

Capt. Virendra Kumar through His Wife

Vs

Chief of The Army Staff, New Delhi

The Constitution of India) with Capt. Virendra Kumar

Vs

Chairman, Disciplinary Committee, Bar Council of India and Others

Writ Petition No. 1344 of 1985

Criminal Writ Petition No. 1741 of 1981 with Criminal Writ Petitions Nos. 1344 and 1604 of 1985;  
Criminal Miscellaneous Petitions Nos. 2470 of 1981 and 2463 of 1985 and Civil Miscellaneous  
Petition No. 11343 of 1980

(O. Chinnappa Reddy, V. Khalid JJ)

13.02.1986

JUDGMENT

CHINNAPPA REDDY, J. -

1. When judgment was pronounced in Civil Appeal No. 475 of 1976 (Captain Virendra Kumar v. Union of India ((1981) 1 SCC 485 : 1981 SCC (L&S) 233)), it was thought that an unhappy litigation had come to a happy ending. But it was not so. It appears that Civil Appeal No. 475 of 1976 was only a prelude to a long drawn out acrimonious and dogged litigation, both parties to which appeared to us to be blameworthy. On the one hand, the matter appears to be viewed by the authorities as one of prestige, that is, false prestige and hurt dignity. On the other hand, there is misplaced determination coupled with a sense of an emotional hurt on the side of the Captain.

2. The approach of the authorities is illustrated by the following statement in the counter-affidavit filed on their behalf by Major S. Krishna, Officiating Military Secretary, Army Headquarters :

It is respectfully submitted that the honour and prestige, the faith and trust of the Armed Forces is at stake and if it is lost, it cannot be regained irrespective of the amount of effort to that end.

It is difficult to imagine how the very 'honour and prestige' of the Armed Forces can ever be at stake in a litigation such as this. The attitude of the officer is revealed by the irascible manner of the conduct of the litigation.

3. We will now proceed to state the minimum basic facts, necessary and relevant but no more. We refrain from referring to facts considered by us to be unnecessary. Captain Virendra Kumar joined the Army on February 14, 1965 as an Emergency Commissioned Officer. He sustained war injury. On September 30, 1970, he was released from the Army having been placed in 'Permanent low medical category'. His commission was revoked by a notification of the President. He challenged his

release by filing a writ petition in the Delhi High Court and by taking up the matter in further appeal to this Court after the writ petition was dismissed by the Delhi High Court. His appeal (Civil Appeal No. 475 of 1976) was allowed by this Court on April 22, 1980 ((1981) 1 SCC 485 : 1981 SCC (L&S) 233). It was held by this Court as follows : (SCC p. 490, paras 11, 12, 13)

The consequence is that the order of termination of service is invalid for failure to adhere to basic procedure. . . .

The inevitable result of the invalidation of the termination of service is that the officer comes back into service and, therefore, the salary due to him from the time of his formal release or termination down-to-date will have to be paid. We direct that this be done within three months from today.

The fact that the order of release or termination is invalid for non-compliance with the procedural requirements does not make the officer a permanent or regular Commissioned Officer. His services are still liable to be terminated, but the correct procedure has to be followed. It looks as if the appellant has suffered a physical disability in action and the Chief of the Army Staff has full power to act and may either resort to Rule 15 or 15(A) and deal with him on that footing. Or may allot to him some sedentary position consistent with his physical condition and his otherwise proven talent.

The judgment of this Court was pronounced on April 22, 1980. The three months' time given by the court for compliance with its directions expired on July 21, 1980. On the last day, that is, on July 21, 1980, the Union of India filed a review petition which was ultimately dismissed on October 1, 1980. The review petition contained some unworthy comments on the judgment. But the court preferring to ignore the comments observed :

We confine ourselves to the merits of the grounds and ignore comments made in the petition about the observations in the judgment. We do not think that the grounds put forward justify a review of the judgment. So we dismiss the review petition. It appears that after the review petition was dismissed, proposals were initiated on October 13, 1980 for payment of the arrears of the back salary as directed by the judgment. In the meanwhile on September 19, 1980, the officer filed Civil Miscellaneous Petition No. 11343 of 1980 to commit the respondent for contempt of court for not complying with the direction of the court in Civil Appeal No. 475 of 1976.

4. On October 15, 1980, the Army Headquarters directed Captain Virendra Kumar to report to the Artillery Centre, Nasik Road Camp at the latest by October 31, 1980. It is interesting to note that notwithstanding the judgment of the court holding that the termination of service of the officer was invalid and, therefore, the officer came back into service, the Army authorities persisted in describing him in the letter of October 15, 1980 (and even thereafter) as ex-Captain Virendra Kumar. We also note that the letter of October 15, 1980 made no reference to the arrears of salary due to the officer and contained no offer to pay the same to him. On October 31, 1980, Captain Virendra Kumar reported to GSO-I Artillery Directorate requesting that he might be permitted to join some time in the last week of November as his health did not permit him to join immediately. He however added "under the foregoing circumstances, while I do convey my acceptance of the offer, I would request you to kindly keep in mind my continuing physical disability, my long suffering at Delhi and my families (sic) mental torture and agony during all the gone-by-years". The officer did not report for duty in the last week of November as promised by him in his letter of October 31, 1980, but reported to the Army Hospital, Delhi Cantonment on December 29, 1980. He

was admitted in the hospital for detailed examination and he was in the hospital from December 29, 1980 to February 2, 1981. On January 31, 1981, the Army Medical Board, while noticing under the head 'defects or disabilities discovered as a result of physical examination' :

- (a) Old injury, Lumbar Spine - affects of N-806
- (b) Fracture - Clavicle Rt. - affects of N-810, E-813
- (c) Closed Head Injury - affects of N-800, E-813

recommended the officer as fit for duties not requiring severe stress and not involving close combat under conditions of active hostilities including counter-insurgency.

The officer refused to sign the proceedings of the Board as he objected to the procedure adopted in subjecting him to medical examination. He also objected to the recommendation of the Medical Board which appeared to supersede his earlier categorisation for the purpose of releasing him from the Army as 'Permanent low medical category'. On February 2, 1981, when he was discharged from the hospital, according to the authorities, he was orally told to report to Army Headquarters, Delhi. This is disputed by the officer. The contempt application came up for hearing on February 18, 1981. No counter or answer was filed in the contempt petition on behalf of the Chief of Army Staff. On February 18, 1981, the court made the following order :

Mr Girish Chandra, who appeared on behalf of the respondent, the Chief of the Army Staff, has made a statement before us relying on the letter which he has received, that the petitioner, Capt. Virendra Kumar, was directed by the authorities to report to the Army HQ on February 2, 1981. It appears that the petitioner could not do so for one reason or the other mostly connected with his health. We direct that the petitioner should report to the Military Secretary to the Chief of the Army Staff, Army Headquarters, New Delhi, on Friday, February 20, 1981 and if he so reports, concerned authorities will act in conformity with the judgment dated April 22, 1980 of this Court.

We hope that the amount which is due to the petitioner under the aforesaid judgment will be paid to him on the 20th when he joins.

5. Captain Virendra Kumar reported to the Secretariat of the Military Secretary on February 20, 1981. There is some controversy as to what took place at the office of the Military Secretary. We do not think that it is necessary to investigate into what happened at that time. It is sufficient to say that the officer returned home and the same day in the evening a cheque for Rs 1,54,000 stated to be arrears of salary for the period from September 30, 1972 to July 20, 1980 was handed over to the officer at his residence along with a letter in which it was further mentioned "as regards the arrears of pay and allowances from July 20, 1980 onwards, the CDA(O) Pune has been requested telegraphically to finalise the same on priority". It was further said, "Fresh instructions for your posting to Arty. Centre, Nasik Road Camp ordered vide this HQ letter No. 77974/O/GS/Arty-11 dated October 15, 1980 are being issued by the Directorate of Artillery separately". On receipt of the letter and the cheque Captain Virendra Kumar endorsed on the letter "Received from Major (illegible) cheque No. K 799278 dated February 20, 1981 for Rs 1,54,000 (Rs One lakh fifty four thousand only) towards payment of arrears of pay and allowances for the period from September 30, 1970 to July 21, 1980". It appears that the Government of India had issued an order that arrears of

salary should be paid up to February 20, 1981, by issuing a corrigendum to the earlier order sanctioning the payment of arrears of salary up to October 31, 1980.

6. On February 26, 1981 fresh posting orders were issued to the officer directing him to report for duty at Ambala at the latest by March 7, 1981. He was further instructed that till he proceeded to Ambala he was to report for duty every day to the HQ, MS Branch/MS 7A at Room No. B-35, South Block. The communication was received by the officer on February 27, 1981. However the officer did not report for duty either at Headquarters or at Ambala. On March 13, 1981 he wrote a letter to the Chief of the Army Staff referring to an earlier letter of his of February 20, 1981 and asking the authorities to take him back 'in the line of his proven ability'. On March 14, 1981 a telegram was sent to the officer by 49 AD Regiment enquiring about his failure to report and his whereabouts. Thereafter on March 19, 1981 an 'apprehension roll' was issued and the Commanding Officer of 49 AD Regiment addressed a confidential communication to the Superintendent of Police, Delhi and the Deputy Commissioner, Delhi giving information about the absence without leave of the officer from March 7, 1981 onwards. Full particulars regarding the officer were given, the name of place/absence was mentioned as Ambala Cantonment and the Controller of Defence Accounts in whose payment the 'deserter' was specified as CDA (Officers) Pune. The Superintendent of Police was requested to apprehend the officer and inform the nearest Regiment Centre immediately on apprehension and to arrange for his despatch under police escort to the Regiment Centre. On March 29, 1981, the officer was arrested and taken to the Nizamuddin Police Station. He was then taken to the Delhi Cantonment where the 49 AD Regiment Officer took charge of him. According to the officer he was maltreated thereafter though this is denied by the authorities. On March 29, 1981 itself a tentative chargesheet was sought to be served on the officer but he refused to accept the same. The tentative charge-sheet was as follows :

The accused, No. EC-59557 Capt. Virendra Kumar, an officer holding an emergency commission in the regular army, 49 Air Defence Regiment, is charged with -

#### DESERTING THE SERVICE

in that he, at Ambala Cantt., on March 7, 1981, having been posted by the Army Headquarters to 49 Air Defence Regiment, failed to report to the said unit till apprehended by the civil police at Delhi on March 28, 1981 at about 0830 hours.

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Sd/-

Place Ambala (Narjung Gurung)

Lt. Col.Date

March 29, 1981

Officer Commanding 49 Air Defence Regiment.

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7. On April 1, 1981 Smt. Raksha Virendra Kumar, wife of Captain Virendra Kumar, moved this Court for the issue of a writ of habeas corpus alleging that her husband had been forcibly removed

from his house and taken away first to the police station and thereafter to some unknown destination and that his whereabouts were not known. On April 1, 1981 the court directed the production of the officer before the court on April 2, 1981 and further directed the Army authorities to inform the officer's wife about where the officer was lodged. On April 2, 1981 the officer was produced before the court and the following order was made :

The petitioner, Captain Virendra Kumar, will report tomorrow, April 3, 1981, at 11.00 a.m. to the Station Headquarters, Delhi Cantt. The petitioner will be taken to the Artillery Brigade, Military Cantonment, Delhi and the authorities concerned will make suitable arrangements to enable the petitioner to report to the aforesaid authority. On the petitioner Captain Virendra Kumar, so reporting, the authorities concerned will give to him the written order indicating the posting which is proposed to be offered to him. This, of course, will be subject to the petitioner's being found medically fit by the Board which generally examines person for recruitment or posting in the army.

Necessary facilities and amenities of a decent comfortable existence will be supplied or be permitted to be supplied to the petitioner (Captain Virendra Kumar). The petitioner, Captain Virendra Kumar, appeared before us today in person. Looking at his physical condition we would strongly recommend to the Military authorities to treat him with every possible courtesy and consideration. The matter be listed before this Court on Monday the April 6, 1981 as last matter and Captain Virendra Kumar will be produced in court on that date.

When the matter came up again on April 6, 1981 rule nisi was issued and the writ petition as well as the contempt petition were directed to be posted together for final hearing on April 15, 1981. A counter-affidavit in opposition to the writ petition was filed on behalf of the Chief of the Army Staff by one Major S. Krishna, Officiating Assistant Military Secretary, Headquarters. It was claimed in the counter-affidavit that the officer was a deserter and the action taken in requisitioning the police authorities to apprehend him was in order and that the detention thereafter in the custody of the Army authorities was legal. It was stated that the offence of desertion was one of the most serious of military offences and that Section 38 of the Army Act, 1950 made it punishable with death if committed on active service or under orders for active service, and in other circumstances with imprisonment which may extend to seven years. Reference was made to Section 39 and to Section 105 which states that when a person subject to the Army Act deserts and when his Commanding Officer gives written information thereof to the Civil Police Authorities, such authorities shall thereupon take steps for the apprehension of the deserter as if a warrant was issued by a Magistrate for his apprehension, and deliver him into Military custody after apprehension. It was stated that as Captain Virendra Kumar had deliberately refused to join his new unit he had committed an offence under Section 38 of the Army Act as he had no intention to rejoin duty. The deponent of the counter-affidavit then referred to the earlier judgment of the court in the civil appeal and the subsequent events. He chose to make the following two objectionable comments on the judgment of the court :

(i) It is regrettable that the false statements being made by the officer all along have been accepted as facts in preference to the evidence which indicates otherwise thereby indirectly encouraging the officer to continue the deplorable damage he is causing to tarnish the image of Armed Forces in the eyes of the nation.

(ii) Coming now to the question of the "proven talent" of the officer we are at a loss to really judge the so-called talent.

When we drew the attention of Shri O.P. Sharma, learned counsel for the Chief of the Army Staff to these two passages in the counter-affidavit, Shri O.P. Sharma straightway apologised and unconditionally withdrew these two statements. An additional affidavit was also filed by one Major R.N. Singh, Deputy Assistant Military Secretary, Army Headquarters who claimed to be competent to swear the affidavit on behalf of the respondents. Referring to the two objectionable passages he said :

I tender unqualified apology for the impolite averments made therein. I say that the respondent certainly has neither any intention nor authority to cast any aspersions on the judgment passed by this Hon'ble Court. I further say that the respondent holds this Hon'ble Court in the highest esteem and has all the respect for the same. The aforesaid averments have been made inadvertently. I crave leave of this Hon'ble Court to permit the respondent to withdraw the said averments in paras 13(a) and 13(c) of the counter-affidavit. The respondent again tenders apology for the aforesaid averments inadvertently made in paras 13(a) and 13(c) of the counter-affidavit.

8. To continue our narrative it was then stated that the officer did not report for duty to the Military Secretary's branch in the Army Headquarters in complete defiance of the court's order dated February 18, 1981. Referring to the direction of the court that the Chief of the Army Staff may allot the officer to some sedentary position consistent with his physical condition and otherwise 'proven talent', it was stated that the posting to Nasik Road Camp as well as Ambala were done keeping in view the judgment of the court and the medical condition of the officer. The two places were 'peace areas where hospital facilities were available'.

9. Subsequently Captain Virendra Kumar filed a very lengthy reply affidavit which we have carefully perused. On May 5, 1981 the court made an order directing the respondent to release Captain Virendra Kumar from custody and adjourned the case to be heard after the summer vacation.

10. Captain Virendra Kumar has been released from custody pursuant to our direction dated April 5, 1981 and so, in one sense, the writ petition for the issue of a writ of habeas corpus has perhaps become infructuous. However the officer contends that his arrest and detention were illegal and that it should be so declared. In the first place he contends that he cannot be considered to be an officer to whom the Army Act applies since he has not been re-commissioned after his commission was revoked by a notification of the President. In the second place he contends that he was not a deserter and could not be deemed to be a deserter either, as the procedure prescribed by Section 106 of the Army Act was not complied with.

11. The effect of the earlier judgment in the civil appeal was stated in the earlier judgment itself. It was said, "the inevitable result of the invalidation of the termination of service is that the officer comes back into service". If as stated in the judgment in the civil appeal the result was that the officer automatically came back into service, we do not think that there was any need for re-commissioning him. There is, therefore, no substance in the first point raised by Captain Virendra Kumar.

12. The next question is whether Captain Virendra Kumar was a deserter. Now, neither the

expression "deserter" nor the expression "desertion" has been defined by the Army Act. However under Section 38 of the Army Act desertion and aiding desertion are made offences. Section 38(1) says :

Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,

if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and

if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

Section 39 deals with the offences of absence without leave and it is as follows :

Any person subject to this Act who commits any of the following offences, that is to say, -

(a) absents himself without leave; or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department to which he belongs, has been ordered on active service, fails without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or

(e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

Section 104 provides for arrest by civil authorities of persons accused of offences under the Act and it says :

Whenever any person subject to this Act, who is accused of any offence under this Act, is within the jurisdiction of any magistrate or police officer, such magistrate or police officer shall aid in the apprehension and delivery to military custody of such

person upon receipt of a written application to that effect signed by his commanding officer.

Section 105 provides for the capture of deserters and is in the following terms :

(1) Whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a magistrate, and shall deliver the deserter, when apprehended, into military custody.

(2) Any police officer may arrest without warrant any person reasonably believed to be subject to this Act, and to be a deserter or to be travelling without authority, and shall bring him without delay before the nearest magistrate, to be dealt with according to law.

Section 106 provides for an enquiry into absence without leave and the deeming of a person declared by the Court of Inquiry to be an absentee to be a deserter. It says :

(1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a Court of Inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

Sections 38 and 39, and Sections 104 and 105 make a clear distinction between 'desertion' and 'absence without leave', and Section 106 prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by Section 106 is followed. Since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the animus. If there is animus deserendi the absence is straightway desertion.

13. As we mentioned earlier neither the expression 'deserter' nor the expression 'desertion' is defined in the Army Act. However we find paragraph 418 of the Artillery Records Instructions, 1981 refers to the distinction between desertion and absence without leave. It says :

418. A person is guilty of the offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he so absented himself, he intended either to quit

the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. Therefore, the distinction between desertion and absence without leave consists in the intention. (AO 159/72). When a soldier absents himself without due authority or deserts the service, it is imperative that prompt and correct action is taken to avoid complications at a later stage.

We also find the following notes appended to the Section 38 of the Army Act in the Manual of the Armed Forces :

2. Sub-section (1) - Desertion is distinguished from absence without leave under AA Section 39, in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire picquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.
3. A person may be a deserter although he re-enrols himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).
4. Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence e.g., apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under AA Section 106 is not by itself a deciding factor if other evidence suggests the contrary.

In Black's Law Dictionary the meaning of the expression 'desertion' in Military law is stated as follows :

Any member of the armed forces who - (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion. Code of Military Justice, 10 U.S.C.A. 885.

14. As we mentioned earlier, the Army Act makes a pointed distinction between 'desertion' and 'absence without leave' simpliciter, 'Absence without leave' may be desertion if accompanied by the necessary 'animus deserendi' or deemed to be desertion if the Court of Inquiry makes the declaration of absence prescribed by Section 106 after following the procedure laid down and the person declared absent had neither surrendered nor been arrested.

15. In the present case the Military authorities appear to have treated the officer as a deserter and did not deem him to be a deserter. The apprehension roll as well as the tentative charge-sheet issued to him treat him as a deserter. According to the authorities the officer, when he failed to report as directed, had no intention of rejoining duty, in other words he had the necessary 'animus deserendi'. This is what is said in the counter-affidavit :

When he failed to report at his new unit also, the Army authorities were left with no choice but to issue an apprehension roll for his arrest since by now it was clear to the Army authorities that Captain Virendra Kumar was not only absent without leave but had no intention to join duty for which he was ordered and thus it was a clear case of desertion.

If the authorities thought that the officer who was absent without leave had even then no intention of coming back to duty, then there was no question of observing the procedural requirements of Section 106 and then deeming him to be a deserter.

16. It was within the competence of the authorities to prima facie decide whether the officer when he absented himself did or did not intend to return to duty. Whether, in the instant case, the authorities were justified in concluding that Captain Virendra Kumar had no intention of resuming duty, is not a matter upon which we are entitled to express any opinion. The position would be otherwise if the decision of the authorities could be shown to be mala fide. On the material available, we are not in a position to say that the decision was mala fide. The authorities had handed over a cheque for Rs one lakh and fifty-four thousand towards arrears of salary, etc. for the period from September 30, 1972 to July 20, 1980 and had indicated that as regards the arrears of salary and allowances for the subsequent period, the matter was pending with the Controller of Defence Accounts, Pune. At the time of the payment of the amount of Rs one lakh and fifty-four thousand, the officer was specifically told in the accompanying letter that separate posting orders would be issued. Thereafter he was informed about the posting to Ambala and was given time till March 7, 1981. If the officer had any grievance about the posting, he had ample time to approach the Court for appropriate directions. He did not do that. He wrote two letters to the Military authorities in neither of which he protested against the posting at Ambala. He made no effort to comply with the direction of the authorities to report to the Headquarters every day until he reported at Ambala. It was in those circumstances that an 'apprehension roll' was issued on March 19, 1981. The worst that could be said against the issuance of the apprehension roll was that the authorities could have approached and sought the directions of the court as to what was to be done consequent on the failure of the officer to report for duty. But that was not really necessary.

17. The officer contended that a Court of Inquiry was indeed constituted into the question of his absence without leave and this showed that the authorities were conscious that they had to comply with the requirements of Section 106 of the Army Act. If they were conscious that the requirements of Section 106 had to be complied with, it was argued, and if they nevertheless arrested him as a deserter without following the procedure laid down by Section 106, it exposed the action of the authorities as mala fide. We do not agree with this submission. Under the Army Rules (Chapter VI), a Court of Enquiry could be constituted not only for the purpose of Section 106 but also for the purpose of collecting evidence with regard to any matter which might be referred to it. Obviously this is meant to be a safeguard against frivolous or baseless accusations. In the present case also, a Court of Enquiry was constituted as a prelude to a court-martial. Because a Court of Enquiry was constituted, it is not possible to hold that it was merely a belated attempt to comply with the requirements of Section 106.

18. Captain Virendra Kumar also argued that he was not obliged to accept the offer of appointment as it was not in conformity with the direction of the court that he should be offered a sedentary position in keeping with his state of health and proven ability. The answer of the authorities was that he had no right to refuse to go to Ambala to resume duty. It was proposed to give him a suitable sedentary posting. It was not open to the officer to straightway, virtually, reject the offer without even going to Ambala and finding out what position was proposed to be given to him. We do not think that the authorities could be blamed for insisting on the officer first reporting for duty at Ambala.

19. As we said earlier neither party thought fit to ask the court for directions though it was in view of the fact that the contempt application as well as the writ petition were both pending in the court and it was pursuant to the direction of the court that the parties were supposed to be acting. If one party was obstinate, the other party was obdurate and both words mean the same thing. We are however not concerned with the question whether the authorities were justified in treating him as a deserter since that is not a question which we can properly decide in these proceedings.

20. Turning to the question whether there has been any non-compliance with the directions given by this Court in the judgment in Civil Appeal No. 475 of 1976, it is clear that initially there was non-compliance as no action was taken within the period of three months stipulated by the Court for giving effect to its directions. The authorities do not appear to have taken any steps - the affidavit is curiously totally silent on what was done to comply with the order of the Court in the three months following the judgment - to implement the directions of this Court. All that was done to file a petition for review and wait for its disposal by the Court. That certainly was not compliance with the judgment of the Court. Things appear to have started moving after the review petition was dismissed. Apparently, the authorities were under the impression that they should await the disposal of the review petition. But things did start moving after the disposal of the review petition and therefore, we guess that they must have somehow gathered the impression that they should await the disposal of the review petition. Thereafter the officer was posted to Nasik Road Camp and this posting was expressly accepted by the officer as evident from the endorsement made by him. The officer would now explain the endorsement by saying that he must have been out of his mind at that time to accept the posting. He puts forward his state of health as the reason for his being "out of his mind". We are afraid we cannot accept this explanation, which appears to us to be too glib. We have also narrated the events which took place subsequently and the payment of the sum of Rs one lakh and fifty-four thousand by cheque to the officer on February 20, 1981 and the further statement that the question of paying the arrears subsequent to July 20, 1980 was pending the consideration of the Controller of Defence Accounts, Pune. Thus we see that by February 21, 1981, though not by July 21, 1980, the directions given by the Court had been substantially complied with. We are satisfied that in so doing, the authorities did not intend to disobey the orders of this Court. There was no wilful non-compliance and we do not, therefore, think that we should take any further action in the contempt application. On our finding that the authorities were entitled to prima facie proceed on the basis that he was a deserter as a result of his failure to report for duty at Ambala or at the Headquarters every day until he reported for duty at Ambala, the application for the issue of a writ of habeas corpus has also to be dismissed.

21. While dismissing the contempt application and the application for the issue of a writ of habeas corpus, we direct the Army authorities not to arrest or detain Captain Virendra Kumar unless he is convicted in court-martial or some other proceeding. But we do hope that the authorities will not further pursue the officer with any proceeding by way of court-martial or otherwise. We also direct the authorities to pay to Captain Virendra Kumar arrears of salary from July 21, 1980 to February

21, 1981, if not already paid. In view of the failure of the officer to accept the posting to Ambala, we absolve the Military authorities from making any further offer of appointment or posting to the officer. The officer will be treated as if he was discharged from service on February 21, 1981 and all benefits, retiral or otherwise, to which he may be entitled, may be paid to him on that basis. There will be no order as to costs in the contempt application or in the writ petition.

22. After his earlier discharge from the Army in 1970, the officer was admitted to the Bar and was practising as an advocate. The Delhi Bar Council which had admitted him to the Bar suo moto issued a notice why his license to practise should not be cancelled as at the time when he applied for enrolment to the Bar Council, he had withheld information that he had been discharged from Military service on September 30, 1970, that he had filed a petition in the Court questioning his discharge, that the petition had been allowed, that he did not report for duty though deemed to be in Military service and that he had been arrested for not joining duty and was on parole. He was also asked to show cause why his license should not be forthwith suspended as he could not be in the legal profession while he was in Military service. Captain Virendra Kumar submitted an explanation. Finally, the Bar Council, Delhi while recording the finding that no material facts had been concealed by Captain Virendra Kumar from the Bar Council at the time of his enrolment, nevertheless removed his name from the roll on the ground that the judgment of the court in the civil appeal had restored him to Military service and he was, therefore, not competent to simultaneously practise. The Bar Council of India to whom Captain Virendra Kumar preferred an appeal practically reproduced verbatim the order of the Delhi Bar Council. The finding that Captain Virendra Kumar had not withheld any information at the time of his enrolment was confirmed but nevertheless it was held that Captain Virendra Kumar was not entitled to practise as he had been restored to Military service by the judgment of the court in Civil Appeal No. 475 of 1976. Captain Virendra Kumar filed Criminal Writ Petition No. 1344 of 1985 questioning the orders of the Bar Council of Delhi and Bar Council of India. This has been heard by us as an appeal under Section 38 of the Advocates Act.

23. At the outset we mentioned that Captain Virendra Kumar was asked to show cause why his license should not be cancelled for withholding certain information at the time of his admission to the Bar. He was absolved of that charge. The Bar Council was, therefore, not right in removing him from the rolls on a charge which he was not asked to meet. The orders of the Bar Council of Delhi and Bar Council of India are, therefore, set aside. It will be open to the Bar Council of Delhi to take appropriate action, if they so desire after giving a proper notice to show cause. The appeal is allowed.

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