

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**

**Consulting Editors** : HON J. A. N. De SILVA, Chief Justice

(retired on 16.5.2011)

HON. Dr. SHIRANI A. BANDARANAYAKE

Chief Justice (appointed on 17.5.2011)

HON. SATHYA HETTIGE, President,

Court of Appeal (until 9.6.2011)

HON S. SRISKANDARAJAH President, Court of Appeal

(appointed on 24.6. 2011)

**Editor-in-Chief** : L. K. WIMALACHANDRA

**Additional Editor-in-Chief** : ROHAN SAHABANDU

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**DEBT CONCILIATION ORDINANCE –** Section 43(1) – Application to Court 309

for a decree in terms of a settlement and entry of decree nisi – is a credi-

tor entitled to pursue an action available to him under the law without

having recourse to the provisions of Section 43(1)?

**Abeyratne v. Anulawathie Manike**

**(**Continued from Part 11)

**FUNDAMENTAL RIGHTS** – Article 12(1), Article 14 (1) (a), Article 126 (2) of 329

the Constitution – where a person alleges that his fundamental right has

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**Wjesekera And 14 Others v. Gamini Lokuge, Minister of Sports and**

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**PENAL CODE -** Section 386, Section 389, Section 403 - Code of 315

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**Wennappuwa**

*Abeyratne v. Anulawathie Manike*

SC *(J.A.N. de Silva CJ.)* 309

**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 provi-

sion 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

fling of an appropriate action to vindicate his title by the creditor

where the settlement has not been complied with by Debtor would

be justifed as the entering of a decree in such an action in favour

of the creditor would confrm 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

*Cur.adv.vult*

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May 12th 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 Appel-

lant 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 eject-

ment of the Defendant. It is admitted by both parties that the

Defendant had obtained a sum of Rs. 9,200/- from the plain-

tiff 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 fled

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

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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 fle 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 pur-*

*pose of giving effect to those terms of that settlement, ap-*

*ply 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 certifed*

*copy of such settlement be fled in court and that a decree be*

*entered in his favor in terms of such settlement. The applica-*

*tion shall be by petition in the way of summary procedure, and*

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*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 set-**

**tlement entered into before the Conciliation Board to be**

**registered in the relevant land Registry under the Reg-**

**istration 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 settle-**

**ment has been complied with by the parties. Therefore**

**the fling of an appropriate action to vindicate his title**

**by the creditor where the settlement has not been com-**

**plied with by Debtor would be justifed as the entering of**

**a decree in such an action in favour of the creditor would**

**confrm the position regarding the outcome of the settle-**

**ment arrived at before the debt Conciliation Board.**

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Section 43 has been considered in several cases previ-

ously 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*(1) 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* (2) 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 vindi-*

*catio* even against the heirs of such transferor”.

In *Rajiyah v. Aboobakker* (3) the above section was dis-

cussed 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 credi-

tor 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 settle-

ment 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 judg-

ment of the learned District Judge and deciding in favor of

the Plaintiff. Accordingly the questions of law on which leave

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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 Appel-

late High Court is affrmed with costs fxed at Rs. 21,000/-.

**RATNAyAke J** – I agree

**ekANAyAke, J.** – I agree.

*Appeal dismissed, and the judgment of the Civil Appellate High*

*Court affrmed with costs.*

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SC 315

**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 18TH, 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 commit-**

**ted an offence, other than that specifed 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 11th

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 Section186

is that tantamount to acquittal in terms of Section 314 of the

Criminal Procedure Code Act?

On 24th October 2001, charges of cheating, criminal misappropria-

tion and criminal breach of trust in terms of Sections 403, 386

and 389 of the Penal Code were fled against the Appellant in the

Magistrate’s Court of Marawila. The Appellant pleaded not guilty

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to these charges. Subsequent to an amendment and re-fling of

charges on 11th September 2002, the Magistrate’s Court ordered

the plaint to be quashed and the release of the Appellant.

Thereafter on 2nd July 2003 a report was fled 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 8th September 2004, to

which the appellant raised an objection, that the Order of 11th

September 2002 quashing the plaint and ordering his release

amounted to an acquittal. This objection was overruled by the

Magistrate by his Order dated 15th September 2004. The Appel-

lant sought to have the said order set aside on the basis that the

original Order made on 11th 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 particu-

lar 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

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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 Sec-

tion 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. Christoffes* – 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.

*Cur.adv.vult.*

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May 05th 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 11th November

2011 whereby the Court of Appeal upheld the Judgment of

the High Court of Chilaw. This Court granted Special Leave

to Appeal on 3rd March 2009 on the following two questions

of law:

**(i) was the Order dated 11th 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 24th 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 fled 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 in-

duced 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-fling of the charges on

11th September 2002.

As his principle defense, the Appellant submitted that

the charges lodged against him were procedurally invalid,

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given that the party fling 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 fled and (ii) the

release of the Petitioner.

Subsequently on 2nd July 2003, the Offcer-in-Charge

of the Special Investigations unit of the Wennapuwa Police

fled 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 8th September 2004, to which the Appellant

raised an objection, that the Order of 11th 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 15th 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 11th 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.

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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 specifc ‘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 frst tasks of a Magistrate

is to ascertain whether there is suffcient ground to frame a

charge against the accused as set out in section 182(1) of the

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Code of Criminal Procedure Act referred to above. On reading

the charge to the accused, if the latter makes a statement

amounting to an unqualifed 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 insuffcient or lack of readiness will not pre-

vent 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, there-

fore, is an indispensable prerequisite to the issuance of a ver-

dict, 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

defne 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 fnds the accused not guilty.

If the Magistrate does indeed fnd the accused guilty, he is to

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record a verdict of guilty, pass sentence upon him according

to law and record such sentence. Section 187 of the Penal

Code further clarifes the nature of verdict, providing that if an

offense proved against the accused by the facts is different

than the one specifed 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* (1)).

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 prevent-

ing him from being tried again for the same offense, which is

an affront to the fnality 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 sub-

stitution or addition of a new charge. (vide section 167(1)).

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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 confrmed this by a confrmation 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. Offcer in Charge, SCIB,*

*Kalutara*(2) 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* (3), 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.

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The Appellant has submitted that the cases of *Fer-*

*nando v. Excise Inspector, Wennappuwa*(4) and *Premadasa*

*v. T.E.R. Assen (Inspector of Police)* (5) 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 char-

acterize an Order of Discharge in terms of section 191 (suc-

ceeded 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 com-*

*pleted 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 prin-

ciple of *autrefois acquit* was held to apply. The objective of the

respective courts hearing these cases was quite clear, namely

that a fnding of discharge would be both procedurally oner-

ous to the Appellant as well as a violation of his/her right to

fnality of proceedings.

While this reasoning is apparent in several cases (vide *Don*

*Abraham v. Christoffes* (6), *Edwin Singho v. Nanayakkara*(7);

*Peter v. Cotelingam* (8), the case of *Fernando v. Rajasooriya* (9)

provides a particularly succinct explanation of it. In this case,

the accused asserted that his discharge in a prior case due

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to an inability of the Prosecuting Offcer to lead evidence

barred his conviction on the principle of *autrefois aquit.*

Making reference to *Sumangala Thero v. Piyatissa Thero* (10),

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 consider-*

*ation 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 adjudica-*

*tion 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 fnd it to be quite clear

that the procedure laid down by the provision was designed

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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 satisfed, 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. Defned to encompass such

portion of a case, a discharge cannot amount to a determi-

nation 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 decla-

ration of the basis for such a determination. The Proviso on

the other hand, serves to vest the Magistrate with a manda-

tory obligation to acquit the accused in the event he is sat-

isfed of the impossibility of conviction, and while doing so,

more restrictively delineates the threshold after which such

acquittal can be made. Qualifcation 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.

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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 discontinu-

ance 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 adju-

dicative 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 fnd 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 fle 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 briefy provide some clarity on whether releases issued un-

der the Proviso of Section 186 fall within the purview of Sec-

tion 314(1) of the Criminal Procedure Code. Section 314(1)

provides:

*A person who has once been tried by a court of compe-*

*tent jurisdiction for an offence and convicted or acquitted*

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*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 –

fnds meaning is 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 con-

text 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) defnition 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 affrmed. No costs.

**RATNAyAke., J** – I agree

**SuReSH CHANdRA, J** – I agree

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

*affrmed.*

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**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 15TH, 2010

**Fundamental Rights – Article 12(1), Article 14 (1) (a), Article 126**

**(2) of the Constitution – where a person alleges that his fundamen-**

**tal right has been infringed or is about to be infringed by execu-**

**tive 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 l*ocus standi* to institute and/or to continue

the Application; and

(c) The Petitioner has failed to show an infringement of his fundamen-

tal 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 fdes, bias or

caprice can be established and if it is a continuing violation, the

Supreme Court will not dismiss the application *in limine*, with-

out at least considering the grievance of the Petitioners, based on

non-compliance with Article 126(2).

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(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 fnds 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 guaran-

teed 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 consid-

ered 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, account-

ability 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

*Wijesekera And 14 Others v. Gamini Lokuge, Minister of Sports*

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(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 1st Petitioner

*Harsha Fernando, S.S.C.* for the 1st and 21st Respondents

*Palitha Kumarasinghe, P.C.* with *Chinthaka Mendis* instructed by

K.P. Law Associates for the 2nd and 3rd Respondents

*Dilshan Jayasuriya* instructed by *Upula Fernando* for the 4th, 5th and 7th

Respondents.

*Upula Fernando* for the 6th Respondent

*Shanaka Amarasinghe i*nstructed by *Samanmalee Widyaratne* for the

18th Respondent

*Kuvera de Zoysa* with *Asiri Dissanayake i*nstructed by *M.J.S. Fonseka*

for the 20th Respondent

8th to 17th and 19th Respondents are absent and unrepresented

*Cur.adv.vult*

June.10th.2011

**SHiRANee TilAkAwARdANe, J.**

The Petitioner, together with 14 others (hereinafter

referred to as the “Petitioner”) instituted this fundamental

Rights Application by Application dated 29th 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

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taken up for argument on 15th 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 Respon-

dents 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 permis-

sion 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*

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*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 1st Respondent

contained in the Gazette notifcation No. 1586/27 dated 30th

January 2009 and marked “E” with the Petition and the fling

of the Application on 29th April 2009, precludes this Court’s

review of the Application. The Respondents refer to the

decision in *Gamaethige v. Siriwardena and Other* (1) to

emplasize the fact that this Court has consistently held com-

pliance with the one month time period stipulated in Article

126 (2) to be mandatory. In *Gamaethige (supra)*, His Lord-

ship 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 substan-

tive 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 fled an Application more than one

month after the issuance of the Order, to reject the Ap-

plication on this basis alone would be to ignore the con-

tinuing nature of the violation of the Petitioner’s fun-

damental rights at issue in this case. The decision in

*Sugathapala Mendis and another v. Chandrika Bandaranai-*

*ke Kumarathunga and others* (2) articulates the nature of the

injustice we seek to avoid here, noting that the nature of a

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large-scale development project was one that, by defnition,

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 vi-

olation of the Petitioners’ fundamental rights in the context of a

situation, which by defnition, continues this violation.

Indeed, in a matter where the violation is of a serious na-

ture, affecting material rights which are pertinent and critical

to the Petitioner, where *mala fdes*, 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

specifcally, 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

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Petitioner and/or violate his fundamental right to equality,

equal protection of the law and freedom to engage in any law-

ful occupation, profession, trade, business or enterprise.

To substantiate this position, the Respondents refer this

Court to the case of *Narendrakumar v. Ziyard and Others* (3),

Where His Lordship S. N. Silva CJ held that:

*“although these rights and freedoms are common to ev-*

*erybody or every citizen, as noted above, the right to in-*

*voke 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* (4), 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 pre-

cept of the quality of all persons in Sri Lanka does not mili-

tate a rejection of standing. It was further held by Justice

Amerasinghe that;

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*“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 disqualifed*

*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 confdent 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*,(5) the Supreme Court further ob-

served:

*“The citizen’s right to vote includes the right to freely choose*

*his representatives through a genuine election which guar-*

*antees 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.*