DAYAWATHIE AND PEIRIS
V.
DR. S. D. M. FERNANDO AND OTHERS

SUPREME COURT
JAMEEL, J.
M. FERNANDO, J. AND
AMERASINGHE, J.
S. C. APPLICATION NO. 4/88 Spl.
S. C. APPLICATION NO. 5/88 Spl.
OCTOBER 18, 19, 26 and 27, 1988.

Contempt of Court — Disobedience to judgment of Court — Compromise after judgment — Relevance of obtaining legal advice — Bona fides — Standard of proof — Apology.

Miss Dayawathie and Mrs. Peiris were nurses in Government Service. They along with several nurses had been excluded from selection to follow a Basic Training Course for promotion on the ground that they by going on strike had defied an essential services order made under the Public Security Ordinance. These nurses filed application No. 37/88 in the Supreme Court alleging discrimination and infringement of their fundamental right of equality. On 25.4.1988 the Supreme Court made order setting aside the selections already made and directing fresh selections to be made on the basis of the marks obtained at the examination without any disqualification on the ground of trade union action between 18.3.1986 and 17.4.1986.

Immediately upon the passing of this order the 1st respondent (Secretary to the Ministry of Health) suspended the training course which by then had been begun on 1.4.1987 and been under way for 13 months with only 3 or 4 months to go. The 1st respondent also prepared 2 lists — one listing those wrongly included and already following the course and the other listing those eligible on the basis of the Supreme Court Order. Further on 27.4.88 the respondents filed a motion seeking clarification from the Supreme Court. The matter of this

motion was mentioned in Court on 9.5.1988 and on 6.6.1988, the court stated it was functus and merely recorded the submissions. On 1.6.1988 a course was started for those eligible in terms of the S. C. order but who had not been selected for the course begun on 1.4.1987. On 6.6.1988 a purported agreement was filed in court.

By this agreement both parties were satisfied that a new course had been started for those eligible but earlier left out and both groups i.e. the group already following the course due to end in about 3 months and the group that began their training on 1.6.1988 would sit one common examination.

The petitioners then sought an order of Court that the agreement to continue the old course did not permit inclusion of those who did not have the requisite marks but this controversy was left unresolved and on 16.6.1988 the court terminated the proceedings thus leaving its original order intact and having on record the agreement of 6.6.1988.

The petitioners' Attorney-at-law wrote a letter to the 1st respondent threatening contempt proceedings. The 1st respondent always sought the advice of the D. S. G. which finally (on 16.6.88) was that there is no objection to proceeding with the first course which was suspended which included nurses who were substituted in place of those dropped owing to trade union activity. On the basis of this advice the 1st respondent directed the Director-General Health Services to commence the old course from 20.6.88.

Thereafter on 8.7.1988 Miss Dayawathie filed S.C. Application 4/88 and Mrs. Peiris S.C. Application 5/88 moving the court to deal with the respondents (1st respondent Secretary, Ministry of Health, 2nd respondent Director-General of Health Services and 3rd respondent Principal of the Basic Training School) for contempt by acting in defiance of and wilfully refusing to obey the order and judgment of the court. The petitioners alleged that the respondents were trying to circumvent the court order and they had acted with a dishonest and collateral motive viz to further the prospects of those nurses who had not gone on strike and to penalise those who had struck work. The two cases were consolidated and heard together.

Held:

(1) The Court had firstly set aside the selections and thus prohibited the continuation of the training course for persons held to be disqualified and secondly directed fresh selections to be made without any disqualification for trade union action.

The order was (a) partly declaratory in nature in that it formally announced that the petitioners had been discriminated against and set aside the selections; (b) partly mandatory in that it gave directions and instructions to make fresh

selections on the basis of marks obtained; (c) partly prohibitory in that it ordered the respondents to refrain from disqualifying those who participated in trade union action between specified dates.

Of the order it was part (a) that was disregarded and gave rise to these proceedings.

(2) The respondents understood the order of court perfectly well and made new lists of those eligible but in re-commencing the course for all those who had been selected earlier regardless of whether they were qualified or not in terms of the order of Court, there is no doubt that they disobeyed the order of court.

(3) There is a difference between disobedience to injunctions and undertakings given to court and disobedience to a declaratory order or a judgment or decree of court.

In the former case there is strict liability. Where the order is coercive every diligence must be exercised to observe it to the letter. In such circumstances there is no need to show that the person charged with contempt was intentionally contumacious or that he intended to interfere with the administration of justice. Unless the act was accidental, casual or done unintentionally it is culpable.

In the latter case mere disobedience without more is insufficient. A party cannot sacrifice his right of appeal nor is it permissible to obtain execution in the guise of contempt proceedings. Where the law expressly provides for the execution of decrees contempt proceedings cannot be resorted to. In the latter type of disobedience the contemner should have acted in defiance of the order or wilfully refused to obey it. Deliberate disdain of the court or a disregard for or defiance of the court and its decree is required.

(4) Notwithstanding the judgment entered, in a civil case it is permissible for the parties to enter into a compromise of their rights under the decree.

(5) Even if a contempt is not a crime it bears a criminal character and it must be satisfactorily proved, that is, beyond reasonable doubt.

(6) The plea that the act was done after obtaining legal advice is not conclusive but it may be a mitigatory factor and relevant in certain circumstances to prove bona fides.

(7) As soon as the court gave its decision the course was stopped and a fresh course was arranged for those who were qualified but dropped for their trade union activities. Being in doubt as to whether the order of the court permitted continuation of the old course for the entire old batch clarification was

sought but the court declined intervention declaring itself functus. A compromise of ambiguous connotation was recorded. The respodents sought the advice of the Deputy Solicitor General and acted in terms of his advice. The acts of the respondents were wilful in the sense that they were not casual, accidental or unintentional. But there was no conscious or deliberate disregard of the order of the Court. Their conduct does no savour of contempt or favour the drawing of an inference of mala fides or improper or collateral motivation. The respondents did not act defiantly. They acted erroneously owing to a misapprehension of what they were entitled to do. Hence they were not guilty of contempt.

(8) Regarding the question that no apology was tendered the law is that an apology must be offered at the earliest possible opportunity. A late apology will not show contrition which is the essence of the purging of a contempt. Yet a man may stake his all on proving he is not in contempt and may take the risk. The respondents ran the gauntlet of such risk and fairly succeeded.

Cases referred to

1. *Re Young and Marston* 31 Ch. D. 174
2. *Elliot v. Furner* 13 Sim 485
3. *Wheeler v. New Merton Board Mill* (1932) 2 KB 669
4. *Lomas v. Peate* (1947) 2 All ER 574, 575
5. *Gayford v. Chouler* (1898) 1 QB 316
6. *Edgyll v. Alward* (1902) 2 KB 239
7. *Sibery v. Connolly* 94 LT. 198
8. *Whitchead v. Reader* (1901) 2 KB 48
9. *O'Reilly v. Drayman* 25 LJ KB 492
10. *Stancombe v. Towbridge, Urban District Council* (1910) 2 Ch D 387
11. *A. G. v. Walthamstowe* 1 TLR 533
12. *Lewis v. Newport Railway Co. et al* 55 TLR 203
13. *Stenier v. Steiner* (1966) 2 All ER 387
14. *The Mileage Conference Case* (1982) 2 All ER (HL) 532 (16) 1981 2 All ER QBD (CA) 349
15. *Home Office v. Harman* (1982) 1 All ER (HL) 532 (16)
16. *Home Office v. Harman* (1981) 2 All ER (CA) 349
17. *Heatons Transport* (1972) 3 All ER HL 1101

18. *Worthington v. Ad Lib Club* (1954) 3 All ER 674, 683
19. *The Rena Case* (1961) 3 All ER 428
20. *Knight v. Clifton* (1971) 2 All ER 379, 381
21. *Odhams Case* (1956) 3 All ER 494
22. *In re Brambleyale* (1969) 3 All ER 1012; (1969) 3 WLR 1062, 1063.
23. *Comet Products U.K. Ltd. V Hawkrs Plastics Ltd.* (1971) 1 All ER 1141
24. *R v. Senior* (1899) 1 QB 289
25. *High Wycombe Corp. v. River Thames Development Contractor* (1898) 78 LT 463
26. *Smith v Wemis Coal Co. Ltd.* (1972) 27 BWCC 483
27. *Wheeler v. New Merton Board Mills Ltd.* (1933) 2 KB 669 CA
28. *Caldwell v. Canadian National Railways* (1940) 3 WWR 24
29. *Goodman v. R (1951-2)* 2 WWR 127
30. *Babington v. Inland Revenue Commissioners* (1958) NZLR 152
31. *Jakson v. Butterworth* (1945) 3 AITR 294
32. *Re East India Dock Junction Railway Act er parte Bradshaw.* (1848) 16 Sim 174
33. *O'Sullvain v. Harford* (1936) SQSR 115
34. *Abdul Kareen v. Prakash* AIR 1976 SC 859, 866
35. *Sathyandra Nath Mithra v. Supdt. of Police* AIR 1963 Cal 336
36. *Sahakari Sonstha v. State of Maharanhtra* 1977 Cri LJ 1809, 1815, 1816, 1817
37. *Prakash Chand v. Grewal* 1975 Cr LR 679, 684 to 686, 688
38. *Roy v. State of Orissa* AIR 1960 S.C. 190; 1960 Cr LJ 282
39. *Kar v. Chief Justice of Orissa* AIR 1961 SC 1367
40. *Mottur Hajee v. Dy. Commissioner, Tan Officer* AIR 1967 Mad 232
41. *Debabrata v. The State of West Bengal* AIR 1969 S.C. 189, 193
42. *Ragunath Rai v. Sairai* 1968 G. L. J. 704, 706, 707, 708
43. *Ismail v. Ismail* (1920) 22 NLR 190, 191
44. *De Alwis v. Rajakaruna* (1964) 68 NLR 180
45. *In re Cader* (1963) 68 NLR 293

46. *Arumugam v. Kanirgampillai* (1963) 68 NLR 506
47. *Velayuthan v. Hon. A.C.A. Alles* 75 NLR 268
48. *Gunaratne v. People's Bank* (1986) 1 Sri LR 338
49. *Ganeshanathan v. Vivienne Goonewardena and three others* (1984) 1 Sri LR 319
50. *Reginald Perera v. The King* (1951) 52 NLR 293, 296 (P.C.)
51. *Reg. v. Gray* (1900) 2 QB036 .
52. *Webster v. Southwork London Borough Council* (1983) 2 WLR 217, 222, 223, 224.
53. *Seaward v. Peterson* (1897) 1 Ch 545, 554
54. *Amarasekera v. Gunawardena* (1914) 1 Bal N.C. 52, 53
55. *In the matter of a Rule on A. F. Molamure* (1935) 37 NLR 33
56. *Silva v. Appuhamy* (1990) 4 NLR 178
57. *Eastern Trust Co. v. Mckenzie Mann & Co. Ltd.* AIR 1915 P.C. 106(2)
58. *De Alwis v. Rajakaruna* (1964) 68 NLR 180
59. *In re P. K. Ensa* (1954) 62 NLR 509, 511
60. *Hardinge v. Tingey* (1864) 12 WR 684
61. *Hewith Transport v. Transport and General Workers' Union 1973* 1 CR 10
62. *Perera v. Abdul Hamid* (1931) 1 CLW 141
63. *Knight v. Clifton* (1971) 2 All ER 378, 393
64. *Stancombe v. Towbridge U. D. C.* (1910) 2 Ch 190, 194
65. *Heaton's Transport (St. Helens) Ltd v. Transport and General Workers' Union* (1972) 3 All ER 101, 116, 117
66. *Fairolough & Sons v. Manchester Ship Canal* (No. 2) (1897) 41 Sol Jo. 225
67. *Gian Chand Bali v. L. P. Singh* (1968) Delhi LT 135
68. *Badoordeen v. Dingiri Banda et al* (1931) 1 CLW 74
69. *P. A. Thomas & Co. v. Mould* (1968) 1 All ER 963
70. *Re agreement of the Mileage Conference group of the Tyre Manufacturers' Conference Ltd.* (1966) 2 All ER 849, 862
71. *Gopal Bosl v. State of Bihar* AIR 1969 Patna 72

72. *Re the Agreement between the Newspaper Proprietors' Association Ltd. and the National Federation of Retail Newsagents, Booksellers and Stationers* (1961) 3All ER 428, 445

73. *In the matter of a Rule issued under Section 47 of the Courts Ordinance P. Ragupathy* (1945) 46 NLR 297, 299

APPLICATIONS for a rule nisi on respondents to show cause against being punished for contempt of court.

H. L. de Silva P.C. with *H. Wittanachchi* and *Miss. N. Gunawardena* for applicant in application No. 4/88 Spl

E. D. Wickremanayake with *K. S. Tillakaratne* and *Miss. N. Gunawardena* for the applicant in application No. 5/88 Spl.

K. N. Choksy P.C. with *L. C. Seneviratne P.C., Lakshman Perera* and *Britto Muttenayagam* for 1 to 3 respondents in both applications.

Cur. adv. vult.

December 12, 1988
JAMEEL, J

The same three Respondents have been named by the **two** Applicants in the two cases. Each Applicant seeks a similar result, namely, the conviction of all three Respondents for contempt of this court on account of their disobedience to the judgment of this court in Case No. Appln. 37/87. *K. K. Dayawathie et. al. vs S. D. M. Fernando.*

In this Case No. 37/87 — which was an application under Articles 17 and 126 of the Constitution the present applicant in S.C. 4/88 was the 1st Petitioner while the present applicant in S.C. 5/88 was the 5th Petitioner. The 1st Respondent in that Case No. 37/87 is the 1st Respondent in both cases before us today.

The aforesaid Case No. 37/87 had been filed to rectify a situation that arose as a result of the several Petitioners in that case not being treated equally with other nurses and of being discriminated against in respect of selection to follow the Post Basic Training Course.

Nurses from Class 11 had to be selected to undergo a course of training for promotion to Grade 1. There were a limited number of vacancies in that grade. The selection was on two criteria, namely, Seniority and Limited Competitive Examination. There were vacancies for Grade 1 Sisters in the wards as well as in the Public Health Service.

In that case No. 37/87 the court held on 25.4.1988 (Judgment produced marked 'X') that there had been unequal treatment in the selections made in respect of the course which had started on 1.4.1987. By its judgment the court made order directing. —

> "That all selections made for the said Training Course — as for instance set out in 'P10' and 'P11' — as Grade 1 Nursing Officers (Hospital Services) be and the same are hereby set aside: That fresh selections be made on the basis of the marks obtained by those who presented themselves for the examination (including the Petitioners and the Added Petitioners) without any disqualification being imposed upon them on the ground of participation in any Trade Union action between 18.3.1986 and 17.4.1986."

According to the Affidavit filed by the 1st Respondent in both these Cases Nos. 4/88 and 5/88 there had been 175 (should read 173) vacancies for the said Training Course. Of these, 64 were to be selected as Ward Sisters on the basis of Seniority, and 46 on the basis of a Limited Competitive Examination. The balance 43 were to be selected for training as Public Health Sisters but on the basis of a Limited Competitive Examination.

The present Petitioners concéde that as a result of the Judgment in S.C. 37/88, which was delivered on 25.4.1988 the Training Course which had been started on 1.4.1987 was suspended and the participants disbanded.

It appears from the evidence before us that, that course which was abandoned after running for 13 months had only a few months more for completion. Presumably for that reason and presumably on instructions of the 1st Respondent, the Attorney-

at-Law for the 1—3 Respondents in S.C. 37/88 filed a motion dated 27.4.1988 in that case (Produced marked 'P3') seeking a 'CLARIFICATION' from the court. They sought the permission of court to carry on to completion the course started on 1.4.1987. (All 163 Trainees) while promising to start a fresh course for those decreed to have been discriminated against. This was objected to, among others, by the present Petitioners. According to the Petitioners the court had, on 29.4.1988 declared that it was functus and that any difficulties that had arisen or were envisaged should be resolved by the agreement of parties. Perhaps because there was a possibility of adjustment the court, by consent of parties nominated the 9th of May 1988 as the next date on which the case was to be mentioned. Another reason alleged for the grant of that date will be adverted to later.

In between these two dates the Ministry of Health, of which the 1st Respondent is the Secretary, had, in accordance with the judgment of this court in S.C. 37/88, prepared Two Lists — marked 'P4A' and 'P4B' — respectively, denoting those who had, according to the judgment, been wrongly included in the 'Old Course' which started on 1.4.1987 (who for convenience of reference will in the course of this judgment be referred to as 'The Ineligibles') and those who were wrongly excluded (hereinafter referred to as 'The New Eligibles'). (Those of the trainees in the old course who had been rightly there will be referred to as 'The Old Eligibles').

The motion 'P3' filed by and on behalf of the Respondents in that case was for a 'Clarification' as to whether the Old Course could be carried on to completion for the 163 nurses, while a new course was to be started for the New Eligibles. That application had been 'Strenuously' opposed by the Petitioners.

The evidence before us reveals that in fact a new course was started for the New Eligibles on 1.6.1988.

On 6.6.1988 the Case S.C. 37/88 was once again mentioned in the Supreme Court and that day's proceedings (marked 'P5') shows:—

That both parties were AGREED—

(1) That the new course had started on 1.6.1988, and

(2) That there would be only one examination for BOTH GROUPS — though each would follow separate classes.

According to the record of the proceedings this word 'BOTH' was, of consent, understood to mean "THE GROUP ALREADY FOLLOWING THE COURSE WHICH WAS DUE TO END IN ABOUT THREE MONTHS" and "THE GROUP WHICH COMMENCED ON 1.6.1988."

Apparently, these Training Courses were of about 15 to 16 months in duration. Of the two groups referred to above one of them had by then only a few months left for completion while the other would have had to go on till about September 1989. What was agreed on was that one examination would then be held for both groups.

According to the Petitioners, as per their motion (marked 'P7') dated 10.6.1988 filed in that Case No. S.C. 37/87, at Paragraph 6, when the case was mentioned in open court on 9.5.1988 the parties were unable to reach finality regarding this question of 'BOTH' courses. Learned Deputy Solicitor General (hereinafter referred to as D. S. G.) had informed court that the course for the New Eligibles will start on 1.6.1988, while counsel for the Petitioners had informed court that they had no objection to the Old Eligibles continuing with the old course. It was in this state of the discussions that the parties had agreed to have the case called again on 6.6.1988. On that date the agreement aforesaid had been recorded. Thus, it appears that the parties were not at variance as to the conducting of a separate course for the New Eligibles as from 1.6.1988, nor for that matter, to the continuance of the old course to completion. The point of variance, according to the Petitioners, was, as to whether the Old Course should be continued only for The Old Eligibles or with the Ineligibles as well. That is to say the ENTIRE BATCH.

According to paragraph 10 of P7 Counsel for the Petitioners had, on 6/6/88, submitted to Court, while the Court was recording the agreement P5, that the word 'BOTH' should be

clarified to read as 'THE NEW GROUP' and 'THE OLD GROUP' EXCLUDING THOSE WHO HAD NOT OBTAINED THE REQUISITE MARKS'. According to the latter half of paragraph 3 of the letter 1R2 the Learned D.S.G. has stated:—

> "I also recall the Petitioner's Counsel stating that 'only those who were eligible to be selected in the old batch would be permitted' to which I responded that 'only the persons eligible were selected and that in any event we should not have this recorded as agreement had already been reached between the parties on the lines recorded by Court' ".

Learned President's Counsel appearing for the Petitioners in these proceedings before us did not challenge the accuracy of the statements as narrated by the Learned D. S. G. in the 3rd paragraph of his letter 1R2.

It is in this context that the Court had been called upon to and did record those agreements on 6/6/88. Thus it would appear that notwithstanding disagreement as to who and who should be permitted to complete the Old Course Learned Counsel appearing for the Petitioners had permitted and consented to the recording that the parties are agreed that BOTH GROUPS would sit one examination.

Subsequent events indicate that the legal advisers of the Petitioners had realised that what had been an unambiguous direction given by the Court in its judgment dated 25/4/88 had become or at least could be construed as having become equivocal by reason of the agreement recorded on 6/6/88.

Thereon, and on that very day itself, the Registered Attorney-at-Law for the Petitioners forwarded the letter, now marked P6, to the 1st Respondent (with copies to the Hon. A. G., Addln. S/H and the D. S. G.) emphasising the position of the Petitioners that :—

> "It was also agreed between the parties that those (Who are qualified and had obtained the requisite marks) should

continue to follow the 'Old Training Course' (that is the course that commenced on 1/4/87) . . . ."

A comparison of what is stated in P6 as having been agreed to between the parties, with what was stated to court and so recorded by Court in P5, shows the extent of the ambiguity created by the non inclusion into the record of the agreement in P5, of the parenthetical clause in P6, viz:—(Who are qualified and had obtained the requisite marks).

No doubt that that was what led the Learned A. A. L. of the Petitioners to address P6 to the 1st Respondent. P6 exhorts the Respondents to adhere strictly to the arrangements stated therein, on pain of punishment for contempt in case of default.

On receipt of P6 the 1st Respondent, on that very day itself, addressed 1R1 to the Learned D. S. G. and sought advice on matters pertaining to the OLD BATCH, viz:—

(1) "Whether we can continue the ENTIRE BATCH in training with immediate effect?" and

(2) "Whether we have to make any modifications in the Batch to continue their training?".

The learned D. S. G's reply to this is the letter 1R2, dated 10/6/88 and referred to earlier.

It is significant that in the original motion dated 27/4/88 (P3) as well as in the letter 2R1 reference is to a batch of 163 nurses who had already completed 13 months of training, which had started on 1/4/87. This same number is repeated at paragraph 5 in each of the petitions before us. The Petitioner states that this number was revealed in the course of the proceedings in S.C. 37/87 and that that was the number of vacancies available.

By 1R2 the Learned D. S. G. has informed the 1st Respondent that in his opinion, any action that may be taken to proceed with the Old Course will not amount to Contempt of the Supreme

Court because of the subsequent agreement reached between the parties and recorded in the Court's proceedings.

The 1st Respondent must be taken as having concluded that he could continue the Old Course without modification for, according to paragraph 13 of P7 he is said to have told the Rev. Ananda Thero, the President of the P. S. Nurses Union on 7/6/88 (that is before he received the reply 1R2 to the letter 1R1) that the Old Course would continue without dropping those who had been disqualified and that the Supreme Court had sanctioned such a procedure.

On 8/6/88 (as per paragraph 14 of P7) counsel for the Petitioners protested to the D. S. G. against any deviations from the procedure set forth in both P4A and P4B.

Not quite satisfied that matters could be rectified by such means, the Petitioners went into court on the motion P7 asking for a CLARIFICATION of the proceedings of 6/6/88. by including in the record that:—

"Counsel for the Petitioners submit that those who had not obtained the requisite marks, should be excluded".
(in fact, by mistake, the prayer reads 'included' for 'excluded')

They further moved that:—
"The record be amended to include the provision that those who are not qualified would not be permitted to follow the course".

That motion came up before the Supreme Court on 16/6/88.
Learned President's Counsel who appeared in support of that motion moved to have the proceedings of 6/6/88 rescinded on the footing that the record does not correctly reflect the position of the petitioners, in that the counsel who had appeared for the Petitioners had SOUGHT TO SUBMIT that the on going course should be confined to those initially qualified to follow that course and accordingly he submitted that the reference to the term BOTH COURSES in the proceedings of 6/6/88 should be confined to those

so qualified. He had further submitted that as recorded the terms did not correctly reflect what the counsel for the Petitioners had INTENDED TO SUBMIT. The basis on which the Counsel for the Petitioners had intended to enter into an agreement had been set out in the paper dated 13/6/88 and filed by the Petitioners. Counsel had therefore moved that the proceedings of 6/6/88 be rescinded. (the emphasis is mine.)

Taking the words 'sought to submit' and 'intended to submit' together with the contents of the 3rd paragraph of 1R2 referred to above, it appears that, that learned Counsel did not inform Court on 6/6/88 that he wished to have the limitations now contended for placed on the words BOTH GROUPS. Had he done so I have no doubt that His Lordship the Chief Justice would have so recorded it. The contents of the 3rd paragraph of the letter 1R2 (which was admitted, by the Learned President's Counsel who appeared before us for the Petitioners, as correctly recording what had happened in Court that day) shows that there had been some discussion between Counsel that day on the lines indicated in that letter, but that what had been finally communicated to Court was (as agreed on between the parties):—

> "That BOTH GROUPS i.e. the group already following the course which is due to finish in about three months time, and the group which commenced their course on 1/6/88 will both sit one common examination"

A matter of some concern is whether this 'agreement' was reached between Counsel in Court on 6/6/88 and, if so, whether on instructions from or without reference to their respective clients (for the 1st Respondent has stated in his affidavit that he had not been present in Court on that day) or whether it was a settlement reached between the parties outside court and merely communicated to court by counsel.

At one stage of his submissions Learned President's Counsel for the present Petitioners did suggest that not only did P5 not record correctly the agreement reached, but that the parties, namely, the Petitioners and/or their Representatives or their

Union on the one hand and the Respondents or any Ministry Official on the other hand, had never met and settled or come to an agreement with each other. Indeed the Learned President's Counsel for the Petitioners challenged as incorrect the statement in 1R2 (2nd paragraph) viz —

> "On the next day the undersigned (i.e. the D.S.G.) was informed by you that AGREEMENT WAS REACHED to proceed with the old course and that a new course had already started."

The non-challenge of the correctness of the facts in paragraph 3 of 1R2 when taken together with the very wording of the recorded proceedings of 6/5/88 points to the possibility that the agreement to hold only one examination had been arrived at outside court. Had it not been so there could and should have been an affirmative statement from the Learned Counsel who had appeared for the Petitioners that day. In the absence of any such evidence to the contrary it would appear that the record made on 6/6/88 was the record of an agreement entered into between the parties earlier, and later intimated to Court through their Counsel. His Lordship the Chief Justice has stated —

> ". . . . but is merely the record of the proceedings that took place in the presence of the parties on that day, and which was communicated to this Court, by the parties " (at page 5 of P8).

His Lordship has gone on to add:—

> "As the parties have not been able to agree as to what took place in Court and as to why what was communicated to Court on 6/6/88 was so communicated, this Court does not propose to continue any further in regard to this matter and these proceedings are now terminated."

As per P8 several different Counsel have appeared for the various Petitioners on 16/6/88. Of these only one of them had appeared for all the Petitioners and all the Added Petitioners on 6/6/88. He had not, intimated to court, then, why or how that communication came to be made.

Consequent on the incidents that had occurred in Court on 16/6/88 the 1st Respondent had addressed the Learned D. S. G. by his letter 1R3 of even date, querying as to whether he could take back the ENTIRE BATCH which had been suspended. To this the Learned D.S.G. had replied on the same day that there would be no objections to his doing so, as:—

> "The Supreme Court today made order terminating the proceedings in S. C. 37/87. This means that the Judgment of the Supreme Court and the Agreement recorded in the proceedings on 6/6/88 would determine the position of the parties to this application."

The learned D. S. G. gave it as his opinion that the INELIGIBLES too could be included and the course continued to completion.

On the face of 1R4 itself the 1st Respondent made an endorsement to the 2nd Respondent to re-commence the course from 20/6/88. This was done and that course continued till it was stopped on 27/6/88 consequent on an order of the Supreme Court in some collateral proceedings bearing No: S.C. 109/88.

On 8/7/88 the present Petitioners filed these two applications against all three Respondents to have them dealt with for Contempt for disobeying the Judgment of the Court in S.C. 37/88. However, this Court issued the following Rule only as against the 1st and 2nd Respondents. Viz:- to wit . . .(1)

> "By re-opening and/or re-commencing on the 20/6/1988 the Post Basic Course for Training of Grade II Segment A Nursing Officers as Grade I Nursing Officers (Hospital Services) which commenced on 1/4/87 which had been set aside by the Supreme Court by its Judgment in Supreme Court Application bearing No: S.C. 37/87 decided on 25/4/88 and which had further directed that fresh selections be made on the basis of the marks obtained by those who had presented themselves for the examination without any disqualifications being imposed on them on the

ground of participation in any Trade Union action between 18/3/86 and 17/4/86 and by holding classes and/or lectures, continuing to hold the said Training Course from 20/6/88 to 25/6/88 at the Mulleriyawa Hospital and at the Kalutara Hospital for those who had been selected for the said Training Course and which was set aside by the said Judgment and thereby acting in defiance of the said order and Judgment of the Supreme Court and wilfully refusing to obey the same."

(2) By deliberately and wilfully neglecting and/or refraining from complying with the Judgment and Order of the Supreme Court in Application bearing No. 37/87 and decided on 25/4/88. by wilfully neglecting and/or failing to make fresh selections for the Post Basic Training Course for training of Grade II Segment 'A' Nursing Officers as Grade I Nursing Officers (Hospital Services) and Grade I Public Health Sisters as directed by the said Judgment and order of the Supreme Court."

At the commencement of the hearing before us both cases Nos. 4/88 and 5/88 were consolidated, with the consent of all the parties and their several counsel in both cases. Counsel's agreement thereto is recorded as follows:— 18/10/88.

"With regard to the words CONCURRANCE and CONNIVANCE appearing in paragraph 26 of the Petition Mr. Choksy states that whether there was concurrance or connivance or not is a matter for their Lordships to decide. It is now agreed between both Mr. H. L. De Silva and Mr. Choksy that in fact the 1st Respondent made the minute on the document 1R4 giving directions to the 2nd Respondent to send out directions, and as a result of which 173 including 90 who were deemed to have been disqualified from attending the course which was resumed on 20/6/88 and which was again stopped on the orders of this Court made in Application No. 109/88 as from 25/6/88.

It is also agreed that the 2nd Respondent had transmitted the order given to him to the 3rd respondent by the letter now marked 2R2.

Mr. Choksy also wishes it to be recorded that the reason why this Court made order in Case No. 109/88 was not in consequence of anything arising in these proceedings and that was for some other reason. Mr. De Silva agrees.

At this stage Mr. E D. Wickramanayake, who appears for the Petitioners in case No. 5/88 instructed by M. Goonawardane, which is also listed for hearing today, states that subject to his right to address the Court on the matter he has no objection to both cases Nos. 4/88 and 5/88 being consolidated for the purposes of hearing and that the facts in both cases are the same.

Mr. De Silva and Mr. Choksy agree to this amalgamation. Mr. De Silva files a medical certificate in respect of the Petitioner in Case No. 4/88 and states that for reasons of illness she is not present in Court today.

Mr Choksy, Mr. De Silva and Mr. Wickramanayake agree that no fresh markings need be given to any of the documents that have already been filed and that the matters could be argued and disposed of on the Petitions, Affidavits and the documents now filed of record.

The 1st and 2nd Respondents are present in Court.
Petitioner in S.C. 5/88 is also present in Court.

By consent of Counsel witness need not remain in Court any longer, and they are discharged."

In Count 1 the two Respondents are charged with having acted **IN DEFIANCE OF** the said Order and Judgment of the Supreme Court, and **WILFULLY REFUSING TO OBEY THE SAME,** and in Count 2 with **DELIBERATELY AND WILFULLY NEGLECTING AND/OR REFRAINING** by wilfully neglecting to and/or failing to make fresh selections . . . . . (The emphasis is mine)

We, thus, see that the acts complained of are said to have been done IN DEFINANCE and REFUSING WILFULLY TO OBEY (in

count. 1) and DELIBERATELY AND WILFULLY NEGLECTING AND/OR REFUSING (in Count 2).

On the facts admitted and established there is no doubt that the 1st Respondent directed the 2nd Respondent who in turn ordered the 3rd Respondent to re-start the Old Course for the ENTIRE BATCH — including the Ineligibles and that it was so re-started on 20/6/88. The question is — Did each of them, the 1st and the 2nd Respondents do it 'In defiance of the Court's Judgment' or 'Wilfully refuse to obey it' or 'Deliberately and wilfully neglect and/or refuse to comply with its directions?'

According to WEBSTER'S New Collegiate Dictionary:—

To Defy — (1) (Archaic) To challange, to combat.
(2) To challange to do something impossible
(3) To confront with assured power of resistance. To disregard Public Opinion,
(4) To resist attempts at — Withstand. Eg: They defy classification.

Defiance (1) The act or an instance of defying,
(2) Disposition to resist or Contempt of Opposition.

In Defiance of: Contrary to, Despite.

Wilful: (1) Obstinately and often perversly self willed.
(2) Done Deliberately: Intentional. (syn. Volantary)

In STROUD'S JUDICIAL DICTIONARY (1986 Ed.) P. 2858.

Wilful: (1) 'Is a word of familiar use in every branch of the Law. It may have a special meaning. It generally, as used in Courts of Law, implies nothing blameable but merely that the person of whose action or default the expression is used, is a free

agent and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing and is a free agent. (Per Bowen L. J. — *Re Young & Harston* (1) 31 Ch. d. 174. Also see — *Elliot vs. Turner* — 13 Sim. 485. (2)

Willful (2) does not necessarily connote blame although the word is more commonly used of bad conduct than of good *(Wheeler* vs. *New Merton Board Mills* — 1932-2. K B 669) (3)

(3) If a man permits a thing to be done, it means that he gives permission for it to be done. And if a man gives permission for it to be done, he knows what is to be done or is being done, and if he knows that, it is wilful.
(Lord Goddard C.J. — *Lomas* vs. *Peate* 1947 — " A.E.R. 574/575.) (4)

(4) What ever is intentional is wilful.
(Day J. *Gayford* vs. *Chouler* —1898-1.Q.B.316) (5)

The subsequent pages in Stroud's Dictionary deal with the word wilful or wilfully in conjunction with various other words as they appear in English Statutes. Among these there appears the combination "WILFUL DISOBEDIENCE" at page 2860.

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Here they deal with Wilful Disobedience to a command by seamen and apprentices. (See — Merchant Shipping Act) Lawful excuse or absence of intention appear to have been held to be 'not wilful disobediance':—

Edgyll vs. Alward (6)
Sibery vs. Conyelly (7)
Whikhead vs. Reader (8)
O'Reilly vs. Drayman (9)

Another series of cases are discussed at page 2861. Some of those cases were cited to us by Learned President's Counsel for

the Petitioners and strongly relied on by him. They deal with 'Wilful Disobedience' by Corporations of Judgments or Orders made against them by the Courts. These came up mainly under the Old Rules of the Supreme Court (England) Ord. 42 r. 31. (Ord. 45.r.5 which replaces it omits the word 'Wilful'.) In the event of such a disobedience the courts could order the sequestration of the property of the Corporation. Under this Rule the words 'Wilful Disobedience' have been interpreted in a long line of cases and they have acquired the meaning of being such disobedience as would not be described as or be excused for being CASUAL, ACCIDENTAL OR UNINTENTIONAL. Vide:—

Stancombs vs. Towbridge Urban District Courail — 1910-2 Ch.D. 387. (10)

It did not entail obstinacy of an obstructive kind. it meant an intentional disobedience

A.G.Vs Walthamstowe	1 T.I.R 533 (11)
Lewis vs Newport Railway Co. et. al.	55 T.L.R. 203. (12)
Steiner vs. Steiner	1966. 2.A.E.R. — Ch. D. 387 (13)
Milleage Conference Case	1966. 2.A.E.R — R.C. 849 (14)
Home Office vs. Hasman	1982. 1.A.E.R. — H.O.L. 532 (15)
Home office v. Harman	1981 2.A.E.R. Q.B.D.) C.A.) 349 (16)
Heatons Transport	19723 A.E.R. H.L. 1101 (17)
Worthington vs. Ad. Senb	1956. 3.A.E.R. 674 (18)
The Rena Case.	1961. 3.A.E.R. 428 (19)

In all these cases the contempts alleged were for disobedience either to an injunction or to an undertaking (given or implied) to court. Therefore, they are not appropriate tests to be applied for the decision of the cases before us. In the cases before us there is one section of the Judgment under reference which declares that the selection made in this instance is violative of a FUNDAMENTAL RIGHT and accordingly it sets aside that selection. The other part of the Judgment goes on to direct the manner in which fresh selections should be made.

The contempt charges are for disobedience of these Orders

In the case of publication of material that is scurrilous or

prejudicial the Law in England has developed on the lines of 'Strict Liability'

In *Knight vs. Cliffon* (1971-2. A.E.R. 379.) (20) it was held:—

> "In proceeding for committal for breach of an order of Court there is no need to prove that the Defendant's conduct was wilful or contumacious. Thus, when an injunction prohibits an act that prohibition is absolute and is not related to intent, unless otherwise stated on the face of the Order."

In the leading case on IMPLIED UNDERTAKINGS. *Home Office vs. Harman* (Supra) it is seen that the Courts will not accept anything short of Strict Compliance in respect of such undertakings given to or liable to be given to Court.

In the case of publications — In *Odhams' Case* (1956- 3.A.E.R. 494.) (21) Lord Goddard summarised the Law as follows:—

> "Each of the Respondents (the owner, the Editor and the Reporter of the News Paper) was guilty of Criminal Contempt of Court since the test of guilt was whether the matter complained of was CALCULATED to interfere with the course of Justice, not whether that result was intended, and lack of KNOWLEDGE that criminal proceedings against M had commenced was not material, except as to penalty."

Thus, in respect of these two matters now before us these English decisions are not of much assistance. Some of them fall within the realm of decisions which have come to be termed Strict Liability Decisions. Others have been developed mostly on the interpretation of the word 'WILFUL' DISOBEDIENCE' by corporations and thereby attracting an order for sequestration of their property on account of the contempt arising from their disobedience, to the injunctions and orders issued against them. These cases do not deal with disobedience to the Judgment of a court. There is no doubt that as contended for by Learned President's Counsel for the Petitioners that the Judgments of all the Courts of Sri Lanka are to be and must be followed and scrupulously

conformed to, especially by the Officers in the Public Service. The two Respondents in both cases on whom the Rules have been issued are Public Servants, appointed under the Constitution. They are governed by the Establishment Code, which Rules require them to seek, when needed, legal advice from the Hon. Attorney General. Having received advice they are bound to act, if they do act, in conformity with that advice. That does not mean that in all or in any particular matter the Public Servant can seek absolution from the consequences of his act by merely claiming that he did so on the advice of the Hon. Attorney General. For instance a breach of a Fundamental Right will remain a breach and be culpable even if the Public Servant had acted on the advice of the Attorney General. So too in a matter which will amount to a crime or be an illegal act. On the other hand it must not be supposed that the Public Servant could act against the advice of the Attorney General. Should he do so he does it at his own risk, for The Attorney General is the Chief Law Adviser of the State and the only Legal Adviser to whom the Public Servant can have recourse.

Vide:— 'E' Code (1985) Vol. I Ch. 32. Clause I.

That is to say when he is being sued (not in his private capacity as in these two cases) he must seek the advice of the Hon. Attorney General. He can obtain private legal advice only if he is sued in his private capacity or for breach of a Fundamental Right; in this latter case if and only if the Hon. Attorney General refuses to appear for him.

Except as stated above the Public Servant is bound to follow the advice of the Hon. Attorney General. The 'E' Code and the conventions of the Public Service preclude him from acting otherwise.

Learned Counsel for both parties in each case concede that, (in the course of their argument) but for the fact that:—

(1) The old Course had been suspended immediately, and,

(2) Both parties had called for clarification from the Court, and,

(3) The correspondence 1R1 to 1R4, and,

(4) Documents P4A and P4B . . . . both Respondents would have been guilty of contempt of this Court for having re-started the Old Course for Training of the ENTIRE BATCH on 20/6/88.

Learned President's Counsel for the Respondents urged that the fact that the Respondents had suspended that Course on the very next day following the Judgment of this Court is an indication of a willingness to comply rather than a desire to defy the orders of the Court.

Consequent on the suspension there came to be two groups of nurses, one the 'Old Eligibles' and the other the 'Ineligibles'. All of them had completed about 4/5ths of the prescribed course. If these Old Eligibles had to join a New Course with the New Eligibles then they would have had to repeat these 13 months of Training. Not merely to those Old Eligibles and to the service but to the Exchequer itself this would have presented a problem. Those Officers would have expended public time and public money in vain. It behoved a good administrator to avoid such waste. Whenever and wherever possible repetition and re-expenditure of public time and money have to be avoided. Conservation of public time and money could well have been the motive for seeking ways and means to continue the Old Course. Prudent Administrative Management would have indicated this, at least in respect of the Old Eligibles. However learned President's Counsel for the Petitioners contended that the TRUE motive was to defy and to disobey the judgment of this Court, because the Trade Union which is opposed to the Trade Union to which the Petitioners belong, had Government patronage, and accordingly that the two Respondents, even if they had not actually been coerced, were, at least, more inclined to help that other Union rather than the Petitioners' Union. Deducing intention from motive alone is at all times a perilous task. Motive of course is very relevant and the burden of proving the existence of the motive, as propounded is on the proponent. In these cases on the Petitioners. Such proof must be done with "The strictness as is consistent with the gravity of the offence charged". Per. Lord Denning. (Vide. *In Re. Brambelwell)*(22)

"When there are two equally consistent possibilities it is not right to hold that the offence is proved beyond reasonable doubt.

Contempt proceedings even to punish for civil contempt are in the nature of criminal proceedings."
Comet Products U.K. Ltd. vs. *Hawkes Plastics Ltd.*

Learned President's Counsel for the Respondents submitted further that the action taken by the 1st Respondent to obtain the sanction of the Court to conduct the Old Course to completion as planned and to provide a new course for the New Eligibles was the clarification he had sought from the Court, by means of the application made by his Legal Adviser, the Attorney General. Learned President's Counsel contended that that was a legitimate exercise and that it was done in deference to and not in defiance of the Order and Judgment of the Court. From what learned Counsel who appeared for the 39th, 49th, 59th, 112th, 120th, 122nd, and 148th Respondents in S.C. 37/88, has stated to Court on 16/6/88 as recorded in P8, it appears that when the motion filed by the A.A.L. for the 1st to the 3rd Respondents came up before Court on 9/5/88 the Court had indicated that before any consideration could be given to the motion the New Course for the New Eligibles should be started, and that the learned D.S.G. had then informed Court that that would be done by 1/6/88. Accordingly the case had been fixed for 6/6/88, and on which date it was confirmed that the New Course had started. (Vide. P5).

Thus, there appears to have been some discussion of the motion on 29/4/88 and on 6/6/88, and according to the Counsel and the 1st Respondent (Vide. para. 7(b) of his affidavit) the case was put off 'Of Consent', to be mentioned on 6/6/88. According to Counsel for some of the other Respondents that postponement was to ensure that the State did not, as in an earlier instance, make promises which it did not fulfill. According to the Petitioners the State prepared the two lists P4A and P4B on 30/4/88 and 5/5/88. (para. 12 of the Petition.) On 9/5/88 the case was put off for 6/6/88. (Vide. para. 16 of the Petition.) as

there was no agreement between the parties. The Petitioners state at Paragraph 11 of the Petition that the Supreme Court had stated on 29/4/88 itself that it was functus in relation to the substantive matter but that any problems between the parties should be resolved by mutual agreement. It is quite apparent that some matters had been under discussion and as a result the case was to be mentioned again to see if any agreement could be reached. Therefore, the Record of 6/6/88 (p5) must be held to be the record of what all the parties had in fact finally agreed on. No doubt that in the course of negotiations the inclusion or otherwise of the Ineligibles too must have cropped up for discussion. Whatever may or may not have been discussed and similarly whatever may have been in the mind of Counsel for the Petitioners that day, all that was communicated to Court that day as their agreement was that:—

"One examination will be held for both groups . . .".

No elucidation, explanation or elaboration as to who were to comprise one of these groups was given. As regards the other group there is no disagreement, and in fact it is so recorded, that it would consist of the New Eligibles who started off their course on 1/6/88. As regards the other group are they the ENTIRE OLD GROUP or only the Old Eligibles? The parties are not agreed on this. It is the position of the Petitioners that they never agreed to the ENTIRE group being included. Although the clarification sought from court was on this very matter the record of the proceedings of 6/6/88 does not bring out the uncompromising dissent of the Petitioners to such a proposal. The same Counsel who appeared for these some other Respondents on 6/6/88, on 16/6/88 went on to state that he could never have agreed to the terms recorded on 6/6/88 had there been any question of any one of the persons who had followed the Old Course for 13 months being dropped off from that course.

Be that as it may, the direct result of the non-recording of what the exact composition of this other group should be, was that ambiguity was allowed to creep in where there was none earlier. The terms of the Judgment of 24/4/88 are by themselves quite clear and unambiguous. But, when this is coupled with the proceedings that led up to 6/6/88, the record of proceedings

on 6/6/88 introduces an element of ambiguity as to the composition of the group that was to continue the course started on 1/4/87. The letter P6 of 6/6/88, itself, is the best proof of the appreciation by the Petitioners and their Legal Advisers of the possibility of two constructions being placed on the word 'BOTH'. P6 must have been written within hours of the recording of the agreement on P5; for the 1st Respondent's letter 1R1 to the D.S.G. is also dated 6/6/88.

What exactly was recorded on 29/4/88 and on 9/5/88 is not part of the evidence before us. We have not been briefed with the copies of those two days proceedings. In terms of the agreement recorded in the two cases in hand on 18/10/88 our considerations are restricted to the documents marked and produced in these proceedings. Of course, we have the several affidavits of the various persons, (now filed of record) but they are in a sense, all ex-post facto and do not help to elucidate either the existence of or the extent of the ambiguity that prompted the writing of that warning note P6.

On receipt of P6 the 1st Respondent had, promptly sought the advice of the A.G. on this specific question. The reply 1R2 — that he had received could have given the 1st Respondent the idea that, should the Ineligibles be included, then, for the reason that the Court had been kept appraised of the contemplated action and that permission was being sought, that the learned D.S.G. was of the opinion that such action would not amount to Contempt of Court. Having suspended the course the 1st Respondent was not compelled to nor was he, in law, compellable to re-commence it. His doing so was a matter within his sole discretion. That is to say he need not have, either with or without the Ineligibles recommenced the Old Course. Yet, as a prudent administrator and as Head of the Department he should always strive to save public money and time. Had he recommenced the Old Course without modification and had he done so without legal advice first having been obtained then it would have been his deliberate act. Then, since it is in conflict with the decision of the Court it would have been wilful disobedience. But, in this instance he had sought and obtained legal advice and that too, in the context, from the only source available to him.

On the Petition P7 (filed after the writing of the letter P6 to the 1st Respondent) The Supreme Court (on 16/6/88.) did not allow the application of the Petitioners to 'RESCIND' the proceedings of 6/6/88. Those proceedings were left intact. The Court declared that it was functus and terminated the proceedings. Faced with this situation the Respondents again sought the advice of the A.G. This was on letter 1R3 to which he received the letter now produced marked 1R4. It was on the basis of the reply received on the letter 1R4 that the ENTIRE GROUP was recalled to complete that which had been started and then had had to be suspended.

It is in this context that learned President's Counsel for the Respondents submitted that the actions of the Respondents were not wilful and should not be treated as having been done in defiance of or in disobedience to the judgment of the Court. He submitted that their conduct was bona fide and on legal advice had and obtained. Strange to say the situation of ambiguity and uncertainty seems to have been created as a result of trying to obtain 'Clarification'.

In support of the defence of bona fides learned President's Counsel cited several Indian decisions and submitted that those decisions were more in accord with our Law than the English decisions as they, as in the case of Sri Lanka, have been developed from the English Common Law, which is the Law obtaining in Sri Lanka.

As it was in India till recently, so it is even today in our country, there is no definition of the words 'Contempt of Court'. Article 105(3) of our Constitution vests in the Supreme Court a jurisdiction to punish for Contempts of the Supreme Court itself, whether committed in the Court itself or elsewhere. In various statutes, for example, in the Partition Act, the Codes of Civil and Criminal Procedure and others, various acts of commission and omission have been made punishable 'As for Contempt'. Yet, in no Act of our Parliament is there a definition of the expression 'Contempt of Court'. The English Common Law concept has always been the basis on which our Courts have acted. Thus, there is much force in the arguments of learned

President's Counsel for the Respondents that it would be more appropriate to place greater reliance on and to give greater weightage to those Indian decisions which have been decided on the basis of the English Common Law, rather than on the decisions of the English Courts which are based on English Statute Law.

Before discussing the development of the law in India it may be useful to note a few cases from England and other Commonwealth jurisdictions on the meaning they have attributed to the word 'Wilful'. For Eg:—

Per Lord Russel of *Killowen C.J. in R. vs. Senior.* (24)

> " 'Wilfully' means that the act is done intentionally and deliberately and not by accident or inadvertence, but so that the mind of the person who does the act goes with it."

Per Kennedy J. in *High Wycombe Corp. vs. River Lanes Development contractors* (25)

> "I do not think that WILFULLY means wanton or carelessly, but I think you can be wilful without being wanton for I think if you permit a thing not under compulsion you do it wilfully."

Per Lord Carlyle (Lord President) in *Smith v. Wemis Coal Co. Ltd.* (26)

> "An act is done willingly if it is done deliberately as distinct from something done without thought, on the spur of the moment."

Per Talbot J. in *Wheeler v. New Merton Board Mills Ltd.* (27)

> " 'WILFUL ACT' is plain English, and I can entertain no doubt that the installing of this machine without guard or fence for use in the factory was a wilful act by someone . . . Wilful is more commonly used in modern speech of

bad conduct or actions than of good though it does not necessarily connote blame."

Per Lord Goddard C.J. in *Lomas v. Peele* (4)

. . . "If a man permits a thing to be done it means . . . . (Supra)

Per Bence D.C.J. in the CANADIAN case of *Caldwell vs. Canadian National Railways*(28) as quoted in WORDS and PHRASES LEGALLY DEFINED — 1972 Ed: Vol. v page 335.)

". . . what may be negligence in one person may not be negligence in another, or what may be negligence in one set of facts in the same person, may not be negligence in some other state of facts, and it seems to be so with a WILFUL ACT."

Per Robertson J. in the Canadian case of *Gooman vs. R*(29)

"To my mind the word WILFUL in Sec: 168 of the Crim: Proc: Code (dealing with obstructions to Police Officers) applies to a state of circumstances where the person charged, knows that he is doing, and intends to do what he is doing and is a FREE AGENT".

Per Turner J. in the NEW ZEALAND case of *Babington vs. Inland Revenue Commissioner*(30)

Words and Phrases, when dealing with a Taxpayer being charged with wilfully misleading in his tax Returns; quotes Fullage J. in *Jakson v. Butterworth*(31) as follows:—

"There must, in my opinion, be either knowledge of belief that what is omitted is INCOME and an advertence to the possibility or probability that it is income and a recklessness in the sense of not caring whether it is income or not."

"That is the matter that must be considered on the totality of the evidence and if in all the evidence I am not satisfied that the necessary state of mind is demonstrated, I ought, I think, to allow the appeal."

Per Shadwell V.C. in the AUSTRALIAN case of *Re EAST INDIA DOCK INGHAM JUNCTION RAILWAY. ACT. Ex. Parte. BRADSHAW*(32): (Words and Phrases Vol. v.p. 340.) dealing with the case of the wilful refusal of the party entitled to it to receive money due from the Promoters . . . states:—

"The Legislature meant by the words 'Wilful Refusal' a refusal arising out of the exercise of mere will or caprice and not from exercise of reason."

Per Napier C.J. in the Australian case of *O'Sullivan vs. Harford*(33): (Words and Phrases Vol. v.p. 340) dealing with a case of wilful obstruction to the Police . . . states:—

" The natural meaning of wilfully can be satisfied, either by knowledge or by a state of mind that admits to the possibility of the existence of the attendant circumstances but forbears to make inquiry and wills to do the act whether or no."

By his letter 2R3 dated 17/6/88 the 2nd Respondent had directed the 3rd Respondent to re-start the course which had been suspended. The 3rd Respondent had complied with that order, to the letter, and had re-commenced that course on 20/6/88. By his letter of even date, P9, the registered A.A.L. for the Petitioners had informed the 3rd Respondent that should she re-start the course she will be guilty of contempt. It is not clear from the evidence as to whether the 3rd Respondent received P9 and its annexure, namely the copy of the judgment in S.C. 37/87 before or after the course got under way.

According to the letter marked P2 the 3rd Respondent had informed one of the participants of that old course, that the course was being suspended on the directions of the 1st Respondent.

This Court did not issue a rule on the 3rd Respondent.

Learned President's Counsel for the Respondents relied on the Indian decisions to support his submissions that the Respondents had acted bona fide, after consulting with and on

the advice of the A.G. and accordingly were not guilty of contempt.

Some of the cases cited by learned President's Counsel for the Respondents cannot, in my opinion, be applied simpliciter to the facts of the cases before us, for they deal with cases of disobedience to judgments of the Superior Courts by the Judges of the Inferior Courts. In such cases the contemner is also a judicial officer and thus strict proof of the existence of a motive to defeat, obstruct or interfere with the due course of justice is required before such an officer could be dealt with for contempt arising from disobedience, of the order of the Superior Court. Vide:— *Abdul Kareen v. Prakash*[34]. However this case itself lays down the general principle with regard to disobedience to the Judgments of the Courts. Viz:—

" Wrong order or even a usurpation of jurisdiction committed by a Judicial Officer owing to AN ERROR OF JUDGMENT OR TO A MISAPPREHENSION of the CORRECT LEGAL POSITION does not fall within the Mischief of Criminal Contempt." (See—1975 A.I.R.—S.C.859.)

The same principle was recognised by Sen J. in *Salhyandra Nath Mithra vs. Suptd. of Police*[35] in respect of a Police Officer who in Good Faith had acted under a mistaken impression of the Law.

The Nagpur Bench of the Bombay High Court in the case of *A.T.K. Sahakari Soustha vs. State of Maharasthtra*[36].

" In our opinion, if a person had acted bona fide in a particular manner on the basis of an advice given by his lawyer, depending on the facts and circumstances of the case, he cannot be found guilty of wilful disobedience."

Even if it is, as was urged by learned Counsel for the Petitioners, that the clear and unambiguous terms of the judgment dated 25/4/88 in S.C. 37/87 were not rendered

cloudy or equivocal by reason of the agreement recorded on 6/6/88 and that it was for that reason that the A.G. had made the guarded statement that he made in the 1R2 to the query by the 1st Respondent, yet, in the light of the events that followed, this position cannot be sustained. The Petitioners' application for clarification and their Counsel's request to have the Record of the proceedings of 6/6/88 rescinded and the request for permission to resile from that agreement on the ground of want of Consuming Ad Idem and the non-grant of any of those reliefs by the Supreme Court on 16/6/88 have all contributed to the making of a more specific reply, viz. 1R1, to the effect that there would be no objection to re-commence the course that had been suspended.

It is significant that it was only after the receipt of the reply 1R4, that the Respondents had taken steps to re-commence that course. They had not acted on the earlier reply, 1R2. In between they had shown every sign of having complied with or at least willingness to comply with the Judgment of the Court. They had suspended the old course and had prepared the lists P4A and P4B.

Dharmaadhikari J. in SAHAKARI'S Case (Supra) added:—

> " If the act or omission was not wilful, then it cannot be said that the Officer, acting in good faith, on the basis of Legal Advice has deliberately and wilfully disobeyed the Order of the Court."

Tuli J. sitting in the High Court of Punjab and Haryana (Full Bench) in *Prakash Chand vs. S.S. Grewal*(37) has quoted from the judgment of the Supreme Court of India in the case of *S. S. Roy vs. State of Orissa* (38).

> " The error must be a wilful error proceeding from improper or corrupt motives in order that he (A Govt. Servant) may be punished for Contempt of Court. On the facts found, the Appellant could certainly be said to have acted without proper care and caution, but there is nothing on the Record

to suggest any wilful culpability on his part and it has been expressly held by the High Court Judge that he was not actuated by any corrupt or dishonest motive."

It was the submission of Learned President's Counsel for the Petitioners that the 1st and 2nd Respondents had a dishonest or collateral motive, viz. To further the prospects of those nurses who had not gone on strike and to circumvent if possible the Decree of the Supreme Court. To penalise the nurses who had gone on strike was a decision of the Government. That was in consequence of a policy decision taken in respect of all Public Servants who had gone on strike during that period. The 1st Respondent would have had to implement that directive. It was according to that directive that the persons who were to participate in the Old Course were chosen. The question that arises is as to whether the 1st Respondent was attempting to continue to implement that Policy Directive, which had been struck down by the Supreme Court, as being violative of the Fundamental Rights of the Petitioners.

The immediate order given to suspend that course, the preparation of the lists P4A and P4B and the queries and the guidance sought in the letters 1R1 and 1R3 do not permit one to draw the inference that the 1st Respondent continued to have such a motivation. The burden is clearly on the Petitioners to establish the continued existence of such a wilful intent. It is trite law that to a charge of Contempt, the plea of having taken action on legal advice is, by itself, not a complete defence. As stated by Dharmaadhikari J. in SAHAKARI'S case (supra):—

". . . . There is certainly no general doctrine which saves a party from the consequences of wrong advice. The matter will obviously stand on a different footing if the person concerned is deliberately avoiding to obey the order by using wrong and illegitimate reasons. Nobody can be permitted to disobey the Orders of Court by putting forward some excuse; including an excuse based on wrong legal advice."

As stated by Mudholka J. in the Supreme Court of India in *S. K. Kar vs. Chief Justice of Orissa*(39).

" There may perhaps be a case where an order disobeyed could reasonably be construed in two ways, and a Subordinate Court construed it in one of those two ways, but in a way different from that intended by the Supreme Court, surely it cannot be said that disobedience of that Order in such a case by a Subordinate Court was Contempt of the Supreme Court."

In Sahakari's case (Supra) it was further held (p. 1818 para. 22):—

" However as held in the Madras High Court in *Motaur Majes and Co. vs. Dy. Commissioner, Tan Officer,* (40) we might emphasise that no Officer of Government, however high or exalted he may be, can take upon himself the responsibility of judging the correctness or the validity of the Order of the Court. If he, honestly and bone fide, in the discharge of his duties feels, that it is either erroneous or needs clarification, the only remedy available to him is to approach the said Court by way of review and seek modification OR approach a High Court by filing an appeal. Instead of following such a course it is not open to him to take upon himself the responsibility of judging the Order and then to take action contrary to or inconsistent with the same on the basis of his own judgment."

It is significant that out of the several circumstances in SAHAKARI's case which have influenced that decision, one, which is not present in either of the cases in hand, is that those Police Officers in that case had made unqualified apologies to Court on realising the mistake they had made in comprehending the Law. In this context it will be appropriate to bear in mind the words of Hidayatulla C.J. in the Supreme Court of India in *Debobrata vs. The State* (41). On the question of the absence of an apology.

" However the man may have the courage of his convictions and may stake his all in proving that he is not in Contempt and may take the risk. In the present case the Appellant ran the gauntlet of such a risk and may be said to have fairly succeeded."

In a case in which a declaratory decree had been obtained striking down a dismissal of a Railway employee as unlawful but with no further directions, pending appeal the Divisional Superintendent withheld payment of his salaries, thereafter. That was done on the advice of their Law Officers. Narula J. added:—

" Though I cannot congratulate him for the somewhat stubborn attitude adopted by him in his return to the Rule issued in this case, I have not been able to pursuade myself to hold the Respondent No. 2 guilty of Contempt of Court in the peculiar circumstances of this case." *Ragunath Rai vs. Sahai*(43)

The Defendant, in a certain case, was ordered to execute certain repairs to a boiler. He did not do so. The District Court held him to be in Contempt. In a subsequent case filed by the same Plaintiff for damages for non-compliance with the earlier Judgment Bertram C.J. held in appeal:—

" That the District Court had no authority to punish for Contempt under the circumstances. (Not unless in the face of the Court.) Non-compliance with a judgment of the court is not in ordinary circumstances a contempt of Court. ". . . *Ismail vs. Ismail*(43)

I am in entire agreement with the dictum of Tuli J. in *Prakash vs. Gerwal* (supra):—

" . . . but if the conduct of the particular Govt. Officer whose duty it is to give effect to the decree, shows that he wilfully and deliberately refrained from giving effect to the decision of the Civil Court a case of Contempt may arise. The present Petition was filed under Sec. 3 of the Contempt of Court Act — 1952, which did not contain any definition of

the phrase 'Contempt of Court' or 'Criminal Contempt' or 'Civil Contempt' with the result that it was left to the learned Judge dealing with the matter to come to the conclusion whether contempt had been committed or not in a particular case . . . Contempt of Court it may be remembered is a summary process and has to be used only from a sense of and under pressure of public interest. These summary powers, if they are to be effective and are to uphold the dignity of the Court, must not be used too rapidly and too frequently, without compelling reasons, at the instance of aggrieved litigants who, more often than not, are inspired by a desire to use the machinery of these powers for enforcing their Civil Rights. These powers have only to be used in serious cases where deliberate Contempt is clearly established on the part of the contemner. The great importance of upholding the dignity, power, prestige and authority of the Court of Law and of implicit obedience to the Orders of Court can be minimised only at the risk of weakening the foundation of our Constitutional set up and correspondingly endangering our very democratic existence. The Court would, accordingly, be failing in its Constitutional obligation to ignore disobedience of its Orders or of those of its subordinate Courts, from any quarter in this Republic, however high. But, the usefulness of this power necessarily depends on the wisdom and restraint with which it is exercised . . . Contempt of Court, it is undeniable, lies, broadly speaking, in despising the authority of Justice or the Dignity of the Court."

Even in Sri Lanka 'Failure to honour an undertaking given to court' is a Contempt of Court.
De Alwis vs. Rajakaruna(44); *In Re Cader*(45)

So too 'Disobedience to an Injunction' . . . is punishable as for Contempt.

Arumugan vs. Kadirgamanpillai 11 —(46)

In 1970 an Assize Judge made an Order for the return of a motor vehicle to the claimant, but made it subject to certain conditions. Two months later, a Proctor, the appellant, made an

application to that Court, before the same Judge, for the unconditional release of the car. He was convicted for contempt. Fernando P. the President of the Court of Appeal of Ceylon, (which at that time was the Apex Court) held:—

> "The application made to court to make an order different from the Order it had already made could not be said to be in violation of that Order. The person affected by that Order of 21/9/1970 could not be denied the opportunity of requesting Court to vary that conditional Order. Much less could a Proctor appearing for that person and presenting a motion to Court to the same effect be guilty of Contempt."

Velayuthan v. The Hon. A. C. A. Alles(47)

From an analysis of all these Judgments it appears that there is a difference between those cases in which there has been disobedience to injunctions and undertakings given to Court on the one hand, and those in which the disobedience has been to a Decree or Judgment of a Court on the other. While in the former, the act itself, unless it has been accidental, casual or done unintentionally, was held to be culpable, in the latter instance, there must be something more, namely, a deliberate disdain of the Court or a disregard for or defiance of the Court and its Decree. In the case of 'Publications' the acts become culpable if they are 'Calculated' to bring the Court or the Judge into disrepute or if it is 'Calculated' to divert the orderly course of justice or diminish the confidence of the Public in the Judiciary or the Judicial Process.

In the cases now before us, the 1st Respondent has approached the Court through his Attorney for a clarification, and for permission to re-commence the Old Course, while at the same time and in compliance with the Decree, straightaway, suspending the Old Course. On being pre-warned of a possible infraction of the Law, and of having to face a charge of Contempt, he had, at every stage, taken advice from the Hon. the Attorney General, before finally re-starting the Old Course, and that too after the receipt of 1R4. Such conduct does not favour the drawing of an inference of mala fides or improper or

collateral motivation. They do not savour of Contempt. The 2nd Respondent, happened to be acting that day for the Director General of Health. In these circumstances and in the absence of cogent evidence of a conspiracy or of connivance, it is most probable that on a reading of the letter 1R4, he, the 2nd Respondent, bona fide believed that there was no illegality or misconduct involved in complying with the order endorsed on it, to him, by the 1st Respondent. That endorsement directed him to take steps to re-commence the course. The 2nd Respondent was no doubt, not a party to that case No. 37/87 at any stage, not even at the stage following the Judgment. From the evidence it appears that as Acting D.H.S. he merely passed on the directive he had received from the Ministry. To my mind his conduct does not, in the circumstances, reveal that degree of carelessness which will attract the censure of the Court and a conviction for Contempt.

Learned President's Counsel for the Petitioners contended that in any event, parties cannot, even of consent, vary the terms of a Judgment. No doubt that the parties cannot be heard to say, even of consent, that there had not been a breach of a Fundamental Right, yet, as regards the other findings and of the directions given I am unable to accept, without reservation, Learned Counsel's proposition. Notwithstanding the Judgment in a Civil case it is possible for the parties to enter into a compromise after they have obtained a Decree on the matters that they had submitted to court for its determination. Indeed the Petitioners themselves, in paragraph 11 of their Petition state that the Supreme Court had indicated that any problems between the parties should be resolved by consent and mutual agreement. With great respect to the learned Judges who made the order on 16/6/88 (p8) I am unable to agree with the statement that once a Court has passed a Decree that it cannot, at the request of the parties and with their consent, record an agreement reached between them subsequent to the decree. It is possible that an arrangement so made and recorded becomes enforceable between the parties. Indeed, in civil cases, when the Judgment Creditor seeks to issue writ, he is bound to inform the Court of any compromise that has been reached between the parties, namely between himself and the Judgment Debtor, subsequent to the Judgment.

Accordingly the Rule issued on both Respondents, 1st and 2nd, are discharged. In all the circumstances of the case I make no order for costs.

FERNANDO, J.

I have had the advantage of reading the judgments of my brothers Jameel, J., and Amerasinghe, J., and set out my reasons for agreeing with them that the Rules issued on the Respondents should be discharged, without costs.

1. The Order dated 25.4.88 of this Court, firstly, set aside the selections made, and by necessary implication prohibited the continuation of the training course for the persons held to be disqualified, and, secondly, mandatorily required that fresh selections be made, without any disqualification being imposed on account of trade union action, and by necessary implication required that the persons so selected be permitted to follow a training course.

2. Fresh selections were made in accordance with that order, and a training course having been commenced on 1.6.88, for the "new" trainees, there has been full compliance with the second limb of the Order, and no question of contempt arises in relation thereto.

3. Had the old course been continued, or had a new course been commenced, for the "disqualified" persons, soon after 25.4.88, this would necessarily have been in deliberate and "wilful" violation of the first limb of the Order, and thus a contempt. However, the old course was suspended, and those "disqualified" were identified, with a view to exclusion from the training course. That Order did not prohibit, for ever, the conducting of a training course for the "disqualified" persons: it would have been quite proper, for instance, if there were vacancies and after an appropriate selection process, to have selected some or all of them for another training course at a future date. However, the resumption of the "old" course on 1.6.6.88, after an eight week suspension, was not, on that basis, and would have been an attempted circumvention of the Order, and thus a contempt, but for the intervening events.

4. The motion dated 27.4.88, if, and insofar as, it sought the sanction of this Court for all the "disqualified" persons to continue to follow the "old" course, was an attempt to obtain a variation of the Order, as it could not possibly have been suggested that the Order was *per incuriam* in that respect; this Court was clearly *functus*. All parties, in effect, invited or at least acquiesced in the Court providing an opportunity for them to reach agreement on any outstanding matter related to the manner of implementation of the Order.

5. Orders giving redress in respect of the violation of fundamental rights can be made in an action in an original Court (as in *Gunaratne v. People's Bank*, (1986) 1 Sri L.R. 338) (48) or in a Writ application (of Article 126(3)), or in an application under Article 126, and while parties cannot, by consent or otherwise, vary the judgments or orders of this Court or of any other Court, it would generally be open to a party to renounce some or all of the benefits to which he is entitled thereunder. A lawful adjustment or compromise subsequent to judgment and decree would not amount to a variation thereof, but would nevertheless bind a party at least to the extent that his right to execute the decree would be affected pro tanto. The persons aggrieved by the discriminatory acts complained of in S.C. 37/87 could have agreed, for instance, that they had no objection to some or all of the "disqualified" persons being selected, in addition to themselves. This would have been no different to a plaintiff who obtains an injunction restraining a defendant from entering his land, later consenting to the defendant walking across part of his land.

6. While there is no doubt that an agreement was reached on 6.6.88, it appears most unlikely that the Petitioners would have agreed to a variation of the Order of 25.4.88; if such a variation was notified to the Court (which had already expressed the view that it was *functus*, to vary its own order) it is most likely that such variation would have been specifically recorded, and not left for inference or implication. However, the terms of the motion dated 27.4.88, the correspondence between the 1st Respondent and the Deputy Solicitor-General, and the legal advice given by the latter on 16.6.88 undoubtedly gave rise to a

misapprehension in the minds of the Respondents as to the Order of 25.4.88 and what they were entitled to do; analysis of the facts by my brother Amerasinghe, J., demonstrates that they acted *bona fide*, and not in defiance or disregard of that Order.

7. While there is "strict" liability for contempt in regard to scandalising the Court, and breaches of injunctions and undertakings, the alleged contempt here does not fall into these categories. I entirely agree with my brother Amerasinghe, J., that (a) the mere failure to comply with a declaratory order, or a non-coercive order, does not, without more, amount to contempt, and that the party affected by such non-compliance is entitled to come back to this Court for appropriate orders; the power under Article 126(4) — to grant relief and to give directions — extends to giving such directions as may be necessary for the due implementation of a judgment or order of the Court; (b) contempt proceedings should not be lightly resorted to, as a mode of execution of decrees and orders, but in accordance with the principles to which he has referred; and (c) acting in accordance with legal advice confers no immunity, but is merely one factor relevant to *bona fides*.

AMERASINGHE, J.

The Ministry of Health had proposed to hold a Post-basic training course for nurses. It had been ordered by the First Respondent—the Secretary of the Ministry of Health — that all the nurses who had defied an Essential Services Order made under the Public Security Ordinance by going on strike would be excluded from that course.

Miss K. K. Dayawathie and several other nurses who were by that decision excluded from the course, in S.C. Application No. 37 of 1987, complained of violations of the Fundamental Rights of equal protection of and equality before the law and the right of non-discrimination on the ground of political opinion guaranteed to them under Articles 12(1) and 12(2) of the Constitution. The Respondents in that case were Dr. S. D. M. Fernando, Secretary, Ministry of Health (who is the First Respondent in this case) and 161 others.

After three days of hearing, the Supreme Court, comprising His Lordship the Chief Justice and Justices Atukorale and Tambiah, on 25 April 1988 decided that the classification made by the Respondents in the selection of nurses for the training course in question had "not been done bona fide". The Chief Justice, (Atukorale and Tambiah JJ. agreeing) was of the opinion "that the Petitioner's assertion of not being equally treated and of being discriminated against is entitled to succeed." The Court accordingly made order "directing that all selections made for the said training course — as, for instance, set out in P10 and P11 — as Grade I Nursing Officers (Hospital Services), be and the same are hereby set aside: that fresh selections be made on the basis of the marks obtained by those who presented themselves (including the Petitioners and the Added Petitioners) for the examination, without any disqualification being imposed upon them on the ground of participation in any trade union action between 18.3.86 and 17.4.86."

On 27 April 1988, two days after the Order of Court, the First Respondent in that case (S.C. Application No. 37 of 1987), who is also the First Respondent in this case, filed papers in Court moving that "this case be mentioned before Your Lordships on 29th April 1988 (9.45 a.m.) for the purpose of obtaining a clarification from Your Lordships whether it would be in order for the 1st and 2nd Respondents to proceed with the course which has already commenced whilst a new course is started for those whose names were deleted on account of trade union action." Thus were commenced, what I shall, for convenience, refer to as, the 'clarification proceedings' before this Court.

The Court (Ranasinghe, C.J., Atukorale and Tambiah, JJ.) on 29 April 1988, 9 May 1988 and 6 June 1988 "listened to the submissions put forward by the respective Counsel, and recorded the proceedings as they took place." (Ranasinghe, C.J.). The Chief Justice explained that

> " This Court assembled after the judgment in this Court was delivered, on an application of the respondents, merely to enable the parties to arrive at any settlement, which they would arrive *inter se* . . . . All this was done by this Court,

even though this Court was *functus*, after the Judgment was delivered, merely for the purpose of enabling the parties to arrive in the presence of Court a settlement which would, thereafter, be given effect to by them."

The Chief Justice said that no order had been made by Court during those proceedings and added that

" As far as this Court is concerned, it has no jurisdiction to make any order that would bind the parties or to record any proceedings or a settlement that would vest any party with any enforceable rights."

His Lordshop the Chief Justice (Atukorale and Tambiah, JJ. agreeing) recorded the proceedings of the 6th of June in the following terms:

" Mr. Mahanama de Silva (Counsel for the Petitioners) informs the Court that a new course has commenced on the 1st of June 1988 and that all those petitioners together with others who had complained that they have been wrongfully left out of the earlier course have been allowed to participate in this new course.

It is also agreed that both groups, i.e., the group already following the course which is due to end in about three months time and the group which commenced their course on the 1st of June 1988, will both sit one common examination, i.e. those who finished the earlier course will have to await till those who commenced their course on the 1st of June 1988 also complete their course and thereafter both groups will sit together a common examination."

There may well have also been, as there usually are from the Bench as well as the Bar during the course of any proceeding, what Dharmadhikari, J. in *A. T. K. Shakari Sanstha;* v. *State of Maharashtra,* (36) described as expressions of "tentative loud thinking." There may have been such thinking on the question of not merely the mode of implementing the decision of the Court, but also on the

possibility of continuing the old training course for all the 163 nurses who had been earlier selected for the course. I am persuaded that there might have been some such loud thinking on this matter during the proceedings on the 6th of June by three matters: Firstly, when the First Respondent wrote to Mr. M. S. Aziz, Deputy Solicitor-General on 6th June inquiring

> "(a) Whether we can continue the entire batch in training with immediate effect.
>
> (b) Whether we have to make any modifications in the batch to continue this training",

the Deputy Solicitor-General in his reply of 10 June stated as follows:

> " On 6.6.1986" *(Sic.)* "I informed Court that there had been discussions with the Ministry officials and the Petitioner's representatives and that it was agreed to have both courses proceed. The Petitioners' Counsel also agreed to this and this was duly recorded. The only stipulation recorded was that both batches will sit for one examination at the conclusion of the new course. *I also recall the Petitioners' Counsel stating that only those who were eligible to be selected in the old batch would be permitted to which I responded that only persons eligible were selected and that in any case we should not have this recorded as agreement had already been reached between the parties on the lines recorded by Court."*

The emphasis is mine.

The second matter is this. On 10 June 1988 the Petitioner in S.C. Application No. 37 of 1987 filed a petition seeking to include two matters in the record, viz., that (1) "Counsel for the Petitioners submit that those who had not obtained the requisite marks should not be included,"; and (2) "that the record be amended to include a provision that those who are not qualified for selection would not be permitted to follow the course."

However, the record of the proceedings of the 6th of June was not amended.

Thirdly, the Deputy Solicitor-General seems to have had the idea of the continuation of the course for all the 163 persons who had been originally selected lurking in the conscious or sub-conscious recesses of his mind. During the proceedings of the Court on June 16th 1988, the Deputy Solicitor-General is reported in the record of the 'clarification proceedings' to have said:

> " One has also to bear in mind the contents of the motion, which was filed soon after the judgment, which sought clarification from Your Lordship whether 163 persons, who were following the 1st course continue to follow that course, since 13 months have elapsed from the commencement of the course and the course is to be concluded in another three months time.
>
> I would respectfully submit, that I object to any steps to resile from this agreement."

The motion recites the fact that there were 163 students who had already followed the course for 13 months. But the Court was not asked in that motion whether all the 163 persons, eligible or not, who were following that course, could continue to follow the course. The motion was solely "for the purpose of obtaining a clarification from Your Lordships whether it would be in order for the 1st and 2nd respondents to proceed with the course which has already commenced whilst a new course is started for those whose names were deleted on account of trade union action."

After the proceedings in Court on 6 June 1988 the Petitioners in S.C. Application 87/7 (probably fearing that the agreement to have a continuing course for those already selected might be construed to mean that all those following the course, whether they were qualified in terms of the Order of Court or not, might be permitted to continue to follow the old course) through their instructing Attorney-at-law, Mr. S. M. Suhaid, wrote to the First Respondent the Secretary, Ministry of Health, on 6 June 1988) as follows:

> " When the above case was mentioned today (6.6.1988) the Supreme Court was informed that a fresh course has

commenced on 1.6.1988. It was also agreed between parties that those (who are qualified and had the requisite marks) could continue to follow the old training course (that is the course which commenced on 1st April, 1987) but that both groups would sit for a single common final examination.

You would appreciate that this concession only permits you to accommodate only persons qualified to follow the course and that persons **who have not obtained the requisite marks should definitely be dropped from the course"** (emphasis is his) "so as to fall in line with and give effect to the judgment in the above case. In this connection I have to invite your attention to the lists prepared by your Ministry and furnished to the Public Services United Nurses Union which contains the names of persons who are qualified to follow the course out of those who were selected initially and the names of persons who would be dropped from the course.

I trust that you would adhere strictly to the aforesaid arrangement as I have been instructed to give notice that any deviation on your part from the aforesaid arrangement would compel my clients to apply to the Supreme Court to have you dealt with for contempt."

When he received Mr. Suhaid's letter of the 6th of June, on the same day, the First Respondent wrote to Mr. M. S. Aziz, the Deputy Solicitor-General who had appeared for him in S.C. Application No. 37 of 1987, with copies to the Attorney-General and the Director-General of Health Services, in the following terms:

" I am herewith annexing a photocopy of a letter sent by Mr. S. M. Suhaid, Attorney-at-Law and Notary Public in regard to Supreme Court Application No. S.C. 37/87. We have taken a batch of nurses for post-graduate training and the course commenced on the 1st of June 1988 . . . . As you are aware, the cut off point for entry into this latter course is higher than the cut off point of the previous students whose training was stopped on the Supreme Court ruling.

Mr. Suhaid's letter suggests that we should drop out from the course which has run for 13 months, those students who are below the cut off point of the new batch.

It was our suggestion that the batch which was in training for 13 months be allowed to continue their training for the balance 5 months but sit for the examination at the same time as the new batch which commenced training on the 1st of June.

The last paragraph of Mr. Suhaid's letter speaks about matters which may arise leading to contempt of the Supreme Court decision.

Therefore, I shall be glad to be informed of the position in regard to the old batch:

(a) Whether we can continue the entire batch in training with immediate effect.

(b) Whether we have to make any modifications in the batch to continue this training."

Mr. M. S. Aziz, Deputy Solicitor-General, on behalf of the Attorney-General, replied on 10 June, 1988 that the Court had been informed that after discussions between the officials of the Ministry of Health and the Petitioners' representatives, it was agreed that both the old course and the new course would proceed and he concludes that

" Since the Supreme Court has been kept informed of the steps we propose to take now (with its permission) regarding the Old Course consequent to the agreement reached, any action taken to proceed with the Old Course cannot, in my view, be regarded as an act in contempt of court. It may nevertheless be open for the Court on an application made by the other party to indicate that we should not proceed with the old course in view of the present situation. This would ultimately be a matter for that Court and one cannot state what its reaction will be."

It is clear from the letter of the First Respondent to Mr. Aziz that he was not concerned with the question whether the old

course and the new course could be conducted. What he wanted guidance on were two precisely worded, specific matters relating, not to the **mode** of training, but to the **eligibility** of those to be admitted to the training facility, howsoever provided. With regard to that matter the Deputy Solicitor-General offered no advice. He merely stated in his letter of 10 June that in the motion for clarification it had been recited that there were 163 students who were following a training course that had already proceeded for thirteen months, and that he recalled that, although the Petitioners' Counsel in the proceedings of the 6th of June had said that only those who were eligible to be selected in the old batch would be permitted to follow the old course, he had responded that only persons eligible were selected and that in any case that should not have been recorded as agreement had already been reached between the parties on the lines recorded by Court.

What had been agreed between the parties and recorded by the Court on 6 June, 1988 did not relate to eligibility. The Court had already decided that and it was by no means attempting to vary its own order. It had no power to do so. (See *Ganeshanathan* v. *Vivienne Goonewardene and three others.*(49) Moreover, it was, as it said of itself, *functus,* and could not, therefore, make any order. It was in these 'clarification proceedings' merely providing a forum for the parties to work out an agreed method of implementing its Order.

Finding that the parties were at variance with each other and not wanting to be drawn into controversy, on 16 June 1988 the Court terminated what I have called the 'clarification proceedings' in respect of S.C. Application No. 37/87. The Chief Justice (with Atukorale and Tambiah, JJ. agreeing) said:

> " We now see that differences have arisen in regard to what took place before this Court on the 6th of June 1988. As the parties have not been able to agree as to what took place in Court, and as to why what was communicated to Court on the 6th of June 1988 was so communicated, this Court does not propose to continue any further in regard to this matter and these proceedings are now terminated."

If I may say so with respect, the Court took the proper step in terminating these proceedings at that stage when there was a dispute as to what was supposed to have transpired. As Dharmadhikari, J. said in *A. T. K. Sahakari Sanstha, Nagour* v. *State of Maharashtra,* (36).

> " Judges cannot be drawn into controversy over such matters. It is not consistent with the dignity of the Court and the decorum of the Bar that any course should be permitted which may lead to controversy . . . . Such matters are to be determined only by what is stated in the record of the Court. That which is not so recorded cannot be allowed to be relied upon giving scope to controversy. To permit the atmosphere of the Court to be vitiated by such controversy would be detrimental to the very foundation of justice."

On the day on which the Court terminated the 'clarification proceedings', i.e. 16 June 1988, the First Respondent wrote to Mr. M. S. Aziz, the Deputy Solicitor-General, as follows:

> " I would be glad to be informed on the decisions made today in the Supreme Court on this case how I should proceed.
> Can I take back for training the entire Batch which Batch was suspended from training earlier by the Supreme Court. There is a lot of pressure from those following the course that the entire batch should be taken for training."

On the same day, the Deputy Solicitor-General wrote to the First Respondent in the following terms:

> " The Supreme Court today made order terminating the proceedings in S.C. Application 37/87. This means the Judgment of the Supreme Court and the agreement recorded in the proceedings of 06.06.88 would determine the position of the parties to this application. Thus, there is no objection to proceeding with the First course which was suspended as a result of the Judgment of the Supreme Court (which included nurses who were substituted in the place of those whose names were deleted as a result of Trade Union Action.)".

On the same day the First Respondent made a minute as follows on the letter of the Deputy Solicitor-General:

"D.G.,
Course to be commenced on Monday 20/6/88. Please issue necessary instructions."

The Director-General, Health Services, to whom the minute was addressed, by his letter dated 17 June 1988 instructed the Principal of the Post Basic Nurses Training School in Colombo to "take action to inform all students on the course which was suspended on 25th April 1988 to report to the School and to re-start the course on Monday 20th June 1988."

The old training course re-commenced on 20 June but was suspended by an Order of Court in S.C. Application No. 109/88.

On 11 July, 1988 the Petitioner in this case (who was one of the Petitioners in S.C. Application 37/87) complained to Court that the First Respondent (The Secretary to the Ministry of Health), the Second Respondent (The Acting Director-General of Health Services) and the Third Respondent (The Principal of the Post Basic Nurses Training School) had by "re-opening and/or re-commencing and/or continuation of the said Post Basic Training Course which commenced on 01.04.87 were acting "in defiance" and that their action constituted "a refusal to obey the order and judgment of" the Court and that they had thereby "committed contempt of the authority of" the Court.

Upon reading the Petition and Affidavit of the Petitioner, and after hearing the submissions of Counsel for the Petitioner, the Court ordered that a Rule be served on the First and Second Respondents to show cause why they should not be punished for having committed contempt of the Supreme Court in the following manner:

"(1) By re-opening and re-commencing on 20th June, 1988 the Post Basic Course for Training of Grade II Segment 'A' Nursing Officers (Hospital Services) which had commenced on 01.04.1987 which had been set aside by

the Supreme Court by its Judgment in Supreme Court Application bearing No. S.C. 37/87 decided on 25.04.1988 and which had further directed that fresh selections be made on the basis of the marks obtained by those who had presented themselves for the examinations without any disqualification being imposed upon them on the ground of participation in any trade union action between 18.03.1986 and 17.04.1986, and by continuing to conduct the said Training Course from 20.06.1988 to 25.06.1988 and by holding classes and/or lectures in respect of the said Training Course, during the said period at Mulleriyawa Hospital and at Kalutara Hospital for those who had been selected for the said Training Course which was set aside by the said Judgment and thereby acting in defiance of the said order and judgment of the Supreme Court and wilfully refusing to obey the same.

(2) By deliberately and wilfully neglecting and/or refraining from complying with the judgment and Order by the Supreme Court in Application bearing No. S.C. 37/87 and decided on 25.04.1988 by wilfully neglecting and/or failing to make fresh selections for the Post Basic Course for training of Grade II Segment Nursing Officers as Grade I Nursing Officers (Hospital Services) and Grade I Public Health Sisters as directed by the said Judgment and Order of the Supreme Court."

It was not disputed that after the Judgment of the Court in Application No. 37/87 the Post Basic Training Course, which had commenced on 1 April 1987, was suspended forthwith. This is stated to be the case in paragraph 8 of the Petitioner's Petition dated 11 July, 1988. Nor was it in dispute that, in accordance with the decision of the Court, fresh selections were made. In paragraph 12 of the same Petition the Petitioner states that

" On 30.4.88 and on 05.05.88 the Ministry of Health had prepared a list of those who should be omitted from the said Post Basic Training Course and a list of those who should be newly selected on the basis of marks from and out of those who had been left out initially."

In paragraph 13 of the Petition, the Petitioner states that "photocopies of the said lists were handed over to Rev. Muthetuwa Ananda Thero, President of the United Public Services Nurses Union, by Dr. Joe Fernando, Director of Health Services", the Second Respondent in this case. Copies of these lists were annexed to the Petition.

What was the purpose of preparing these new lists? The Petitioner in Paragraph 14 of her Petition explained that "the said lists were prepared by the Ministry of Health for the purpose of commencing a new Post Basic Training Course on the basis of the marks obtained in order to give effect to and comply with the Judgment of Your Lordship's Court in the said case No. 37/87."

On the basis of the admissions made in the Petitioner's own Petition that the Respondents had made fresh selections for the Post Basic Training Course in order to give effect to and comply with the judgment of the Court, the second charge in the Rule issued in these proceedings must fail.

The first of the two charges, in the Rule issued on the Respondents is that by continuing to conduct the training course from 20.06.1988 to 25.06.1988 "for those who had been selected for the said training course and which was set aside "by Order of the Supreme Court", the Respondents were "acting in defiance of the said Order and Judgment of the Supreme Court and wilfully refusing to obey the same."

The gravamen of the charge is not that the old training course had been re-commenced, but that all those who had been originally selected, whether qualified or not in terms of the directions of the Court, had been allowed to continue to follow that course. It is this part of the rule that bears most heavily on the Respondents.

There was clearly a failure on the part of the Second Respondent to comply with the order of the Court that only those who were eligible in terms of the marks obtained were to be admitted to the training course, for the Second Respondent in his letter dated 17 June 1988 to the Principal, Post Basic

Training School ordered the Principal to "take immediate action to inform all students on the course to report to your school and restart the course by Monday, 20th June 1988."

The minute made by the 1st Respondent to the 2nd Respondent does not specifically refer to the persons to be allowed to follow the course but, in a cryptic manner, merely orders the re-commencement of the course. *Ex facie*, therefore, it might have been argued that the First Respondent did not, in the directions he gave, fail to comply with the Order of Court which said nothing of the mode of training. Indeed, according to the recorded proceedings of the 6th of June, the Court had expressed no objection to the continuation of the old course. The Second Respondent took the minute to be an order that **all students** who were following the old course should be summoned to continue the course. He probably misunderstood the opinion of the Deputy Solicitor-General who, somewhat ambiguously, said in his letter of 16th June to the First Respondent that that "there is no objection to proceeding with the first course which was suspended as a result of Trade Union action." The course that was suspended and with regard to which he was required to issue instructions was, it seems, taken to mean the course, not merely in the sense of form and content, but in the wider sense of those following it as well. The course, lock, stock and barrel.

The First Respondent, however, did not in his Affidavit of 30 September, 1988, filed in these proceedings, specifically deny the Petitioner's complaint in paragraph 25 of her Petition of 11 July 1988 that the Respondents, including the First Respondent, were making arrangements to continue the Post Basic Training Course which commenced on 1 April, 1987 "for all those who had been selected for the said course and without compliance of the said Judgment of Your Lordships' Court."

Nor was it argued on his behalf that the First Respondent had no intention of re-commencing the course for all those who had followed the earlier course. The First Respondent, quite properly in my view, did not seek to take shelter behind technicalities but, instead, took his stand on the ground that in doing what he did, he did not act in contempt of this Court.

The question to be answered then is whether by re-commencing the course for all those who were participants in the old course, regardless of their eligibility as determined by the Court in its Order of 25 April 1988, the First Respondent and the Second Respondent were guilty of contempt of court. Were they, as they are charged, acting in "defiance" of the "Order and Judgment of the Supreme Court and wilfully refusing to obey the same"?

The charge has, in my view, been correctly framed, for a mere failure or even refusal to abide by the decision of a Court does not, without more, constitute a contempt of Court. Whether there has been a contempt by reason of the failure to comply with the decision of a Court depends on the circumstances of the case, including the nature of its Order.

Mr. H. L. de Silva, P.C., on behalf of the Petitioner, urged that where the Supreme Court, in the exercise of the jurisdiction conferred upon it by Article 126 of the Constitution, hears and determines any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or Chapter IV of the Constitution, the Order of the Court ought to be enforced through contempt proceedings in terms of the power conferred on the Supreme Court by Article 105(3) of the Constitution.

Article 105(3) of the Constitution says that

" The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit . . . ."

I am unable to accept without qualification the submission of the learned President's Counsel appearing for the Petitioner.

In order to establish Contempt of Court, in the words of Lord Radcliffe in *Reginald Perera v. The King*.(50)

"There must be involved some act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts. See *Reg. v. Gray*.(51)

This does not necessarily happen where a person has failed to or refused to obey an ordinary, non-coercive order of court.

Bertram, C.J. in *Ismail v. Ismail* (43) said that "non-compliance with the judgment of a Court is not, in ordinary circumstances, a Contempt of Court."

Where the Order of Court is declaratory, i.e. where it is a decision merely expressing publicly, in formal and explicit terms, the rights and obligations of the parties concerned, a failure to abide by such an order would not, in my opinion, without more, amount to a Contempt of Court. (See Borrie and Lowe's, **Law of Contempt,** 1983, 2nd Edn. at p. 418). In *Webster v. Southwark London Borough Council,* (52) following Idndley, L.J. in *Seaward v. Peterson,* Forbes, J. said (53).

> " I readily accept the proposition that where a Court makes only a declaratory order it is not contempt for the party affected by the order to refuse to abide by it."

Indeed, even if the Order of the Court is more than merely declaratory, the failure, or even refusal, to comply with it does not necessarily, by itself, constitute a Contempt of Court. In *Amarasekera v. Goonewardene,* (54) a Police Magistrate had directed the Respondent to abate a nuisance by removing a kiln to the furthest distance possible from the house or break it down. The Appellant stated aloud: "I will neither remove the kiln nor break it down." Ennis, J. (at p. 53) said :

> " Now, if the appellant said this in open Court in an offensive or contemptuous tone, he certainly deserved punishment and he rendered himself liable to punishment. But the Magistrate called upon him to show cause why he should

not be punished for contempt not for the tone adopted by the appellant but for refusing to obey the Order appealed from imposing a fine of Rs. 100 for Contempt of Court. Had the complainant accepted the Order of Court and undertaken to obey it, he would have practically sacrificed his right of appeal. This he was not bound to do and by the mere refusal to obey the order referred to, it can hardly be said that he became liable to be punished for Contempt of Court."

By no means does this imply that the Orders of a Court can be disregarded. An Order of a Court, even one that is irregularly issued, must be obeyed by the party affected until the Order be discharged. (Per Macdonell, C.J. *In the Matter of a Rule on A.F. Molamure,* (55) following *Silva v. Appuhamy,* (56). Any person wilfully disobeying such an order is liable to be punished for Contempt of Court. (Per Macdonell, C.J. in *Molamure's case (supra)* at pp. 50 fin. – 51). Moreover, there is it seems, a special duty cast on public officers to comply with the orders of court. Tuli, J. in *Parkash Chand v. S.S. Grewal,* (37) Punjab and Haryana High Court, (Full Bench) at paragraph 5 of the judgment of the Court explained the expectations of the law in the following way:

" If any party to the proceedings considers that any Court has committed any error, in the understanding of the law or in its application, resort must be had to such review or appeals as the law provides. When once an Order has been passed which the Court has jurisdiction to pass, it is the duty of all persons bound by it to obey the Order so long as it stands, and it would tend to the subversion of orderly administration and civil Government if parties could disobey orders with impunity. If such is the position as regards private parties, the duty is all the more imperative in the case of Governmental authorities, otherwise there would be a conflict between one branch of the State polity, viz., the executive and another branch — the Judicial. If disobedience could go unchecked, it would result in Courts ceasing to have any meaning and judicial power itself becoming a mockery. When the State Government obeys a

law, or gives effect to an order of a Court passed against it, it is not doing anything which detracts from its dignity, but rather, invests the law and the courts with the dignity which are their due, which enhances the prestige of the executive Government itself, in a democratic set up."

Attention might also be drawn to the observations of Nerula, J. in *Raghunath v. P. Sahai.* (42) paragraph 10, where he said as follows:

" Counsel then referred to the Judgment of the Judicial Committee in *Eastern Trust Co. v. Mckenzie Mann & Co. Ltd.*, (57). In that case it was held that it is the duty of the Crown and of every branch of the Executive to abide by and obey the law and that if there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, and not to disregard it."

Although a failure or refusal to obey a merely declaratory order will not by itself, without more, expose a person to an action for contempt, yet, where, in the circumstances of a case, justice demands that such an order should be enforced, the court has an inherent jurisdiction to enforce such orders. (See per Forbes, J. in *Webster v. Southwark L.B.C.*, (52). In Webster's case the Court found (see p. 224) that, although it had made a declaratory order rather than issue an injunction or afford coercive relief because the defendant was a responsible authority and it was "thought inconceivable that a declaratory order would not result in the plaintiff obtaining his rights", yet that authority had in consequences of the manner in which it had treated the order of the Court, "forfeited all right to be regarded as a responsible authority so far as the Courts are concerned." In such exceptional circumstances, Forbes, J. said (at p. 226) that a Court could not "just stand by and confess that it was powerless" and decided that the writ of sequestration in that case was "properly sought and properly given."

I cannot, however, go so far as to say that contempt proceedings should be ordinarily resorted to execute the orders

of a Court. Certainly, with regard to cases where the law expressly provides for the execution of decrees, separate proceedings, such as Contempt proceedings, should not be resorted to give effect to an order of a Court. This was clearly indicated by Bertram, C.J. in *Ismail v. Ismail,* (43).

Even if there is no process in law to execute a particular order, and there is in my opinion no such process prescribed by law to give effect to the orders of the Supreme Court made in the exercise of its jurisdiction conferred upon it by Article 126 of the Constitution in its determination of questions relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution, it would, I think, be improper to use Contempt proceedings as a lever for obtaining such execution (see per Bal Raj Tuli, J. in delivering the Judgment of the Full Bench of the Punjab and Haryana High Court in *Parkash Chand v. S.S. Grewal and Others,* (37) See also *Raghunath Rai v. P. Sahai and another,* (42) or to do duty for other measures. (See per Hidyatullah, C.J. delivering the Order of the Court in *Debabrata Bandopoadhyay and others v. The State of West Bengal and another,* (41).

Perhaps it may be advisable in cases where the law does not provide for the execution of an Order to ensure that the party affected gives an undertaking to comply with the order, for then the failure to honour such an undertaking would, I think, entitle the other party to legitimately use contempt proceedings to enforce the order, even though the undertaking may not be embodied in the Order. (Cf. *C.J.F. De Alwis v. L. C. Rajakaruna,* (58) following *In Re P. K. Ensa,* (59).

What is the position where a party who has given no undertaking to Court refuses to or otherwise fails to comply with a declaratory order of Court made in the exercise of the jurisdiction given in terms of Article 126 of the Constitution? The party concerned ought, in my opinion, to go back to Court and seek an injunction to enforce the order of the Court. (See per

Forbes, J. in *Webster v. Southwark London Borough Council,* (52).

Once such a coercive order is obtained, the obligations and rights of the parties are placed on a different footing. There is then a most solemn and authoritative order of the Court where every diligence must be exercised to observe the order of the Court and to obey it to the letter, strictly in terms of the order of the Court. (See per Kindersley, V.C., in *Hardings v. Tingey,* (60) *Spokes v. Banbury Board of Health.* (1865) LR (42 at 48) and *Howitt Transport v. Transport and General Workers' Union,* (61) referred to with approval in Borrie and Lowe's **Law of Contempt,** 1987, 2nd Edn. at p.394. See also in *Re S.M.A. Cader and another,* (45) and *Perera v. Abdul Hamid* (62). In such circumstances there is, I believe, no need to show that the person charged with contempt was intentionally contumacious or that he intended to interfere with the administration of justice. (Borrie and Lowe's **Law of Contempt,** 1983 2nd Edn., p. 400; per Sachs, L. J., in *Knight v. Clifton,* (63) and *Stancombe v. Trowbridge U.D.C.* (64) cited with approval by Lord Wilberforce in *Heaton's Transport (St. Helens) Ltd. v. Transport and General Workers' Union* (65).

Under Rule 31 of the Old English Rules of the Supreme Court, an act of disobedience would become an act of contempt only if it was "wilful". "Wilful" was taken to mean that while, where the terms of an injunction were broken it was not necessary to show that the person was intentionally contumacious or that he intended to interfere with the administration of justice, yet where the failure or refusal to obey the order of Court was casual or accidental and unintentional, it will "not be met by the full rigours of the law". (Borrie and Lowe's, **Law of Contempt, (supra)** at p. 400-401 following Lord Russell, C.J. in *Fairelough & Sons v. Manchester Ship Canal* (No. 2) of 1897 41 Sol. Jo. 225).

Although Rule 5(1) (which is the corresponding provision in the English Rules of the Supreme Court of 1965 which came into effect on 1st October 1966) omits the word 'wilful' before 'disobeys', the liability for the disobedience of an injunction has

not become strict and absolute. The omission of the word 'wilful' may have made it easier to establish a *prima facie* case of Contempt, but disobedience which attracts commitment or sequestration continues in practice in the United Kingdom to be required to be disobedience which is not casual, accidental and unintentional. See per Lord Wilberforce in *Heatons Transport (St. Helens) Ltd. v. Transport and General Workers' Union,* (65).

In the matter before us the Order of the Court was of a mixed nature. It was partly declaratory in nature when it was formally announced that the petitioners had been discriminated against and the selections made were set aside. It is this part of the Order that has been disregarded and gave rise to these proceedings. The Order was also partly mandatory, in that in terms it gave directions and instructed the Respondents in S.C. Application No. 37 of 1987 to make fresh selections on the basis of the marks obtained by those who presented themselves. It was partly prohibitive in that it ordered the Respondents to refrain from imposing disqualification on the ground of participation in any trade union activity between certain dates specified by the Court.

The Respondents understood this perfectly well, and, for that reason, made new lists of eligible persons in terms of the order of the Court. In re-commencing the course for all those who had been selected earlier, regardless of whether they were qualified or not in terms of the order of Court, there is no doubt that the Respondents disobeyed the order of this Court. Whether they did so "in defiance" of the order of the Court and whether they were "wilfully" refusing to obey the order of the Court and guilty of Contempt of Court is another matter.

Justice Tuli in *Parkash Chand v. S. S. Grewal and others,* (37) quotes with approval the following instructive words of Chief Justice Dua of the Delhi High Court, in *Gian Chand Bali v. L. F. Singh,* (67) on the nature of contempt proceedings:

> " Contempt of Court it may be remembered, is a summary process and has to be used only from a sense of duty and under pressure of public interest. These summary powers, if they are to be effective and are to uphold the dignity of

Court, must not be used too readily and too frequently, without compelling reasons at the instance of aggrieved litigants who, more often than not, are inspired by a desire to utilise the machinery of these powers for enforcing their civil rights. These powers have to be used only in serious cases where deliberate contempt is clearly established on the part of the contemner. The great importance of upholding the dignity, power, prestige and authority of the Courts of Law and justice in a democratic society founded on the Rule of Law and of implicit obedience to the orders of the Courts, can be minimised only at the risk of weakening the foundations of our constitutional set-up and correspondingly endangering our very democratic existence. This Court would, accordingly, be failing in its constitutional obligation to ignore disobedience of its orders or those of its subordinate Courts, from any quarter in this Republic, however high. But the usefulness of this power necessarily depends on the wisdom and restraint with which it is exercised. . . . . Contempt or Court, it is undeniable, lies broadly speaking, in despising of the authority, justice or dignity of the Court, and the person whose conduct tends to bring the authority and administration of law into disregard or disrespect or interferes with or prejudices the parties or witnesses, or tends to obstruct the Court in the discharge of its duties, is normally understood to be guilty of contempt; and it is equally undeniable that this Court would be quick to take all lawful steps against the guilty for vindicating the Court's authority."

After quoting those words from the decision of Chief Justice Dua, Justice Tuli in *Parkash Chand's* case *(supra)* goes on to say at p. 688 as follows:

" From the above discussion it is abundantly clear that the essence of the offence of contempt of court is wilful disobedience to any judgment, decree, direction, order or writ of a Court and not mere inaction to give effect to it. The conduct of the alleged contemner must be wilful, showing deliberate and conscious disregard of the Court's order or a

despising and disdainful attitude towards the verdicts of Courts. It has to be remembered that contempt proceedings cannot be resorted to by a litigant with a view to obtaining relief in accordance with the order or decree in his favour but a serious note is to be taken of a disrespectful or disdainful attitude of a person bound by the decree or order with a view to uphold the majesty, authority, and dignity of the Courts of Law."

In *Badoordeen v. Dingiri Banda et al.*, (68) Macdonell, C.J. expressed the view, *obiter*, that Contempt is not criminal unless the act punished *per se* constitutes a crime.

Even if a contempt is not always a crime, it bears a criminal character and, therefore, it must be satisfactorily proved.

Lord Denning, M. R. in *Re Bramblewale Ltd.*, (22) said:

" A Contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt."

In *Knight v. Clifton*, (20) Lord Justice Russell, following *Re Bramblewale* (22) said:

" Contempt of Court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent."

In *P. A. Thomas & Co. v. Mould*, (69) O'Connor J. said:

" Where parties seek the power of the Court to commit people to prison and deprive them of their liberty there has got to be quite clear certainty about it."

This is also the view of the Supreme Court of India. Hidyatullah, C.J., speaking for the Court, in *Debabrata Bandopadhyay v. State of West Bengal,* said (41):

> " A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the Judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished .... Punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

This elucidation of the law was quoted with approval by Barkaria, J. (who delivered the judgment of the Court) in *S. Abdul Karim v. M. K. Prakash and Others,* (34). In that case Sarkaria, J. said:

> " The broad test to be applied in such a case is, whether the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required to establish a charge of 'criminal contempt' is the same as in any other criminal proceeding .... Human Judgment is fallible and .... so long as a .... officer in the discharge of his official duties acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the Courts will not as a rule punish him for a "criminal contempt". Even if it could be urged that *mens rea,* as such, is not an indispensable ingredient of the offence of contempt, the Courts are loath to punish a contemner, if the act or omission complained of was not wilful."

In *Ragunath Rai v. P. Sahai,* (42) Nerula, J. said that:

> " Whether in a particular case contempt has been committed or not, has to be decided in the light of the circumstances of each case. While zealously safeguarding the dignity of the Court, it is also to be borne in mind that it is of equal importance that contempt proceedings should not be abused and that utmost care must be taken to avoid resort to such proceedings in such cases where such action is not appropriate. Though disregard of a Court's order may itself amount to contempt even in the absence of disobedience, it would still be necessary, in my opinion, to prove in most cases, that even the disregard was wilful and not **bona fide.**"

In continuing the old course for all those who were originally selected, the acts of the Respondents may have been 'wilful' in the sense that they were not casual, accidental or unintentional. However, in the light of the circumstances of this case, I am not satisfied that the Respondents acted with a conscious and deliberate disregard of the Order of Court. Their conduct was not consistent with a disdainful attitude towards the Order of the Court. They displayed a contemptuous indifference or disregard. They did not unduly neglect to pay attention to the Order of the Court or treat it as being of no importance. In the circumstances, I am not satisfied that they were guilty of the defiance with which they are accused. They acted incorrectly. However, in my opinion they did so on account of a misapprehension and not because they were actuated by any improper motive or deliberate design to thwart, impede, obstruct or interfere with the course of justice or the lawful process of the Court or to circumvent or defeat an Order of the Court or to bring the Court into contempt or lower its authority. (Cf. per Lord Radcliffe in *Reginald Perera v. The King,* (50) and per Sakaria, J. in *S. Abdul Karim v. M. K. Prakash,* (34).

The decision of the Court has been of paramount importance to the Respondents. The manner in which they conducted themselves shows that. As soon as the Court had

given its decision, the course was stopped. Fresh selections were then made in terms of the Order of Court. Being in some doubt as to whether the terms of the Order of Court permitted them to continue the old course and the new course side by side with a new one, clarification was sought from Court by way of motion. These are, in my view, certainly not the acts of a person who, with disdain, thought that the Order of Court deserved scant attention. They are not the acts of a person who was defiant towards the Orders of the Court.

Having made fresh selections in accordance with the directions of the Court and having, in my view, properly concluded that two courses could be conducted side by side, one a continuation of the old course and the other a new one for those who had been earlier improperly excluded, the new course was commenced on 1st June 1988 — a fact which was communicated by Counsel for the Petitioners and recorded by Court.

The Respondents, however, directed that the old course be re-commenced on 20th June 1988 and violated the Order of Court by permitting all those who had been originally selected, whether they were eligible or not in terms of the Order of the Court, to follow the old course. They did so, in my opinion, on account of a misapprehension of the advice they had sought and obtained from the Deputy Solicitor-General on the 16th of June 1988. There had been, as I have stated before, some tentative thinking aloud in Court during the proceedings on the 6th June on the question of eligibility although what was recorded, as might be expected, related only to the mode of conducting the course and the method of examination. Yet, as far as Counsel in the case were concerned, as we have seen, there was uncertainty, so much so that a motion, albeit unsuccessfully, was made to rectify the proceedings of the Court on the 6th of June.

When the First Respondent in his letter to the Deputy Solicitor-General on 16th June, 1988 asked for advice on "how I should proceed" and, specifically asked "Can I take back for training the entire Batch which Batch was suspended from training earlier by the Supreme Court", the Deputy Solicitor-General, on the same

day, on behalf of the Attorney-General, after stating that the effect of the termination of the 'clarification proceedings' meant that

> " the Judgment of the Supreme Court and the agreement recorded in the proceedings of 06.06.88 would determine the position of the parties to this application".

went on to advise as follows:

> " Thus there is no objection to proceeding with the first course which was suspended as a result of the Judgment of the Supreme Court (which included nurses who were substituted in the place of those whose names were deleted as a result of Trade Union action)".

The Order to re-commence the course was made on the letter of the Deputy Solicitor-General to the First Respondent. The Second Respondent interpreted the Order to mean that all those who had followed the earlier course were to be recalled to complete their course. The Respondents had no doubt erroneously, but in good faith, supposed that that was what they were at that time entitled to do in terms of the legal advice sought and obtained from the Attorney-General.

Mr. H. L. de Silva, P.C. maintained that, whether in the case of a public servant or a private person, the fact that a person has acted on legal advice is not an answer to a charge of contempt based on disobedience of an Order of Court. It is, he said, only a mitigatory circumstance.

Mr. K. N. Choksy, P.C., however, argued that, not only was legal advice a good defence, but that in the case of a public servant who is required by the Establishments Code to consult the Attorney-General on questions of law relating to his work, the fact of acting in accordance with the advice of the Attorney-General confers immunity on such an officer. Later, however, learned Counsel, finding himself in some distress, quite properly, I think, jettisoned the more burdensome part of his argument and proceeded to urge that the selecting of legal advice was relevant to the question of good faith.

Seeking and relying upon legal advice may, no doubt, be relevant in mitigation of Contempt, but it is not conclusive of the question whether there was Contempt. (See per Megaw, P. in *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.*, (70) *Gopal Bose v. State of Bihar*, (71). However, in the circumstances of a particular case, the fact that a person has acted on legal advice may support the contention that the party concerned had not wilfully disregarded the Order of Court. (See per Tuli, J. in *Parkash Chand v. S.S. Grewal*, (37). "If the act or omission was not wilful, then it cannot be said that the officer acting in good faith on the basis of legal advice, has deliberately or wilfully disobeyed the order of the Court." Per Dharmadhikari, J. in *A. T. K. Sahakari Sanstha, Nagpur v. State of Maharastra*, (36). See also per Narula, J. in *Raghunath Rai v. P. Sahai*, (42).

I have said that in my view the Respondents did not act defiantly but acted erroneously owing to a misapprehension of what they were entitled to do in terms of the Order of the Court placed in the context of the 'clarification proceedings' and the advice received from the Deputy Solicitor-General. As for the future, I must add that the Order of Court in S.C. Application No. 37 of 1987 remains an Order which must be strictly obeyed and I trust that there will be an honest endeavour by all these concerned, including the Respondents, to honestly perform their obligations in terms of that Order. All that I have decided in this case is that the Order in S.C. Application No. 37 of 1987 has not been contumaciously disregarded. If it is strictly complied with hereafter, adopting the words of Sterling, J. in *Perthington and Others v. Adlib Club Ltd.* (18) I should like to add that, "speaking entirely for myself, I would find it impossible to say that it was not a contumacious disregard." And if there is wilful and contumacious disobedience of the Order of the Court, the person who so disobeys the Order of Court will be guilty of contempt and must be punished. See *L. Arumugasamy v. L. Kathirgampermpillai*, (46) in such a case, it may not be of such avail, even as a mitigating circumstance, that a person had

acted on the advice of lawyers. (Cf. per Diplock, J. in *Re The Agreement Between the Newspaper Proprietors' Association Ltd. And the National Federation of Retail Newsagents, Sellers and Stationers,* (72). As a matter of justice, I believe the Petitioner is entitled to such an assurance on my part.

Learned Counsel for the petitioner urged that the absence of an apology was an indication of the contumacy of the Respondents. An explanation that offence was not intended, with an expression of regret for any given or taken, may or may not assist a person charged with Contempt of Court. It would depend upon the circumstances of a particular ones. An unqualified apology may be an indication of *bona fides.* (See A.T.K. Sahakari Sanatha, *Naggapr v. State of Maharastra,* 1977 Cri. L.J. 1809 at p. 1819). On the other hand an insufficient apology will be of little use. (See *In the matter of a Rule issued under Section 47 of the Courts Ordinance on P. Ragunpathy* per Keuneman, S.P.J.)(73). The absence of an apology does not necessarily show that the party was stubbornly perverse or rebellious and insubordinate or that he was wilfully disobedient. In *Debrebrata Bandopadhamy and others v. The State of West Bengal and another,* (41) no apology had been made. Hidyatullah, C.J. said, at p. 193 paragraph 7. as follows:

> " The second point which the High Court unfortunately placed at the very forefront was failure to offer an apology and noted with great show of motion that none was offered. Of course, an apology must be offered and that too clearly and at the earliest opportunity. A person who offers a belated apology runs the risk that it may not be accepted, for such an apology hardly shown the contrition which is the essence of the purging of a contempt. However, a man may stake his all on proving that he is not in contempt and may take the risk.".

As in that case, it may be said in the matter before us, that the Respondents "ran the gaumtlet of such risk and may be said to have fairly succeeded." (Per Hidyatullah, C.J. at p. 193).

For the reasons I have stated I make order discharging the Rules on the First and Second Respondents.

I make no order as to costs.

Rules discharged.