is a rate payer to the CMC, and had made this application on his behalf as well as on behalf of the residents of the Colombo Municipal area.

On a consideration of the totality of the aforementioned, I hold that Article 126(2) of the Constitution must be given a

broad and expansive interpretation keeping in line with the developments that had taken place in the arena of Public Law and I accordingly overrule the objection raised on the basis of the standing of the petitioner.

Having considered the objection raised by the learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents, let me now turn to examine the main issues raised in this application.

The contention of the learned Counsel for the petitioner was that 1<sup>st</sup> and /or 2<sup>nd</sup> and/or 3<sup>rd</sup> and/or 4<sup>th</sup> and/or 5<sup>th</sup> respondents had granted approval to erect hoardings in the CMC area in violation of the by-laws marked P2 and advertisement guideline marked P4.

Learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that the petitioner had relied on the purported by-law contained in the document marked P2, but the said by-law is not the prevailing by-law, which regulate the displaying of banners, advertisements and hoardings within the CMC area as it was never approved by the 1<sup>st</sup> respondents Council. The contention of the learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents was that the applicable by-laws are the ones, which came into operation in 1949 and which was gazetted in the Notification No.541/17 dated 20.01.1989.

Learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents further contended that the position taken up by the learned Counsel for the petitioner regarding the guidelines that they were given legal sanctity by the 1<sup>st</sup> respondent Council is not correct. His position was that the fundamental rights applications bearing Nos. S.C. (Application) 30-35/2006 were filed challenging, *inter alia*, the applicability of the proposed guidelines at that time and the contents of the said guidelines. The submission of the learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents was that this Court had directed the 1<sup>st</sup> respondent Council to entertain the applications for the erection of

hoardings, in terms of the applicable by-laws of CMC and not on the basis of the guidelines.

Since the said by-laws were outdated, this Court had permitted the said guidelines to be used to ascertain the hoardings that should be removed. Learned Counsel further submitted that, thereafter a set of new guidelines approved by the then Commissioner was filed in Court for approval and as the petitioners in the applications referred to earlier, sought to withdraw the said applications before the conclusion of the hearing, the said guidelines could not be properly considered by this Court.

The contention of the 1<sup>st</sup> to 5<sup>th</sup> respondents therefore was that the by-laws, which come into operation in 1949 and the by-laws gazetted in Government Gazette Notification No. 541/17 dated 20.01.1989 and adopted by the 1<sup>st</sup> respondent Council regulated the displaying of banners, advertisements and hoardings within the Colombo Municipality area (R9 and R10) and the question as to whether the hoardings set up at various locations referred to in the petition were in violation of the guidelines does not arise as the operation of the guidelines in question had been suspended by the 3<sup>rd</sup> respondent.

Since the applicability of the guidelines has come up as the main issue in this application, I would now turn to examine the validity of the said guidelines in question.

Considering the submissions made by the learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondent and the affidavit of the 4<sup>th</sup> respondent on behalf of himself and 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents, it is apparent that initially erection of hoardings within the Colombo Municipal area were considered in terms of the by-laws, which regulated the displaying of banners, advertisements and hoardings. Admittedly the said by-laws had come into effect in 1949 and was gazetted in the Gazette Notification dated 20.01.1989.



Later a set of guidelines for the purpose of advertising in Colombo had come into being to be effected from January 2006. The said guidelines (P4) contained 18 clauses and stated that the said guidelines had to be followed in considering applications to obtain a license to display advertisements within the city of Colombo.

It is thus not disputed that a set of guidelines had been introduced by the 1<sup>st</sup> respondent Council and had come into being, with effect from January 2006. In fact the applicability of the said guidelines had been considered by this Court in February 2006, when the question of removal of hoardings had to be examined. In that manner, the 1<sup>st</sup> respondent Counsel had informed this Court that the 1<sup>st</sup> respondent would decide as to the hoardings that would have to be removed on the basis of the guidelines for advertisements of the 1<sup>st</sup> respondent Council(P5). It is to be noted that on the day the said order was made by this Court, the Chief Legal Officer of the 1<sup>st</sup> respondent Council was present in Court and the order made on 01.02.2006 had stated that,

“The applications, which have already been made by the petitioners, would be taken into consideration for the purpose of deciding to grant formal licenses to the petitioners in terms of the applicable by-laws.

Learned Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents informs Court that after perusing the applications made by the petitioners, the 1<sup>st</sup> respondent Council will decide as to the hoardings that will have to be removed **in terms of the guidelines**” (emphasis added).

The order thus had referred to the applicable by-laws as well as the guidelines, which were to be taken into account in deciding the validity of the already erected hoardings as well to consider the applications made for the purpose of erection of new hoardings.

Whilst this was the position by February 2006, it appears that the 3<sup>rd</sup> respondent had thereafter decided to suspend the guidelines and to draft a new set of by-laws. The 4<sup>th</sup> respondent in his affidavit referred to documents marked as R6 and R7 and had averred to the aforesaid intention of the 3<sup>rd</sup> respondent. These two documents are reproduced below since they are of importance to this application.

“Director Engineering (Projects)

**Implementation of Guidelines for Hoardings in  
Colombo**

As you are aware, several cases had been filed in the Supreme Court against the Council in respect of hoardings. When these cases were taken up in the Supreme Court and having heard both petitioners and respondents, Supreme Court had noticed that certain amendments or modifications have to be made to the present guidelines for hoardings. Thereafter amendments and modifications were made to the guidelines and the same was submitted to the Supreme Court, but unfortunately the petitioners concerned withdrew those cases on 18.09.2006.

Though we have reserved our rights to implement the present guidelines, still I see it needs further modifications and amendments.

Since this is substantial income to the Council and the interest of the Council as well as advertisers, it is high time for the Council to amend present advertising by laws incorporating the present guidelines with amendments and modifications to suit the present economic, cultural and social status of the city in particular and the country in general.

In view of the above, you are requested to draft a set of advertisement by laws incorporating the guidelines as

aforesaid, in consultation with Legal Officer, Director (Traffic & Designs) and Director (planning). The application of present guidelines is hereby suspended until such time the new by laws are framed and enacted.

Municipal Commissioner

26.09.2006 (R6).”

The Director Engineering (Projects) by his letter dated 03.10.2006 had informed the 3<sup>rd</sup> respondent, Municipal Commissioner that he would not take into consideration the guidelines either for the new applications or for the applications for the existing hoardings. He had further stated that he would prepare the by-laws ‘leisurely in his spare times’. The said letter is as follows:

“Municipal Commissioner

**Implementation of Guidelines for Hoardings in**  
**Colombo**

This is in reference with your instructions dated 26.09.2006 regarding the above matter.

As instructed by you, present guidelines will not be taken into consideration. I hereby refrain from adopting guidelines for locations of new applications and requests for advertisements and also for existing advertisements.

Formulation of new by laws incorporating modified guidelines is a time consuming process as many aspects such as economic, cultural, social status of the city, identification of objectionable locations, aesthetic and scenic beauty requirements, impact on traffic etc. should be considered. On the other hand, I have to undertake these tasks in addition to my assigned duties as Director Engineering (Projects). Hence I am unable to give you any

predicted period to finalize by laws and please allow me to draft these by laws **leisurely in my spare times** and I will appraise you of progress of draft by law from time to time when necessity arises. I also suggest and seek your approval to incorporate a new enhanced fee structure for advertisements together with the by laws.

Director Engineering (Projects)

03.10.2006” (emphasis added) (R7).

The 4<sup>th</sup> respondent in his affidavit therefore had averred that the question whether the hoardings set up at various locations and stated in paragraph 11 of the affidavit filed by the petitioner, that the said hoardings have been set up in violation of the guidelines does not arise since the operation of the aforesaid guidelines have been suspended by the 3<sup>rd</sup> respondent. The contents of paragraph 11 was reproduced in tabulated form and given in Table I at the commencement of the judgment.

On examination of the aforementioned two communications between the Municipal Commissioner and the Director Engineering (Projects) (R6 and R8) it is abundantly clear that at a time when this Court had recorded to the effect that,

“the guidelines in question had been approved by the Chief Minister on the basis,

1. the specific locations would be identified where hoardings should be permitted;
2. within the specific locations where the guidelines would apply”

(Journal Entry dated 28.04.2006 – P10),

and that the

“respondents would take action that has been withheld pending these applications in respect of the hoardings that are not compliant with by laws and guidelines and also to recover the amounts that are due.”

(Journal Entry dated 18.09.2006-P10),

the 3<sup>rd</sup> respondent, Municipal Commissioner had taken steps to suspend the application of present guidelines until new by-law are framed and enacted, with a single stroke of his pen. It is quite apparent that no thoughts were given and no steps were taken for the period interim, for hoardings that were to be erected in the city of Colombo. Due to this position several parties suffered; the advertisers did not know on what basis they had to apply for the erection of hoardings; the residents and the general public within the city of Colombo had faced difficulties (P8a, P8b and P8c) and the 1<sup>st</sup> respondent Council had lost revenue as there was no clear fee structure. It is also to be noted that the 3<sup>rd</sup> respondent had refrained from tendering an affidavit to this Court and had got the 4<sup>th</sup> respondent to file an affidavit on his behalf as well as on behalf of 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.

Considering the aforementioned affidavit of the 4<sup>th</sup> respondent filed on his behalf and on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents, the question which arises at this point is that, whether the suspension of the guidelines marked as P4 was lawful and whether the 1<sup>st</sup> to 5<sup>th</sup> respondents had acted in contravention to the doctrine of public trust.

Learned Counsel for the petitioner strongly contended that the failure of the 1<sup>st</sup> to 5<sup>th</sup> respondents to remove a large number of unauthorized hoardings erected within CMC area and granting of purported approval for the erection of hoardings is illegal, irrational and contrary to by-laws of the Council

and its guidelines and therefore constitutes a grave abuse of power and is obnoxious to the doctrine of public trust.

As stated earlier, it was not disputed that the displaying of advertisements within the Colombo Municipality area was regulated by the by-laws, which came into operation in 1949 and the by-laws gazetted in Government Gazette Notification bearing No. 541/17 dated 20.01.1989 and adopted by the 1<sup>st</sup> respondent Council. The displaying of such advertisements within the Colombo Municipality area was also regulated, as stated earlier, by the guidelines prepared and approved by the Chief Minister of the Western Provincial Council. The aforementioned by-laws clearly stipulated that,

“No person shall cause any advertisement to be displayed so as to be visible from any street, road, canal or lake, except under the authority of licence issued in that behalf by the Commissioner.”

The proviso to the above clause refer to the advertisements to which the aforesaid should not apply, provided that such advertisement is an illuminated advertisement or a sky sign. These types of advertisements were described as follows:

- “(a) an advertisement relating to any entertainment the net proceeds of which are to be used for the purpose of charity;
- (b) an advertisement relating to any entertainment to be held in the premises upon which such advertisement is displayed;
- (c) an advertisement displayed by the Government,
- (d) an advertisement relating to a religious, political or public meeting;
- (e) an advertisement in the window of any building;
- (f) a ‘To Let’ advertisement;