

**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 1ST 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 1st to 5th 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 1st to 5th respondents to remove unauthorized hoardings erected and granting of purported approval for the erection of hoardings within the city limits of the 1st 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, 1st to 5th 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 1st to 5th Respondents.

M. M. Mohideen for 6th and 7th 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 1st to 5th 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 3rd respondent was vested with powers to entertain and approve applications and to issue licenses for displaying of advertisements.

In 2005, the 2nd respondent’s predecessor, the 3rd 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 1st 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

<p>Guidelines - Clause 1</p>	<p>The maximum size of a hoarding should be 20 feet × 10 feet.</p> <p>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.</p>
<p>Guidelines - Clause 2</p>	<p>Hoardings should only be erected on uni-poles (single poles).</p> <p>The majority of the hoardings are erected on two or more poles.</p>
<p>Guidelines - Clause 3</p>	<p>No hoarding should be erected within road reservations of Independent Mawatha, Baudhaloka Mawatha, Ananda Coomaraswamy Mawatha and Galle Face Centre Road</p> <p>There are a large number of hoardings erected on the said roads.</p>

<p>Guidelines - Clause 4</p>	<p>No hoarding should be erected at the Independent Square, frontage of Sports Ministry Grounds, alongside cemeteries and Viharamahadevi Park</p> <p>There are several hoardings alongside the Borella Public Cemetary.</p>
<p>Guidelines - Clause 6</p>	<p>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.</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>Guidelines - Clause 7</p>	<p>No hoarding should be erected alongside sites of monuments within 10 meters thereof obliterating such monuments.</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>

<p>Guidelines - Clause 8</p>	<p>No hoarding should be erected violating the rights of property owners to enjoy reasonable property frontage, ventilation and natural light.</p> <p>Hoardings have been erected in violation of the said Clause 8</p>
<p>Guidelines - Clause 9</p>	<p>No hoarding should be erected on top of another hoarding.</p> <p>Hoardings have been erected in violation of the said Clause 9</p>
<p>Guidelines - Clause 10</p>	<p>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.</p> <p>There are hoardings at almost all the roundabouts and traffic signal heads in the Colombo city.</p>
<p>Guidelines - Clause 11</p>	<p>No hoarding should be erected within roundabouts, traffic diversion islands, public parks and centre median.</p> <p>Hoardings have been erected at many places violating the said Clause 11</p>
<p>Guidelines - Clause 12</p>	<p>No hoarding should be erected without displaying municipal reference number, contact telephone number of applicant of advertisement and the phrase city complaints www.cmc.lk on the right</p>

	<p>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 x 2 feet directional signboard.</p> <p>Almost all the hoardings are in violation of the said Clause 12.</p>
<p>Guidelines - Clause 13</p>	<p>No hoarding should be erected on a land or a property maintained by the council in the following manner-</p> <ul style="list-style-type: none">(a) parallel to a property frontage;(b) at an angle less than 45 degrees to property frontage;(c) with less than 2.5 meters ground clearance;(d) within three meters of vehicular access to premises;(e) overhanging a carriageway;(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;(g) on electricity posts and tele-communication posts. <p>Hoardings have been erected in violation of the said clause 13.</p>

<p>Guidelines - Clause 14</p>	<p>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.</p> <p>Hoardings have been erected in violation of the said Clause 14.</p>
<p>Guidelines - Clause 15</p>	<p>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.</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 3rd 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 1st and/or 2nd and/or 3rd 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 1st to 5th 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 1st 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 1st to 5th respondents.

Learned Counsel for the 1st to 5th 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*,⁽¹⁾

“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*⁽²⁾ 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*⁽³⁾, 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*⁽⁴⁾).

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.*⁽⁵⁾). 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*⁽⁶⁾, 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*, 9th 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*⁽⁷⁾ 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*⁽⁸⁾. 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*⁽⁹⁾. 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 an 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 5th and 7th 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 5th and 7th 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 Iddamalgodala and others* ⁽¹⁰⁾. 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 1st to 5th 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 1st and /or 2nd and/or 3rd and/or 4th and/or 5th 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 1st to 5th 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 1st respondents Council. The contention of the learned Counsel for the 1st to 5th 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 1st to 5th 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 1st 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 1st to 5th respondents was that this Court had directed the 1st 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 1st to 5th 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 1st 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 3rd 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 1st to 5th respondent and the affidavit of the 4th respondent on behalf of himself and 1st, 3rd and 5th 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 1st 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 1st respondent Counsel had informed this Court that the 1st respondent would decide as to the hoardings that would have to be removed on the basis of the guidelines for advertisements of the 1st 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 1st 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 1st and 3rd respondents informs Court that after perusing the applications made by the petitioners, the 1st 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 3rd respondent had thereafter decided to suspend the guidelines and to draft a new set of by-laws. The 4th respondent in his affidavit referred to documents marked as R6 and R7 and had averred to the aforesaid intention of the 3rd 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 3rd 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 4th 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 3rd 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 3rd 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 1st respondent Council had lost revenue as there was no clear fee structure. It is also to be noted that the 3rd respondent had refrained from tendering an affidavit to this Court and had got the 4th respondent to file an affidavit on his behalf as well as on behalf of 1st, 3rd and 5th respondents.

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

Learned Counsel for the petitioner strongly contended that the failure of the 1st to 5th 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 1st 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;

- (g) a 'For Sale' advertisement;
- (h) a domestic name plate;
- (i) a name plate not exceeding 09 square meters in area, used for professional purpose;
- (j) an advertisement on a vehicle used for trade purposes displaying the name and address of the owner of that vehicle;
- (k) an advertisement relating to the trade or business carried on in the premises upon which such advertisement is displayed.

Part II of the said set of by-laws, refers to the other relevant provisions pertaining to advertisements. The learned Counsel for the 1st to 5th respondents submitted that the by-laws referred to above are the currently applicable by-laws and the 4th respondent too had averred to this effect in his affidavit of 30.11.2007.

It is therefore abundantly clear that there was a set of valid by-laws in addition to the aforementioned guidelines pertaining to advertisements within the city limits of the 1st respondent Council area. The contention on behalf of the 1st to 5th respondents, as stated in the affidavit of the 4th respondent is that the question whether the hoardings set up at various locations referred to in the petition in violation of the guidelines does not arise since the operation of the said guidelines had been suspended by the 3rd respondent. Although the learned Counsel for the 1st to 5th respondents strenuously contended that the guidelines in question were not adequate for the purpose it was intended and that they had not obtained legal sanctity, there was no reference made to the applicability of the by-laws approved by the members of the Municipal Council and published in terms of the Municipal Councils Ordinance in the Gazette of 20.01.1989. Specific reference was however, made to the by-laws of 1948 (R9) being 'archaic and in need of drastic changes to suit socio

economic environment at present'. The question however, arises at this juncture as to whether the 3rd respondent could have taken the decision to suspend the guidelines in question as stated earlier with just a stroke of a pen and totally ignore the by-laws enacted in terms of the provisions of the Municipal Councils Ordinance.

The law regarding the waiver, relaxation and repeal of by-laws of local authority has no ambiguities as there is no possibility for a local authority to waive its by-laws unless there is specific provision contained in the by-law itself. Referring to this position, Charles A Cross (Principles of Local Government Law, 6th Edition, pg.123) stated that,

“An authority has no power to waive its by-laws or to relax them in any respect unless the by-laws themselves contain provisions enabling this to be done (it is highly improbable that by-laws containing a dispensing power would be confirmed) or else there is specific statutory provisions for waiver or relaxation.”

This position was considered as far back as in 1899 by Day, J. in *Yabbicom v King* ⁽¹¹⁾, where it was categorically stated that,

“. . . by-laws properly made have the effect of laws; a public body cannot any more than private persons dispense with laws that have to be administered; they have no dispensing power whatever.”

When the 3rd respondent had decided to suspend the guidelines, he had not stated about the applicability of the by-laws. A careful examination of the letter from the 3rd respondent to the Director Engineering (Projects) however, reveals that there is no reference to the applicability of by-laws enacted and published in the Gazette Notification dated 20.01.1989. In these circumstances the question arises as to whether the 3rd respondent's decision to suspend the

application of guidelines and by-laws without any authority from the 1st respondent Council could be regarded as lawful and not an arbitrary decision. The answer to the question is clearly in the negative for the reasons set forth in the following paragraphs.

The allegation of the petitioner is that the failure of the 1st to 5th respondent to remove a large number of unauthorized hoardings erected and further granting of purported approval for the erection of hoardings within the city limits of the 1st respondent Council area contrary to applicable by-laws and guidelines had infringed the fundamental rights of the petitioner' and of the resident's of the CMC area guaranteed in terms of article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

Equality, which is a dynamic concept, forbids unfairness and arbitrariness. The Concise Oxford Dictionary of Current English (7th Edition, pg. 44) refers to an arbitrary decision as,

"Derived from mere opinion or random choice; capricious; unrestrained, despotic."

Referring to arbitrariness, in *E. P. Royappa v. State of Tamil Nadu* ⁽¹²⁾ it was stated that equality is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. In the words of Justice Bhagwati (as he then was),

In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both

according to political logic and constitutional law and is therefore violative of Article 14. . . .”

The summation of these concepts is that in terms of the Constitution everything must be carried out according to the rule of law. The concept of the rule of law has many meanings and out of which an important and relevant aspect is that the functions of the authorities should be conducted within a framework of recognized rules and principles, which would restrict discretionary power. Professor Wade refers to the picturesque language of Coke, where he had described this position as ‘the golden and straight metwand’ of law as opposed to ‘the uncertain and crooked cord of discretion’ (Administrative Law, supra pg. 20).

Although Dicey in his theory had explained that in classical constitutional law wide discretionary power was incompatible with the rule of law (A. V. Dicey, Law of the Constitution, 9th Edition, pg. 202), this concept does not hold good in today’s context and in practical terms what is necessary would be not to eliminate the wide power of discretion, but the control of its exercise.

This general principle had remained unchanged for centuries and in Coke’s words (Administrative Law, supra page. 351),

“For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit.*”

It is interesting to note that the general principle which was evolved since the *Rooke’s* case in 1958 (Administrative Law, supra) was followed continuously in related matters and the decision in *Westminister Corporation v.*

London & North Western Railway⁽¹³⁾, where Lord Macnaghten, stated with reference to a local authority's power to erect public conveniences that,

"It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

This position was further illustrated with approval by Lord Denning M.R. in *Breen v Amalgamated Engineering Union*⁽¹⁴⁾, referring to the land mark decision in *Padfield v Minister of Agriculture, Fisheries and Food*⁽¹⁵⁾, where it was stated that,

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield v Minister of Agriculture, Fisheries and Food*, which is a land mark in modern administrative law."

It is therefore apparent that a public authority has no absolute or unfettered discretion. Referring to this position, Professor Wade (supra pgs. 354-355) had stated that,

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – That is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended" (emphasis added).

Learned Counsel for the petitioner contended that the manner in which the approval was granted for the hoardings and how they were allowed to be displayed constituted a grave abuse of power and violation of the doctrine of public trust and the 1st to 5th respondents were liable in terms of section 12(1) of the Constitution.

This Court in *Bulankulama and others v Secretary, Ministry of Industrial Development and others (supra)* had carefully considered the concept of public trust and had held that the 'organs of State are guardians to whom the people have committed the care and preservation of the resources of the people'. This position was referred to in the Supreme Court Determination on 'Land Ownership' (Decisions of the Supreme Court on Parliamentary Bills, 1991 – 2003, Vol. VII pg. 455), where it was stated that, 'from the time immemorial, land had been held in **trust** for the people in this island republic'.

The concept of public trust had been followed in several judgments of this Court and now it 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 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.

In such circumstances, the 1st to 5th respondents have a fundamental duty as specified in Article 28(d) 'to preserve and protect public property, and to combat misuse and waste of public property'. Furthermore the learned Counsel for the petitioner contended that the arbitrary methods of approving hoardings in a non-transparent manner had serious lapses of financial accountability. The 1st respondent Council, which has a history of over one hundred and twenty two years, is the

largest and the oldest Municipal Council in the country. Revenue from an independent source, which is an essential commodity for any local authority, could have been enhanced, if the 1st respondent Council had utilized the applicable by-laws and the guidelines in granting approval for the hoardings.

Accordingly it is apparent that by the process, which was followed by the 1st to 5th respondents, the 1st respondent Council would have lost a substantial amount of income, which could have been put to good use for the upliftment, not only of the capital city, but also of its residents.

Learned Counsel for the 1st to 5th respondents contended that the guidelines, which were suspended did not provide for many important aspects of advertising. It had not made provision to prevent covering the public view, and no provision regarding the safety of the public. Furthermore, there was no provision for competitive transparent bidding procedure in awarding the bill boards and hoardings to advertisers. It was also contended that the existing bylaws were archaic and outdated and in need of drastic changes to suit the present socio-economic environment.

Learned Counsel for the 1st to 5th respondents had further contended that the 1st respondent Council received only the annual fee of Rs. 20,000/- per hoarding regardless of the location of the hoarding. It was conceded referring to the documents marked P9(a) to P9(e) that the Road Development Authority had fetched millions of rupees adopting the competitive bidding process.

There were five (5) documents submitted by the petitioner along with his petition marked P9(a) to P9(e). These documents refer to the charges levied by the Road Development Authority in the year 2007 for the erection and maintenance of hoardings, gantries, cantilevers and overhead bridges. The relevant portions of these documents are re-produced

below, since they indicate the income that could be generated through this process.

“ Permission for erection and maintenance of hoardings at Peliyagoda abundant bridge on Colombo - Kandy road.

This refers to the auction held at Ministry of Highways on 16.01.2007 on the above.

You are required to do the following prior to the erection of hoarding.

Make payment of Rupees **Seven Million Nine Hundred and Twelve Thousand and Five Hundred + 15% VAT (Rs. 7,912,500.00 + 15% VAT)** by a Bank draft. . . .

1. You are required to erect, maintain and removal of the above hoarding strictly in accordance with the conditions for erection, maintenance and removal of hoardings on National Highways. . . . (P9a)

Permission for erection and maintenance of gantries and cantilever on Cotta Road.

. . . Make payment of Rupees One Million Six Hundred Thousand + 15% VAT (Rs. 1,600,000.00 + 15% VAT by a Bank draft. . . (P9b)

Permission for erection and maintenance of gantries, cantilevers and overhead bridges on Marine Drive.

. . .

This it to inform you that you are the successful bidder at the above auction for installing and maintaining of **02 Nos. full gantries, 04 Nos. cantilevers and advertising space of 02 Nos. overhead bridges on Marine Drive.**

. . . .

Make payment of Rupees Two Million Eight Hundred Thousand + 15% VAT (Rs. 2,800,000.00 + 15%VAT) . . . (P9c)

Permission for erection and maintenance of gantries and cantilevers on W. A. Silva Mawatha.

....

This is to inform you that you are the successful bidder of the above auction for installing and maintaining of **03 Nos. full gantries and 02 Nos. Cantilevers on W.A. Silva Mawatha**

....

This is to inform you that you are the successful bidder of the above auction for installing and maintaining of **03 Nos. full gantries and 02 Nos. Cantilevers on W. A. Silva Mawatha.**

....

Make payment of Rupees One Million Nine Hundred Thousand + 15% VAT (Rs. 1,900,000.00 + 15% VAT) (P9d)

Permission for erection and maintenance of hoarding on Baseline Road.

....

This is to inform you that you are the successful bidder at the above auction for installing and maintaining of **35 Nos. hoardings on Baseline Road.**

....

Make Payment of Rupees Six Hundred Thousand + 15% VAT (Rs. 6,600,000.00 + 15% VAT). . . . (P9e)" (emphasis added).

It is common ground that the 1st respondent Council had charged only a maximum of Rs. 20,000/- per annum per hoarding. The aforementioned documents clearly illustrate the amount of revenue the 1st respondent Council could have earned through such hoardings. In fact guideline 18 of the document marked P4 refers to the fact that hoardings could be awarded to advertisers by calling for tenders. Even in the event that there were no proper guidelines, the 1st respondent Council could have formulated relevant guidelines either to allow tenders or to conduct auctions. Irrespective of the method used, it is not disputed that, this would have paved the way for the 1st respondent Council to enhance its revenue from an independent source of income.

Learned Counsel for the petitioner submitted that it is common ground that even a newspaper advertisement of a full page in an insignificant page of a widely circulated newspaper would cost over Rs. 350,000/-. In such circumstances, it is surprising that the 1st respondent Council, presumably being aware of how advertising space was given by other organizations such as the Road Development Authority, took no steps at least on a temporary basis, until such time the guidelines were implemented, to levy a fee commensurate with the other comparable institutions.

Learned Counsel for the 1st to 5th respondents submitted that the 1st respondent Council had levied license fees in terms of Council Resolution No. 2061 (sanctioned on 28.06.1996) and that it is necessary to revise the present fees.

Accordingly learned Counsel for the 1st to 5th respondents contended that it was the sole responsibility of the members of the 1st respondent Council to impose appropriate license fees and to prepare a new set of by-laws to regulate the setting up of hoardings.

Whilst such was the situation, the 3rd respondent had taken steps to suspend the guidelines without making any

arrangements as to the procedure that should be applicable regarding the erection of hoardings in the interim. At the time the guidelines were suspended no reference was made to the applicability of the prevailing by-laws. Accordingly it is not disputed that due to the said action of the 3rd respondent, several illegal hoardings had come up within the city limits of Colombo without any consideration for the safety of the general public or the scenic beauty of the capital city of the country.

Advertising, it is to be noted, has been used by the commercial enterprises and the business community for the purpose of promoting their products and has become a thriving industry in the commercial world. Considering its competitiveness in today's context, advertising, which in its purest form is an art, alone had become a booming industry, which should not be stifled. It is also to be noted that the creativity and the variety of out door advertisements carried out in an organized manner could add colour, vividity and luster to a city centre.

However, it is to be admitted that there should be a policy, guidelines and bylaws to regulate the erection of hoardings, bill boards, gantries and any other mode used for the purpose of exhibiting advertisements. These regulations should have the requirement in issuing licenses for such hoardings etc. in public places as well as in private places. When public places are concerned, it is not disputed that the State or the local government institutions concerned has the authority to regulate them. As stated in *Saghir Ahmad v. The State of Uttar Pradesh* ⁽¹⁶⁾, referring to the decision in *C. S. S. Motor Service v. State of Madras* ⁽¹⁷⁾:

"The true position then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the

public are entitled as beneficiaries to use them as a matter of right. . . . The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally;. . .”

However, this does not mean that the hoardings erected on private places should be excluded. As referred to in *Links Advertisers and Business Promoters v Commissioner, Corporation of the City of Bangalore* ⁽¹⁸⁾, what is necessary to be considered is whether the advertisement affixed is fronting the public street and is exposed to public view and if so the conditions applicable to hoardings situated in public property would be applicable to those as well.

On an examination of all the circumstances aforementioned, it is apparent that the manner in which hoardings had been allowed to be displayed without any regard to the scenic beauty and the historical value of the capital city of the country, without due regard to safety of the public and the non consideration for the financial accountability regarding the income that could have been generated by the 1st respondent Council, the said respondents should have taken steps to remove the unauthorized hoardings in terms of the applicable by-laws and guidelines. Such failure to remove the said 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 CMC area by ‘executive and administrative action’ within the meaning of Article 126 of the Constitution and I hold that the 1st to 5th respondents are responsible for the said violation 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.

I accordingly allow this application and direct the 1st respondent to take action forthwith on the following:

1. to strictly enforce the by-laws published in the Gazette Notification dated 20.01.1989 (R10) and the guidelines for advertising in Colombo which came into effect on 01.01.2006, (P4) until such time amended by-laws and guidelines are introduced;
2. to remove all unauthorized/illegal hoardings and hoardings erected in the Colombo Municipal Council area which were given approval in violation of the aforementioned by-laws and the guidelines for advertising in Colombo; and
3. to take immediate steps to revise the present guidelines, considering the globally accepted detailed policies on hoardings and out door advertising in keeping with the practice of other organizations such as the Road Development Authority conducting auctions to enhance the financial viability in the process. Such revision of guidelines to be carried out as an urgent requirement by the 1st respondent Council and to consider the proposals for this purpose that could be submitted by the 6th and 7th respondents, who are the President and the Secretary – General of the Outdoor Advertising Association of Sri Lanka, respectively.

These guidelines to be prepared and finalized to come into being with effect from 01.01.2010.

If these directions are sincerely and expeditiously carried out, it would not only improve the revenue of the 1st respondent Council, but would also be an enhancement to the advertising industry and more importantly, would beautify the capital city of the pearl of the Indian Ocean.

In all the circumstances of this case, I make no order as to costs.

AMARATUNGA, J. – I agree

BALAPATABENDI, J. – I agree

Application allowed