



THE  
**Sri Lanka Law Reports**

**Containing cases and other matters decided by the  
Supreme Court and the Court of Appeal of the  
Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 12**

**PAGES 309 - 336**

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# DIGEST

	<b>Page</b>
<b>DEBT CONCILIATION ORDINANCE</b> – Section 43(1) – Application to Court for a decree in terms of a settlement and entry of decree nisi – is a creditor entitled to pursue an action available to him under the law without having recourse to the provisions of Section 43(1)?	309
<b>Abeyratne v. Anulawathie Manike</b> (Continued from Part 11)	
<b>FUNDAMENTAL RIGHTS</b> – Article 12(1), Article 14 (1) (a), Article 126 (2) of the Constitution – where a person alleges that his fundamental right has been infringed or is about to be infringed by executive or administrative action, he may apply to the Supreme Court within one month thereof, for relief or redress, by way of petition. - locus standii.	329
<b>Wjsekera And 14 Others v. Gamini Lokuge, Minister of Sports and Public Recreation &amp; 20 Others</b>	
<b>PENAL CODE</b> - Section 386, Section 389, Section 403 - Code of Criminal Procedure Act Section 5, Section 182(1) – framing of charges against the accused – Section 183 (1) – Admission of offence – Section 183(2) – Refuse to admit the offence – Trial – Section 184 (2) – Procedure on trial – Section 186 and 187 – Power of Magistrate to discharge the accused at any time if it appears that the accused has committed an offence, other than that specified in the charge – Section 314 – No person to be tried twice for the same offence - Dismissal - Discharge - autre fois acquit - Tried?	315
<b>Amadoru v. Officer-in-Charge, Special Criminal Investigarion Unit, Wennappuwa</b>	

**Held:**

- (1) Section 43(1) of the Debt Conciliation Ordinance uses the word “may” in its operative part regarding the steps that can be taken by a creditor in terms of the Debt Conciliation Ordinance where the debtor has failed to comply with the terms of settlement arrived at before the Board. Therefore it is not a mandatory provision where a settlement has been reached. Thus, Section 43(1) of the Debt Conciliation Ordinance is an inclusive Section which permits recourse to other available remedies, available to the parties.

Per J.A.N. de Silva, CJ.-

“The Ordinance provides for the registration of a settlement entered into before the Conciliation board to be registered in the relevant Land Registry under the Registration of Documents Ordinance as such settlement is deemed to be an instrument affecting or relating to such land. However, there is no provision regarding the registration of any instrument indicating that the settlement has been complied with by the parties. Therefore the filing of an appropriate action to vindicate his title by the creditor where the settlement has not been complied with by Debtor would be justified as the entering of a decree in such an action in favour of the creditor would confirm the position regarding the outcome of the settlement arrived at before the Debt Conciliation Board”

**APPEAL** from the judgment of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden in Kegalle.

**Cases referred to:**

- (1) *Nona v. Engalthinahamy*- 72 NLR 152
- (2) *Baby Nona v. Don Dines Silva* – 79 2 NLR 153
- (3) *Rajiyah v. Aboobakker* – (1978/79) Sri L.R. 131

*Manohara de Silva*, PC for the Petitioner

M.S.A. *Saheed* with *Purnika Hettiarachchi* for the Plaintiff-Appellant-Respondent

May 12<sup>th</sup> 2011

**J.A.N. DE SILVA CJ.**

This is an appeal from the judgment of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden at Kegalle allowing the appeal of the Plaintiff Appellant Respondent.

The Plaintiff-Appellant Respondent instituted action in the District Court of Kegalle for a declaration of title to the land described in the Schedule to the plaint and for ejectment of the Defendant. It is admitted by both parties that the Defendant had obtained a sum of Rs. 9,200/- from the plaintiff and had executed a deed of transfer in favor of the Plaintiff with a condition to retransfer on payment of the said sum with interest within a period of two years. The Defendant went before the Debt Conciliation Board and the parties had entered into a settlement before the said Board. Since the Defendant had not honoured the said settlement the plaintiff instituted action in the District Court of Kegalle seeking a declaration of title as aforesaid.

When the case had been taken up for trial the parties had raised issues and Issue No., 7 was raised as a preliminary issue which related to the maintainability of the action filed by the plaintiff since the parties had entered into a settlement before the Debt Conciliation Board in view of section 43 of the Debt Conciliation Ordinance.

The learned District Judge answered the said issue in favor of the Defendant and ordered dismissal of the action and the plaintiff appealed against the said order. The Provincial Civil Appellate High Court allowed the appeal of

the Plaintiff and ordered the District Court to proceed with the action on the other issues raised by the parties.

The Defendant sought leave to appeal from the Supreme Court and leave was granted on the following questions:

17(a) Whether the learned Provincial High Court Judges have erroneously decided that after a settlement is entered into at the Debt Conciliation Board the remedy available to the creditor is to make an application under Section 43 of the Debt Conciliation Ordinance for a decree in terms of that settlement is not the only remedy for him.

17(e) Whether the learned District Judge had correctly answered issue No. 7.

The basis of these two questions is as to whether the plaintiff who entered into a settlement before the Debt Conciliation Board could file and maintain the vindicatory action that he had instituted.

Section 43(1) of the Debt Conciliation Ordinance states as follows:

*Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor may except in a case where a deed or instrument has been executed in accordance with the provisions of section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in court and that a decree be entered in his favor in terms of such settlement. The application shall be by petition in the way of summary procedure, and*

*the parties to the settlement, other than the petitioner shall be named respondents and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of settlement.*

The rest of the section deals with the procedure that follows thereafter.

The question for determination that arises in this case is whether Section 43(1) deals with an “**exclusive**” situation or and “**inclusive**” situation. There are certain Statutes which give rise to an exclusive situation whereby the procedure laid down therein has to be followed by parties there. Section 43(1) uses the word “**may**” in its operative part regarding the steps that can be taken by a Creditor in terms of the Debt Conciliation Ordinance where the Debtor had failed to comply with the terms of settlement arrived at before the Board. Therefore it is not a mandatory provision where a settlement has been arrived at. Thus the section is an inclusive section which permits other available remedies available to parties have recourse to.

**The Ordinance provides for the registration of a settlement entered into before the Conciliation Board to be registered in the relevant Land Registry under the Registration of Documents Ordinance as such settlement is deemed to be a an instrument affecting or relating to such land. However, there is no provision regarding the registration of any instrument indicating that the settlement has been complied with by the parties. Therefore the filing of an appropriate action to vindicate his title by the creditor where the settlement has not been complied with by Debtor would be justified as the entering of a decree in such an action in favour of the creditor would confirm the position regarding the outcome of the settlement arrived at before the Debt Conciliation Board.**

Section 43 has been considered in several cases previously and the *cursus curiae* is to the effect that a creditor is entitled to pursue an action available to him under the law without having sole recourse to the provisions of Section 43(1) in such a situation.

In *Nona v. Engalthinahamy*<sup>(1)</sup> it was held that the law grants discretion to a creditor, in the case of a secured debt, to choose whether he should proceed under Section 43 of the Debt Conciliation Ordinance or not.

In *Baby Nona v. Don Dines Silva* <sup>(2)</sup> it was held that “where a transferor on a conditional transfer applied to and obtains relief from the Debt Conciliation Board, but defaults thereafter in complying with the terms of settlement which provided that the rights to redeem was to be at an end in the event of any default, a purchaser from the transferee gets good and valid title and can maintain an action *rei vindictio* even against the heirs of such transferor”.

In *Rajiyah v. Aboobakker* <sup>(3)</sup> the above section was discussed in relation to a hypothecary action. It was held that the entering of a settlement before the Debt Conciliation Board extinguishes the original debt by novation, the creditor being now entitled to seek payment of the new debt under the settlement, but it does not extinguish the mortgage which persists. The mortgagee is entitled in respect of the settlement to enforce his legal rights in a hypothecary suit under the Mortgage Act or follow the procedure laid down in Section 43 of the Debt Conciliation Ordinance.

The Civil Appellate High Court has considered these decisions in arriving at the conclusion to set aside the judgment of the learned District Judge and deciding in favor of the Plaintiff. Accordingly the questions of law on which leave

was granted would be answered in favor of the plaintiff and the case should go back to the District Court of Kegalle for the trial to proceed on the other issues raised by the parties expeditiously.

Accordingly the appeal of the Defendant-Respondent-Appellant is dismissed and the judgment of the Civil Appellate High Court is affirmed with costs fixed at Rs. 21,000/-.

**RATNAYAKE J** – I agree

**EKANAYAKE, J.** – I agree.

*Appeal dismissed, and the judgment of the Civil Appellate High Court affirmed with costs.*



**AMADORU V. OFFICER-IN-CHARGE, SPECIAL CRIMINAL INVESTIGATION UNIT, WENNAPPUWA**

SUPREME COURT

TILAKAWARDANE, J

RATNAYAKE, J. AND

SURESH CHANDRA, J.

S.C. APPEAL NO. 12A/2009

S.C. SPECIAL L.A. 332/2008

H.C. CHILAW REVISION APPLICATION NO. 36/2004

COURT OF APPEAL P.H.C. (A.P.N.) 35/2008

JANUARY 18<sup>TH</sup>, 2011

***Penal Code - Section 386, Section 389, Section 403 - Code of Criminal Procedure Act Section 5, Section 182(1)-Framing of charges against the accused - Section 183 (1) - Admission of offence - Section 183(2)-Refuse to admit the offence-Trial-Section 184(2)-Procedure on trial - Section 186 and 187 - Power of Magistrate to discharge the accused at any time if it appears that the accused has committed an offence, other than that specified in the charge - Section 314 - No person to be tried twice for the same offence - Dismissal - Discharge - autre fois acquit - Tried?***

The Accused – Petitioner – Petitioner – Appellant (Appellant) sought Leave to Appeal from the decision of the Court of Appeal dated 11<sup>th</sup> November 2008, whereby the Court of Appeal upheld the Judgment of the High Court of Chilaw. The Supreme Court granted Special Leave to Appeal on the following questions of law:

- (1) Was the Order given by the Magistrate’s Court of Marawila in Case No. 69172 under Section 186 of the Criminal Procedure Code or under the proviso thereof?
- (2) If the said Order was made in terms of the proviso to Section 186 is that tantamount to acquittal in terms of Section 314 of the Criminal Procedure Code Act?

On 24<sup>th</sup> October 2001, charges of cheating, criminal misappropriation and criminal breach of trust in terms of Sections 403, 386 and 389 of the Penal Code were filed against the Appellant in the Magistrate’s Court of Marawila. The Appellant pleaded not guilty

to these charges. Subsequent to an amendment and re-filing of charges on 11<sup>th</sup> September 2002, the Magistrate's Court ordered the plaint to be quashed and the release of the Appellant.

Thereafter on 2<sup>nd</sup> July 2003 a report was filed under Section 136(1)(6) of the Code of Criminal Procedure Act charging the Appellant with cheating and criminal misappropriation. The Appellant once again pleaded not guilty and the matter proceeded to trial.

The Prosecution amended the charges on 8<sup>th</sup> September 2004, to which the appellant raised an objection, that the Order of 11<sup>th</sup> September 2002 quashing the plaint and ordering his release amounted to an acquittal. This objection was overruled by the Magistrate by his Order dated 15<sup>th</sup> September 2004. The Appellant sought to have the said order set aside on the basis that the original Order made on 11<sup>th</sup> September 2002 amounted to an acquittal and the charges could not be proceeded with as it violated the provisions of section of 314 of the Criminal Procedure Code.

**Held:**

- (1) There is a distinction between the two Orders that could be made in terms of Section 314 of the Code of Criminal Procedure Act, the former amounting to a mere discharge and the latter, an Order made under the Proviso, is one that should be characterized as one providing for acquittal.
- (2) The correct framing of charges is an indispensable prerequisite to the issuance of a verdict, as it is on these charges that the accused is to tender his plea and the Court is to consider whether to proceed to trial.
- (3) An Order for release given in the absence of any opportunity to consider the merits of a case cannot be considered an adjudicative action and *autrefois acquit* cannot apply, regardless of the particular word that may be ascribed to the release. Whether a release is deemed a 'dismissal' or 'discharge' or some other term, the fact that no evidentiary basis exists from which a Court can draw a reasoned conclusion is alone dispositive of the matter.
- (4) A plain reading of Sections 185 and 187 of the Criminal Procedure Code leads unequivocally to the conclusion that at least some deliberation on the merits of the case must have taken place

before a verdict can be reached. The Court of Appeal correctly concluded that the earliest stage at which a Magistrate has the power to acquit or convict is after the taking of evidence.

- (5) The Court of Appeal correctly reviewed the discharge in this case to amount to simply a discontinuance of proceedings and not a verdict of acquittal and as such the Order in Case No. 60172 could not have been made pursuant to the proviso of Section 186 of the Criminal Procedure Code.
- (6) If a person is to have been considered “tried” for purposes of Section 314 of the Criminal Procedure Code, the opportunity for both sides to produce some evidence to support their respective stances has to have been available. Given the determination that acquittals under the proviso of Section 186 of the Criminal Procedure Code require some level of evidentiary proceeding to have taken place, and that an opportunity for leading evidence is inherent to Section 314(1) determination of “tried”, it necessarily follows that an acquittal under the proviso to Section 186 does not fall within the ambit of Section 314

**APPEAL** from the Judgment of the Court of Appeal.

**Cases referred to:**

- (1) *L.I.C. de Silva v. V.M.P. Jayatillake* – 67 NLR 169
- (2) *Perera v. O.I.C. SCIB, Kalutara* – (1999) 3 Sri L.R. 407
- (3) *Veerappan v. Attorney General* – 72 NLR 361
- (4) *Fernando v. Excise Inspector, Wennappuwa* – 60 NLR 227
- (5) *Premadasa V.T.E. R. Assen, Inspector of Police* – 60 NLR 451
- (6) *Don Abraham v. Christoffles* – 55 NLR 135
- (7) *Edwin Singho v. Nanayakkara* – 61 NLR 22
- (8) *Peter v. Cotelingam* – 66 NLR 468
- (9) *Fernando v. Rajasooriya* – 47 NLR 399
- (10) *Sumangala Thero v. Piyatissa Thero* – (1937) 39 NLR 265

*Dilindra Weerasuriya* with *Sanjaya Gunasekera* for the Accused-Petitioner-Petitioner-Appellant *S. Kularatne*, S.S.C. for the A.G.

May 05<sup>th</sup> 2011

**SHIRANEE TILAKAWARDANE, J.**

The Accused-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) has sought Leave to Appeal from the decision of the Court of Appeal dated the 11<sup>th</sup> November 2011 whereby the Court of Appeal upheld the Judgment of the High Court of Chilaw. This Court granted Special Leave to Appeal on 3<sup>rd</sup> March 2009 on the following two questions of law:

- (i) Was the Order dated 11<sup>th</sup> September 2002 given by the Magistrate's Court of Marawila in Case No. 60172 under Section 186 of the Criminal Procedure Code or under the proviso thereof?**
- (ii) If the said Order was made in terms of the proviso to Section 186 is that tantamount to acquittal in terms of Section 314 of the Criminal Procedure Act?**

On 24<sup>th</sup> October 2001, charges of cheating, criminal misappropriation and criminal breach of trust in terms of sections 403, 386 and 389 of the Penal Code respectively, were filed against the Appellant in the Magistrate's Court of Marawila. Employed at Ceylinco Insurance Company as an insurance agent, the Appellant was alleged to have induced the fraudulent issuance of cheques in his favour by an insurance policy holder. The Appellant pleaded not guilty to these charges, and maintained his innocence in response to a subsequent amendment and re-filing of the charges on 11<sup>th</sup> September 2002.

As his principle defense, the Appellant submitted that the charges lodged against him were procedurally invalid,

given that the party filing the complaint – the insurance policy holder in whose name he had allegedly forged cheques – had not sustained any loss. It was at this juncture that the Magistrate’s Court ordered (i) the plaint to be quashed while reserving the right for a fresh plaint to be filed and (ii) the release of the Petitioner.

Subsequently on 2<sup>nd</sup> July 2003, the Officer-in-Charge of the Special Investigations Unit of the Wennappuwa Police filed a report under Section 136(1)(b) of the Code of Criminal Procedure Act No. 15 of 1979, charging the Appellant with, cheating and criminal misappropriation and, furthermore, cited an accountant of the Ceylinco Insurance Company as a witness. The charges were read to the Petitioner who once again pleaded not guilty. The matter proceeded to trial and the evidence of one witness was called.

The Prosecution amended the charges with permission of the Court on 8<sup>th</sup> September 2004, to which the Appellant raised an objection, that the Order of 11<sup>th</sup> September 2002 quashing the plaint and ordering his release amounted to an acquittal and, therefore, continuation of the said trial stood in violation of Section 314 of the Code of Criminal Procedure Act No. 15 of 1979. This Objection was overruled by the Learned Magistrate by his Order dated 15<sup>th</sup> September 2004. The Appellant sought unsuccessfully to set aside this Order in his Application for Revision to the High Court of the North Western Province, holden in Chilaw and the Court of Appeal.

The Appellant seeks to have the said Orders set aside on the basis that the original Order made on 11<sup>th</sup> September 2002 amounted to an acquittal and the pending charges could not be proceeded with as it violated the provisions of 314 of the Code of Criminal Procedure Act adverted to above.

It has to be appreciated that there is a distinction between the two Orders that could be made in terms of this section, the former amounting to a mere discharge and the latter, an Order made under the proviso, is one that should be characterized as one providing for acquittal. As evidence for establishing the Proviso as the basis for the issue of the Order, the appellant has submitted a somewhat confusing comparative analysis of the present Penal Code versus its prior iterations. While this analysis adequately serves to establish the parallels between the main clause and proviso of section 186 and provisions of the older law, it fails to actually substantiate his assertion that the Magistrate's determination of the defective nature of the charges necessarily leads to a conclusion that the Magistrate's Order was written in terms of the Proviso. Interestingly, the Appellant's suggestion that the language of the Order mandates this conclusion is in opposition to his own suggestion that this Court not be governed by the specific 'phraseology' used by the Learned Magistrate used in making the Order.

Addressing the distinction sought to be drawn by the Appellant, the Respondent-Respondent-Respondent argues primarily on two correlated points, namely that (i) a full analysis of the context in which the Order was issued is required to properly determine the intended statutory basis of the document, and that (ii) guiding this interpretation is settled principle of law that a verdict cannot said to have been granted in the absence of properly formed charges.

In considering this it is relevant to consider that the summary trial in criminal procedure is initiated by the framing of charges and, therefore, one of the first tasks of a Magistrate is to ascertain whether there is sufficient ground to frame a charge against the accused as set out in section 182(1) of the

Code of Criminal Procedure Act referred to above. On reading the charge to the accused, if the latter makes a statement amounting to an unqualified admission, the Magistrate has a mandatory obligation in terms of section 182(1) of the said Act to record a verdict of guilty and pass sentence according to the law. If the accused withdraws his admission with leave of the Court, the Magistrate shall proceed to trial as if a conviction has not been entered. If no such admission is tendered, the Magistrate will in terms of section 183(1), (2) of the said Act, inquire as to whether the accused is ready for trial and, if so, proceed to try the case. If, however, the accused is not ready for whatever reason, the Magistrate holds discretion to postpone or proceed with the trial, and the accused's claim of insufficient or lack of readiness will not prevent the Magistrate from taking evidence of the prosecution and of any other witnesses of the defence as are available.

When the above is considered in light of the provision for Procedure on Trial set out in section 184 of the Act, it becomes clear that only after the charges are read to an accused can a verdict be given, whether on admission of the accused or after a trial. The correct framing of charges, therefore, is an indispensable prerequisite to the issuance of a verdict, as it is on these charges that the Accused is to tender his plea and the Court is to consider whether to proceed to trial.

This logical conclusion is further substantiated by the provisions of Sections 185 and 187 of the said Act, which define the power of the Magistrate to issue a verdict. Section 185 provides that the Magistrate shall, if after taking evidence for the prosecution and defence and such further evidence (if any) as he may on his own motion cause to be produced record a verdict of acquittal if he finds the accused not guilty. If the Magistrate does indeed find the accused guilty, he is to

record a verdict of guilty, pass sentence upon him according to law and record such sentence. Section 187 of the Penal Code further clarifies the nature of verdict, providing that if an offense proved against the accused by the facts is different than the one specified in the charge, the Magistrate can convict the accused of the offense that has been proven but may do so only after framing a charge and reading and explaining the same to the accused. A plain reading of these Sections leads unequivocally to the conclusion that *at least some deliberation on the merits of the case* must have taken place before a verdict can be reached. We are of the opinion that the Court of Appeal correctly concluded that the earliest stage at which a Magistrate has the power to acquit or convict is after the taking of evidence in the abovementioned manner. (vide also *L.I.C. de Silva v. V.M.P. Jayatillake* <sup>(1)</sup>).

The reason why the framing of a charge is prerequisite to an actual verdict but not simply to discharge is evident in Chapter XVI of the said Code of Criminal Procedure Act, Chapter XVI which establishes that the purpose of “the Charge” is to indicate the offense with which the accused is charged. (Vide Sections 164 and 165). Where there is no charge framed in terms of the law, the Court cannot acquit the accused simply because the Court cannot know- nor can the accused be adequately noticed of – what offense he is to be regarded as acquitted. If the offense for which he was acquitted is not known, there is effectively nothing preventing him from being tried again for the same offense, which is an affront to the finality of an acquittal and the rights of the accused. In respect of the need for properly framed charges, the Penal Code allows for as many amendments to charges as is necessary and at any time before Judgement is pronounced; such alteration can be in the form of a substitution or addition of a new charge. (Vide section 167(1)).



The only occasion in which an alteration will disrupt the proceeding of a trial is when the alteration, in the opinion of the court, is likely to prejudice the accused in his defense or the prosecutor in the conduct of the case, in which case, the court may either direct a new trial or adjourn the trial for such period as may be necessary. (Sections 168 and 169).

Apart from the clear intent of the legislators to disallow the issuance of a verdict where no evidentiary proceedings are available from which to be able to deduce guilt or innocence, the court has implicitly confirmed this by a confirmation of the inverse, holding that a challenged Order will be deemed to be a verdict only when the context of the situation reveals an intent to adjudicate. In *Perera v. Officer in Charge, SCIB, Kalutara*<sup>(2)</sup> this court found that the unwillingness of the police in proceeding with a case did not amount to a withdrawal mandating acquittal as required under Section 189 of the Penal Code, because an acquittal could not be given where the intention was a mere discontinuance of proceedings as opposed to conclusion, adjudication or determination of proceedings. In *De Silva v. Jayatilake (supra)*, the court held that “while it was open to a Magistrate for reasons stated to discharge an accused in terms of section 191, (vide section 186 of the Code of Criminal Procedure Act) such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal. An acquittal under section 190 (vide section 185 of the Code of Criminal Procedure Act) means an acquittal on the merits”. As further basis for arriving at this decision, this Court referred to *Veerappan v. the Attorney-General*<sup>(3)</sup>, where the Privy Council held that the defence of *autrefois acquit* cannot succeed where an Order of discharge was made without going into merits, in a set of circumstances analogous to the instant case.

The Appellant has submitted that the cases of *Fernando v. Excise Inspector, Wennappuwa*<sup>(4)</sup> and *Premadasa v. T.E.R. Assen (Inspector of Police)*<sup>(5)</sup> support his claim that the issuance of an acquittal does not require an inquiry into the merits of a case. While these cases can be broadly read to make this point, such a reading is, to this Court, unacceptably simplistic. The importance of these cases cannot stand simply for the fact that discharge Orders were characterized as acquittals without due attention to the reason which underlay the decision to make such a characterization. In *Fernando (supra)*, the Court chose to characterize an Order of Discharge in terms of section 191 (succeeded by Section 186 of the Code of Criminal Procedure Act) as a substantive verdict of acquittal due to the fact that the accused raised objection to it *only after the Prosecution completed its lead of the evidence and the defence effectively closed his case*, reasoning that a decision to release at such a point in the case would have to be for, all intents and purposes, one based on the merits of the case. In *Premadasa (supra)*, charges against the accused were discovered to be improperly formulated *only after the Prosecution had closed its evidence*, and although the Order given was one of discharge, the principle of *autrefois acquit* was held to apply. The objective of the respective courts hearing these cases was quite clear, namely that a finding of discharge would be both procedurally onerous to the Appellant as well as a violation of his/her right to finality of proceedings.

While this reasoning is apparent in several cases (vide *Don Abraham v. Christoffles*<sup>(6)</sup>, *Edwin Singho v. Nanayakkara*<sup>(7)</sup>; *Peter v. Cotelingam*<sup>(8)</sup>, the case of *Fernando v. Rajasooriya*<sup>(9)</sup> provides a particularly succinct explanation of it. In this case, the accused asserted that his discharge in a prior case due

to an inability of the Prosecuting Officer to lead evidence barred his conviction on the principle of *autrefois acquit*. Making reference to *Sumangala Thero v. Piyatissa Thero*<sup>(10)</sup>, Soertz, J., explained that:

*... the Magistrate has the power to control the trial by discharging the accused if he is of the opinion that it would serve no useful purpose to proceed any further with the case or, if he prefers to make an Order of acquittal, he should be able to rule out any other evidence available to the prosecution for some good reason pertaining to the admissibility or relevancy of evidence. In such a case, there is a decision upon the merits and such a decision is essential for a valid plea of autrefois acquit. This view is supported by good authority. Spencer Bower relying upon many decisions of the English Courts, to which he makes reference, observes as follows in his treatise The Doctrine of Res Judicata at pages 32 and 33: "Thus the dismissal of a summons, complaint or charge by a Court of summary jurisdiction, if expressly stated by the Court, or shown by evidence properly receivable to have proceeded upon a consideration of the merits, is a judicial decision of the innocence of the alleged offender . . . But where the dismissal did not purport to have been or, was not in fact, founded upon a consideration of the merits even in the largest and most liberal sense of that somewhat elastic expression, it is not deemed to involve, or necessarily to involve, any adjudication of the innocence of the accused."*

Finally, to the language of Section 186 of the Penal Code – the section at issue in this case – we find it to be quite clear that the procedure laid down by the provision was designed

in contemplation of the rationale detailed above. Section 186 reads as follows:

*Anything herein before contained shall not be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so;*

*Provided that, if the Magistrate is satisfied, for reasons to be recorded by him, that further proceedings in the case will not result in the conviction of the accused, he shall acquit the accused.*

The Main Clause indicates that discharge of the accused can take place at “any previous stage of the case”, which when read together with the abovementioned section (sections 182, 183, 184, and 185 etc), effectively refers to any time before the case has proceeded to trial, before evidence was taken, before a plea was given by the accused and before even charges have been framed. Defined to encompass such portion of a case, a discharge cannot amount to a determination of the rights of the parties because no adjudication has taken place and is to be given before any deliberation on the merits has taken place. It is for this reason that such a decision by the Magistrate must be accompanied by a declaration of the basis for such a determination. The Proviso on the other hand, serves to vest the Magistrate with a mandatory obligation to acquit the accused in the event he is satisfied of the impossibility of conviction, and while doing so, more restrictively delineates the threshold after which such acquittal can be made. Qualification of the word “proceedings” with the word “further” requires a presumption that some level of proceedings has been undertaken. A proceeding can only be considered a “further” or otherwise subsequent proceeding if it follows a prior one.

While this Court does not choose to promulgate a rule as to precisely when in the timeline of a case a discharge is to be seen as an adjudicative action and not a mere discontinuance of proceedings – it would be inappropriate to deprive the Magistrate of the discretion he is afforded by the Code of Criminal Procedure Act on this point – the relevant statutory provisions and pertinent case law on the matter as detailed hereinabove warrants a conclusion that, as a matter of law, an Order for release given in the absence of any *opportunity* to consider the merits of a case cannot be considered an adjudicative action and *autrefois acquit* cannot apply, regardless of the particular word that may be ascribed to the release. Whether a release is deemed a “dismissal” or “discharge” or some other term, the fact that no evidentiary basis exists from which a court can draw a reasoned conclusion is alone dispositive of the matter. Accordingly, we find that the Court of Appeal correctly viewed the discharge in the case before us to amount to simply a discontinuance of proceedings and not a verdict of acquittal and, as such, hold that the Order could not have been made pursuant to the Proviso of Section 186. That the Magistrate reserved the right to file a fresh plaint when making this Order removes any trace of doubt that the order was intended to simply affect the Appellant’s release incidental to a discontinuance of proceedings.

Having determined the inapplicability of Section 186 upon the Order in dispute, the Appellant’s second question of law is rendered untenable. However, we take the opportunity to briefly provide some clarity on whether releases issued under the Proviso of Section 186 fall within the purview of Section 314(1) of the Criminal Procedure Code. Section 314(1) provides:

*A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted*

*of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence.*

The word “tried” – the operative word of this section – finds meaning in Section 5 and Section 184 of the Code of Criminal Procedure Act referred to above. Section 5 provides that all offenses (under the Penal Code or any other Law) are to be (i) investigated, (ii) inquired into and (iii) tried and otherwise dealt in accordance with the provisions of the Code of Criminal Procedure Act referred to above. The nature of these three phases of an allegation of an offense in the context of a summary procedure is found in Section 184 which stipulates that if a Magistrate proceeds to try the accused, there is a mandatory obligation to take all such evidence as is produced by the prosecution or the defense. The effect, then, of the operative language of Section 314(1) as informed by the abovementioned sections is to make clear that if a person is to have been considered “tried” for purposes of Section 314, the opportunity for both sides to produce some evidence to support their respective stances has to have been available. Given the earlier determination that acquittals under the Proviso require some level of evidentiary proceeding to have taken place, and that an opportunity for leading evidence is inherent to Section 314(1) definition of “tried”, it necessarily follows that an acquittal under the Proviso of Section 186 does not fall within the ambit of Section 314.

For the aforesaid reasons the Appeal is dismissed and the judgment of the Court of Appeal is affirmed. No costs.

**RATNAYAKE., J** – I agree

**SURESH CHANDRA, J** – I agree

*Appeal dismissed and the Judgment of the Court of Appeal affirmed.*

**WIJESEKERA AND 14 OTHERS V. GAMINI LOKUGE, MINISTER  
OF SPORTS AND PUBLIC RECREATION & 20 OTHERS**

SUPREME COURT  
SHIRANEE TILAKAWARDANE, J.  
IMAM, J. AND  
SURESH CHANDRA, J.  
SC (FR) APPLICATION NO. 342/2009  
NOVEMBER 15<sup>TH</sup>, 2010

***Fundamental Rights – Article 12(1), Article 14 (1) (a), Article 126 (2) of the Constitution – where a person alleges that his fundamental right has been infringed or is about to be infringed by executive or administrative action, he may apply to the Supreme Court within one month thereof, for relief or redress, by way of petition. - locus standi.***

When this Application was taken up for argument, the Respondents assailed the Application on the following preliminary objections:

- (a) The Application is out of time and therefore is time barred;
- (b) The Petitioner has no *locus standi* to institute and/or to continue the Application; and
- (c) The Petitioner has failed to show an infringement of his fundamental right guaranteed under Articles 12(1) and/or 14 (1)(g) of the Constitution.

**Held:**

- (1) In determining the time limit of one month in Article 126(2), if the violation is of a serious nature, affecting material rights which are pertinent and critical to the Petitioner, where mala fides, bias or caprice can be established and if it is a continuing violation, the Supreme Court will not dismiss the application *in limine*, without at least considering the grievance of the Petitioners, based on non-compliance with Article 126(2).

- (2) The substantive injustice alleged to have been suffered upon the Petitioners warrants the Court's review of it. *Locus standi* exists.

Per Shiranee Tilakawardene, J.

“..... the opinion of this Court is as regards to standing or *locus standi* in fundamental rights Applications, the interest of justice mandates this Court's focus on the potential injustice canvassed by the applicant, and not on the interest of the applicant and, therefore, in light of the foregoing case law this Court finds that so long as the applicant of a fundamental right Application comes before this Court in good faith, on a matter or matters affecting a broad spectrum of people, and where special and or exceptional circumstances exist, such as where the matter impacts, ..... standing is to be allowed.....”

- (3) The Petitioners have provided in their pleadings matters that need to be at least considered relating to whether the Petitioners are entitled to relief from violation of their fundamental rights guaranteed by Article 12(1), 12(2) and 14(1)(g). Therefore the petitioner should be given the opportunity to be heard on whether there has been a violation of his fundamental right.
- (4) Fundamental Rights Applications must be seriously considered before they are brushed off *in limine* without affording the Petitioners the opportunity to present their case.
- (5) Per Shiranee Tilakawardane, J. –

“The rule of law is and must after all be characterized with the principles of supremacy of the law, the quality of the law, accountability to the law, legal certainty, procedure and legal transparency, equal and open access to justice to all, irrespective of gender, race, religion, class, creed or other status”.

**APPLICATION** under Articles 17 and 126 of the Constitution.

**Cases referred to:**

- (1) *Gamaethige v. Siriwardena and other* – (1988) 1 Sri L.R. 384
- (2) *Sugathapala Mendis and another v. Chandrika Bandaranaike Kumaratunga and others* – S.C.F.R. 352/2007



- (3) *Narendrakumar v. Ziyard and others* – (2000) 1 Sri L.R. 251
- (4) *Bulankulama v. Secretary, Ministry of Industrial Development* – (2000) 3 Sri L.R. 243
- (5) *Jayantha Adikari Egodawele v. Dayananda Dissanayake, Commissioner of Elections* – F R D (2) 292
- (6) *Kottabadu Durage Sriyani Silva v. Chanaka Iddamalgoda* – 21 SC(FR) 471/2000

*Upul Jayasuriya* with *Manoj Bandara* instructed by *Aparajitha Ariyadasa* for the 1<sup>st</sup> Petitioner

*Harsha Fernando*, S.S.C. for the 1<sup>st</sup> and 21<sup>st</sup> Respondents

*Palitha Kumarasinghe, P.C.* with *Chinthaka Mendis* instructed by K.P. Law Associates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

*Dilshan Jayasuriya* instructed by *Upula Fernando* for the 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents.

*Upula Fernando* for the 6<sup>th</sup> Respondent

*Shanaka Amarasinghe* instructed by *Samanmalee Widyaratne* for the 18<sup>th</sup> Respondent

*Kuvera de Zoysa* with *Asiri Dissanayake* instructed by *M.J.S. Fonseka* for the 20<sup>th</sup> Respondent

8<sup>th</sup> to 17<sup>th</sup> and 19<sup>th</sup> Respondents are absent and unrepresented

*Cur.adv.vult*

June.10<sup>th</sup>.2011

**SHIRANEE TILAKAWARDANE, J.**

The Petitioner, together with 14 others (hereinafter referred to as the “Petitioner”) instituted this Fundamental Rights Application by Application dated 29<sup>th</sup> April 2009 seeking several avenues of relief. Subsequently the 14 Petitioners withdrew their Application and the case proceeds on the Application of the Petitioner. When this matter was

taken up for argument on 15<sup>th</sup> November 2010, the Counsel for the Respondents assailed the Application on the following Preliminary Objections:-

- (a) The instant Application is out of time and is therefore time barred;
- (b) The Petitioner has no *locus standi* to institute and/or to continue the instant Application; and
- (c) The Petitioner has failed to demonstrate an infringement of his fundamental rights guaranteed under Section 12 (1) and/or 12 (2) and/or 14 (1) (g);

In light of the aforementioned grounds, the Respondents submitted that the Application should be dismissed *in limine*. This Court, having heard all the parties to this matter on the above preliminary objections, thereafter gave permission for parties to tender limited written submissions on the said preliminary objections. Having received and reviewed such submissions, we have examined and analyzed the merits of the said objections.

The initial matter for this Court's consideration is whether the Petitioners Application is time barred in terms of Article 126(2) of the Constitution. Article 126(2) of the Constitution provides that:

*“Where a 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.”*

The Respondents assert that the nearly 3 month gap between the issuance of the Order of the 1<sup>st</sup> Respondent contained in the Gazette notification No. 1586/27 dated 30<sup>th</sup> January 2009 and marked “E” with the Petition and the filing of the Application on 29<sup>th</sup> April 2009, precludes this Court’s review of the Application. The Respondents refer to the decision in *Gamaethige v. Siriwardena and Other* <sup>(1)</sup> to emphasize the fact that this Court has consistently held compliance with the one month time period stipulated in Article 126 (2) to be mandatory. In *Gamaethige (supra)*, His Lordship Fernando, J. stated that “the time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory. . .” and that “. . . the remedy under Article 126 must be availed of at the earliest opportunity, within the prescribed time, and if not so availed of, the remedy ceases to be available.” (at pages 397 and 401, respectively).

While this Court accepts that the entirety of the substantive relief prayed for in Prayer (c) of the Application relates to the Order, we do not agree with the Respondents that the dates of these two documents (and especially the date of the Order) are alone appropriate in determining compliance with the timing requirement in Article 126(2). Though the Petitioner has indeed filed an Application more than one month after the issuance of the Order, to reject the Application on this basis alone would be to ignore the continuing nature of the violation of the Petitioner’s fundamental rights at issue in this case. The decision in *Sugathapala Mendis and another v. Chandrika Bandaranaike Kumarathunga and others* <sup>(2)</sup> articulates the nature of the injustice we seek to avoid here, noting that the nature of a

large-scale development project was one that, by definition, continued over time, and therefore, the commencement of the project could not fairly be used as the point from which time began. In this case too, the petitioner has alleged that by the suspension of the Petitioner from the team of the Sri Lanka Rugby football Union, merely on the basis of his refusal to participate in the Asian Rugby Football Union Five Nations Division – Rugby Tournament which was to be held in Dubai, which he alleged was legitimately refused by him on the basis that his Captaincy was wrongly and unfairly overlooked and a partisan appointment to Captaincy had been purportedly made.

As in *Sugathapala (supra)*, the instant case involves the violation of the Petitioners' fundamental rights in the context of a situation, which by definition, continues this violation. Indeed, in a matter where the violation is of a serious nature, affecting material rights which are pertinent and critical to the Petitioner, where *mala fides*, bias or caprice can be established and if it is a continuing violation, this Court will not dismiss the case *in limine*, without at least considering the grievance of the Petitioners especially in a matter that affects youth and young persons. Therefore, this Court refuses to dismiss, in these particular circumstances, this case *in limine* based on non-compliance with Article 126(2).

The Respondents also have averred that the Petitioners have no standing to maintain this Application. More specifically, the Respondents aver that (i) the Petitioner is not a member of the Sri Lanka Football Rugby Union, (ii) the Petitioner has not pleaded to ever being a member in his Petition and therefore, (iii) the Order marked "P6" dissolving the Sri Lanka Rugby Football Union and appointing an Interim-Committee to ensure the smooth functioning of the activities of the said Union cannot be found to be discriminatory of the

Petitioner and/or violate his fundamental right to equality, equal protection of the law and freedom to engage in any lawful occupation, profession, trade, business or enterprise.

To substantiate this position, the Respondents refer this Court to the case of *Narendrakumar v. Ziyard and Others* <sup>(3)</sup>, Where His Lordship S. N. Silva CJ held that:

*“although these rights and freedoms are common to everybody or every citizen, as noted above, the right to invoke the Constitutional remedy in Article 126(1) upon an infringement of such a right is individual to the person who is aggrieved by such infringement. This is the necessary inference of the words contained in Article 17 and 126(2) of the Constitution . . .” (At page 261)*

While this Court considers the Respondents’ suggestion and of His Lordship’s reasoned judgment, this Court notes that the decision of whether a petitioner lacks *locus standi* is informed by a body of case law that exceeds a single case. Cases decided relatively contemporaneously with the *Narendrakumar case (supra)* broaden the scope of standing with respect to Fundamental Rights cases in a way, which we believe, proves relevant to the scenario at hand. In the case of *Bulalnkulama v. Secretary, Ministry of Industrial Development* <sup>(4)</sup>, the Supreme Court observed that the fact that the violation for which redress is sought is one suffered upon a broad swath of the citizenry, and affects the entire appointments to the different sporting bodies and decisions taken by those bodies, which the ordinary citizenry expects to be purely on merit, and on decisions that are objective, unbiased, impartial and based on the fundamental precept of the quality of all persons in Sri Lanka does not militate a rejection of standing. It was further held by Justice Amerasinghe that;

*“On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Article 12, 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka—rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners Fundamental Rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountability, in the best interest of the people in Sri Lanka, including the petitioners, and future generations of Sri Lankans, become relevant.”*

In *Jayantha Adikari Egodawele v. Dayananda Dissanayake, Commissioner of Elections*,<sup>(5)</sup> the Supreme Court further observed:

*“The citizen’s right to vote includes the right to freely choose his representatives through a genuine election which guarantees the free expression of the will of the electors; not just his own. Therefore, not only is a citizen entitled himself to vote at a free, equal and secret poll, but he also has the right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs. . . . The freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association. This is by no means unique. A scrutiny of Article 14 reveals that many Fundamental Rights have both an individual and a collective aspect.*