CALCUTTA HIGH COURT

Nripendra Nath Bagchi

Vs.

Chief Secretary

Civil Revn. Case No. 520 of 1955

(P.B. Mukharji, Bose and P.N. Mukherjee, JJ.)

01.07.1960

JUDGMENT

P.B. Mukharji, J.

1. We are unanimous that the Rule in this case must be made absolute.

2. Who controls the subordinate judiciary in the State and who in particular exercises disciplinary control over members of the Subordinate Courts of the States under the Constitution of India and what principles govern the procedure of disciplinary Tribunals are the important questions raised for determination on this Reference by the Chief Justice.

3. The petitioner Shri Nripendra Nath Bagchi, a senior member of the West Bengal Judicial Service officiating in the Higher Judicial Service and an Additional District Judge, at the fag end of his career of service extending over a quarter of a century and when about to reach 55 years, the age of compulsory retirement under his conditions of service, was served with a notice to appear before a Disciplinary Tribunal and on its findings was dismissed from service by an order, of the State Government dated 25th May, 1954 after a departmental enquiry.

4. The petitioner reached the age of superannuation on the 31st July, 1953. Only about 10 days prior to that date he was suspended from service on the 20th July, 1953. By an order dated the 14th July, 1953, hardly a week before his suspension, the Government sanctioned his retention in the service under Rule 75(a) of the West Bengal Service Rules. The language of the order of the 14th July, 1953 numbering 2863-GA/IL-14/53 substituting an order of the same number and date appears as follows :

> "I am directed to state that Government had been pleased to sanction, under Rule 75(a) of the West Bengal Service Rules, Part I, the retention in service of Nripendra Nath Bagchi, Additional District and Sessions Judge, 24 Parganas for a period of two months with effect from 1st August, 1953, the date of his compulsory retirement, in the interest of the public service."

5. No consent of the petitioner for retaining his service was called for or obtained. The two expressions in the above order (1) "Retention in service' and (2) "in the interest of public service" do not on the facts of this case mean what they say. Here "retention in service" means suspension from service because from the date when he was "retained" in service he was suspended from service. The other expression "the interest of the public service" does not mean actual service to the public but meant only departmental enquiry against him. His service was extended from time to time with a view to enable the Government to start and conclude the departmental enquiry against him during which the petitioner was allowed to live on a bare subsistence allowance.

6. The departmental enquiry in this case was conducted by Sri B. Sarkar, I. C. S., Commissioner of Burdwan Division, and thereafter a member of the Board of Revenue. No format appointment of Sri Sarkar by the Governor has been placed before us and it appears that the Chief Secretary asked him to conduct the enquiry. The Enquiring Officer submitted his report on 21-12-1953 holding him guilty of most of the eleven charges against him and absolving him from a few. The report admits that the departmental proceedings were drawn up against the petitioner under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. The Enquiring Officer concludes his report by saying that he is not in a position to suggest any punishment as that will have to be determined after considering the records of the officer. From this it follows that the Enquiring Officer could not recommend the punishment of dismissal even on the charges as found by him. No new materials have been placed before us to show what, if any, blemishes marred his long record of service other than what he had to face in this impugned and challenged departmental enquiry, and thereby merit the punishment of dismissal which even the Tribunal could not recommend.

7. After the order of dismissal the petitioner appealed to the Governor who rejected his appeal.

8. Thereupon the petitioner moved this Court under Article 226 of the Constitution for a writ of certiorari to quash the report, records, findings and proceedings of the departmental enquiry and for a writ of mandamus restraining the respondent-state from acting on the order of dismissal. The application came before Mr. Justice D.N. Sinha who referred the matter to the learned Chief Justice for constitution of a larger Bench on the ground that the petition raised important questions regarding the interpretation of the Constitution and the control of the Court over the members of the judicial service. In the order of reference the points raised for decision are as follows :

> (1) That the provisions of Rule 75(a) of the West Bengal Service Rules have not been complied with.
> (2) That the service of a civil servant cannot be extended merely for the purpose of dismissal.
> (3) That the control over the District Courts and the Courts subordinate thereto is vested with the High Court under Article 235 of the Constitution, and the authority competent to take disciplinary proceedings and action against the petitioner or to deal with in any way was the High Court and not any other authority.
> (4) That the provisions of the Civil Services (Classification, Control and Appeal) Rules in

so far as they authorize any authority other than the High Court to take disciplinary action against the person holding the post of petitioner are ultra vires and void under Article 235 of the Constitution.

(5) That, in any event, the entire departmental enquiry and proceedings have been conducted in violation of the principle of natural justice. The learned Chief Justice constituted this Special Bench to determine the points raised on this Reference and to dispose of the entire application.

9. The crucial enquiry is to find the authority competent to exercise disciplinary jurisdiction over members of the Subordinate Judiciary of the State, presiding in the District Courts and the Courts subordinate thereto. The most relevant article of the Constitution on the point is Article 235. Its true interpretation depends on the Constitutional context and the language of this Article.

10. Article 235 appears in Part 6, Chapter VI of the Constitution under the rubric "Subordinate Courts". In the preceding chapter V, the Constitution deals with the High Court in the States. The removal of a Judge of a superior Court like the Supreme Court and the High Court is regulated by Article 124 read with Article 218 of the Constitution. No such express Article of the Constitution provides for the procedure for removal of any member of the subordinate judiciary. Chapter VI of the Constitution deals with the subordinate courts in five articles being Articles 233 to 237. Article 233 deals with the appointment, posting and promotion of District Judges in the State and the authority for such appointment, posting and promotion is expressly said there to be the Governor of the State in consultation with the High Court of the State. Article 234 deals with appointment to the judicial service of the State of persons other than such District Judges. That appointing authority is again the Governor of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and the High Court of the State. Under these two articles 233 and 234 of the Constitution, the High Court is only a consultative authority. Article 236 provides a dictionary for the meaning and interpretation of the two expressions used in this Chapter VI, namely, "District Judge" and "Judicial Service." The expression "District Judge" includes inter alia an Additional District Judge, which the petitioner was. The Government argument to exclude the petitioner from this definition on the ground that he was only officiating as Additional District Judge cannot be upheld because the Constitution includes all additional District Judges irrespective of the fact that they are permanent or officiating. We cannot therefore disinherit the petitioner from the benefits of this Constitutional definition by reading limitations into the Constitution which are not there. In any event the Constitutional definition is not intended to be exhaustive because of the word "includes". Besides the expression "Judicial Service" means a "service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts, inferior to the post of District Judge." An acting district Judge like the petitioner comes within this definition of judicial service as he certainly is "intended to fill the post of district judge" within the meaning of that definition.

11. The other Constitutional context for a proper interpretation of Article 235 of the Constitution is provided by the Chapter on Services in part 14 of the Constitution. There Article 309 inter alia provides for the recruitment and conditions of service of persons serving the State, and regulation of the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of any State by Acts of the appropriate Legislature, subject to the provisions of the Constitution. There is a proviso to that Article which makes it competent, inter

alia, for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article 309. It goes on to provide that any rules so made shall have effect subject to the provisions of any such Act. No such Act has been passed to regulate the conditions of service of the petitioner. It is followed by Article 310 which says that except as expressly provided by the Constitution, every person who is a member of the civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State. But such "pleasure" cannot afford to be unconstitutional and can only be exercised in strict accord with the express provisions of the Constitution. By reason of the words "except as expressly provided" in Article 310, it appears the "pleasure" therein cannot be qualified or limited by any unexpressed implications or inferences. Then Article 311 provides inter alia for dismissal, removal or reduction in rank of persons employed in civil service of the State. The gist of this provision is that such a civil servant cannot be dismissed or removed by any authority subordinate to that by, which he was appointed and that such a civil servant shall not be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him except in certain specified cases mentioned in that Article. The result is that Article 311 of the Constitution, being an express provision, acts as a rider of limitation on the "pleasure" under Article 310. By Article 313 of the Constitution all laws in force immediately before the commencement of the Constitution and applicable to public service shall continue in force "so far as consistent with the provisions of the Constitution" and until other provision is made in this behalf under the Constitution.

12. The expressions "disciplinary jurisdiction" or "disciplinary matters" are not expressly referred to in any of the Articles I have noticed so far. But in Article 320(3)(c) it is expressly provided inter alia that the State Public Service Commission shall be consulted "on all disciplinary matters" affecting a person serving under the Government of a State in a civil capacity including memorials or petition relating to such matters.

13. From this broad review of the relevant Articles of the Constitution three possible competing institutions to exercise disciplinary authority or jurisdiction over a member of the subordinate judiciary can be envisaged. The three competing claimants for such authority are the High Court of the State, the Government of the State and the State Public Service Commission. The important point for decision on this reference is to which of these three institutions lawfully belongs under the Constitution the power to exercise disciplinary authority and jurisdiction over the members of the subordinate judiciary in the State.

14. Undoubtedly, under Article 309 the State Legislature by an Act can regulate the recruitment and conditions of service of such persons. Equally undoubtedly with the limits of the proviso of that Article 309 the Governor of the State can make rules regulating the recruitment and conditions of service of such persons. Thirdly, no such person can be dismissed or removed from service by an authority subordinate to that by which he was appointed and as such public servant holds office under the pleasure of the Governor of the State under Article 310, and as the power to appoint under Articles 233 and 234 of the Constitution belongs to the Governor which read with Section 16 of the General Clauses Act, 1897 includes power to dismiss or suspend, the Governor is the authority to remove or dismiss such public servant. Fourthly, by the transitional

provisions of the Article 313, pre-existing laws before the commencement of the Constitution applicable to such public service are constitutionally recognized provided there is no inconsistency with the provisions of the Constitution and provided no other provision is made in that behalf under the Constitution.

15. These four considerations define the authority of the State Government in this respect. But one conclusion is irresistible that no express power is given to the Government of the State as such to exercise disciplinary authority and jurisdiction in respect of such a public servant.

16. Then comes the consulting capacity of the State Public Service Commission in Article 320 of the Constitution. It casts an obligation without stating, on whom, to consult the Commission on all disciplinary matters and it is here that "disciplinary matters" are expressly stated in the Constitution. While the obligation to consult is there it has been held that the advice given on such consultation is not necessarily binding on the seeker of the advice whoever he may be. The constitutional controversy decided by the Supreme Court that this provision is not mandatory but only directory is not relevant for decision on this reference. Its relevance for the present purpose is to show that the State Public Service Commission must be consulted on all disciplinary matters.

17. Nothing appears on record here to prove that the Government in this case consulted the Commission before deciding to take disciplinary action against the petitioner and before setting up the authority to conduct the enquiry although it is on record that the Government duly consulted the Public Service Commission after report of the enquiring officer and before actually making the order dismissing and removing the petitioner from service.

18. From these constitutional provisions this much is clear that while no express constitutional provision relating to the disciplinary jurisdiction is made authorizing the Government to exercise it, a clear provision is made for consulting the Public Service Commission on such matters. It follows that whoever is concerned should consult the Commission, and the decision to take disciplinary action against a public servant and to set up the actual disciplinary Tribunal and its personal should form subject matter of such consultation, as coming within the wide general words "all disciplinary matters" in Article 320(3)(c) of the Constitution.

19. It is now necessary to examine the power assigned by the Constitution to the High Court in this respect at this point. It is therefore essential to focus attention on the actual language of Article 235 of the Constitution. It provides :

> "The control over District Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court, but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

20. On an interpretation and an analysis of Article 235 of the Constitution I draw four broad and

outstanding conclusions.

21. First, the Constitution in express language vests in the High Court "the control over District Courts and Courts subordinate thereto." The High Court is vested with this control. It is a major departure from the provisions of the old Government of India Act 1935 whose Sections 254-255 can be said to be the immediate ancestors of these Articles 233 to 235 of the present Constitution. Sections 254 and 255 and particularly Section 255 (3) of the Government of India Act 1935 did not mention the "control" over District Courts and Courts subordinate thereto. This is new law in the present Constitution. Adequate meaning, due regard and appropriate effect must be given to this new Constitutional provision.

22. Secondly, this control does not (i) take away the right of appeal under the law regulating the conditions of service or (ii) authorize the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. The two expressions "right of appeal" and "deal with him" belong to the domain of discipline and disciplinary matters. "Dealing with him" and the "right of appeal" are integral parts of disciplinary control and relevant there under. These words therefore inter alia import disciplinary control. Therefore, the word "control" in Article 235 of the Constitution would include disciplinary control and jurisdiction subject to the two exceptions to be found in the condition of his service protecting first his right of appeal and secondly the manner of dealing with him. Disciplinary action is part of "dealing" with a person and this second limitation only means that such, disciplinary action must conform to the conditions of his service. These two limitations do not divest the High Court's Control but only regulate the manner and procedure of the exercise of that control as laid down in the conditions of service. These conditions of service may certainly include provisions for disciplinary action and therefore can equally certainly be made by an Act of the State Legislature or regulated by the Governor of the State under Article 309 of the Constitution but neither the Governor nor the Act of the State Legislature can override the Constitution by divesting the High Court of the control the Constitution has vested in it. If the Governor or the State Act provides for disciplinary control over subordinate courts, then such provision has to be consistent with the High Court's control. In other words the Governor or the State Act can only say how and in what manner the High Court shall exercise such disciplinary control and not that the High Court shall not have that control or that some other authority will have that control.

23. Thirdly, the word "including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of the State and holding any post inferior to the post of a District Judge" on a plain interpretation means in the first place, that posting, promotion and leave are only illustrative of the types of "control" mentioned in the Article and are not exhaustive. To my mind it is not possible to construe the word "control" as being limited only to the three cases of posting, promotion and leave as I shall presently show. In the second place, the expression "persons belonging to the judicial service of a State and holding any post inferior to the post of a District Judge" is one of limitation only in respect of posting, promotion and leave and not in respect of other controls including control by disciplinary jurisdiction and action. The Advocate General's contention that the control in Article 235 does not extend to the post of a District Judge but only to those who are inferior to him cannot be accepted because in that event that control over the District Judge will belong to the Government which Article 233 expressly limits only to appointment, posting and promotion of District Judges. If it was the intention of the Constitution that other control of District Judges, as distinguished from control in respect of their

appointment, posting and promotion, was also to be with the Government, then Article 233 would not have expressly confined itself only to appointment, posting and promotion of District Judges. Similarly, again so far as persons other than District Judges are concerned, Article 234 expressly limits itself to appointment. Therefore, it follows that the word "control" in Article 235 means all residuary controls except those which are already expressly provided for in the two preceding Articles 233 and 234. Naturally, having already given the power of posting and promotion of District Judges only to the Governor under Article 233, this posting and promotion (with the addition of leave) of District Judges had to be excluded from Article 235 of the Constitution. That in my judgment is the true meaning and import of the expression "holding any post inferior to the post of a District Judge" in Article 235 of the Constitution.

24. Fourthly, the expression "the control over District Courts and Courts subordinate thereto" in Article 235 must necessarily include control over District Judges they being the presiding officers of the District Courts. There can be no real control without power to enforce or take disciplinary action. The Constitution having vested the control over District Courts and Courts subordinate thereto in the High Court, it is inconceivable how the High Court can exercise that control if disciplinary actions are taken by some other authority. Control in the ordinary acceptation of that term must include discipline and disciplinary actions against persons intended to be controlled. Subba Rao, C.J. delivering judgment of a Division Bench of the Andhra High Court in *Mohammed Ghouse v. State of Andhra*[1], explained it clearly at page 68 of the Report by saying :

> "The control will certainly be ineffective if the authority exercising the control cannot take disciplinary action against a person under its control. To put it in other words, a superior authority cannot control the actions of a subordinate if he cannot take disciplinary action against him."

25. In addition to this control, the High Court has the "superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction" under Article 227 of the Constitution. The High Court of a State therefore has superintendence over all the subordinate Courts in that State. This superintendence in Article 227(1) Is not limited to specific cases mentioned in sub-articles (2) and (3) of Article 227 because of the express language "without prejudice to the generality of the foregoing provision" in Article 227(2). This superintendence in my opinion also imports control. There can be no superintendence without control. Therefore, I read Article 227 of the Constitution also to include power of control in the High Court in respect of its subordinate courts, including

[1] AIR 1955 And 65

control by disciplinary proceedings and actions.

26. I read the Constitution and the scheme of its different articles to mean that the High Court is vested with disciplinary control over members of the judicial service in the subordinate courts of the State. It is a conclusion eminently agreeable to the very necessary independence of the judiciary as it emancipates the subordinate judiciary of the State from unconstitutional executive control. I read and interpret Article 235 of the Constitution as the State Subordinate Judiciary's Constitutional Charter of liberty according well with Article 50 of the Directive Principles of the

State Policy under the Constitution of separating the judiciary from the executive in the public services of the State.

27. The Andhra High Court in AIR 1955 Andhra 65, where Subba Rao, C.J. discusses and analyses Articles 227, 233, 234, 235 and 309 of the Constitution, takes at page 68 the same view as we are taking of Article 235 of the Constitution and the meaning of the word "control" therein. In that case it is held that conditions of service providing in effect that the High Court shall not have power to take a disciplinary action either in exercise of its power of superintendence under Article 227 or under the power of control under Article 235 is constitutionally invalid. Indeed the point of the decision was that the suspension of the Subordinate Judge by the Registrar of the Madras High Court in its disciplinary jurisdiction was valid and it could not be contended that the High Court had no power to continue disciplinary proceedings against the Subordinate Judge after the Andhra Civil Service Disciplinary Proceedings Tribunal Rules came into force and that the said power was vested only in the Tribunal for disciplinary jurisdiction. This case went up to the Supreme Court where Vankatarama Iyer, J. in *Mohammad Ghose v. State of Andhra*[2], upheld the decision without expressing any particular opinion on this point although the point was noticed at page 249. The Supreme Court did not dissent from the view taken by Subba Rao, C.J. This case then came back to the Andhra High Court and the further decision of the Andhra High Court is reported in *Mohammed Ghouse v. State of Andhra Pradesh*[3], holding that (1) the word "court" includes persons presiding over those Courts and other functionaries of those Courts and that (2) the High Court has certainly jurisdiction to hold enquiries into the conduct of judicial officers and it is clear that it is not confined merely to the holding of a preliminary enquiry for the purpose of ascertainment whether there is a prima facie case for answering the charge. We respectfully agree with these two decisions of the Andhra High Court.

28. It is no doubt true that under Article 311 read with Articles 310, 233 and 234 of the Constitution the appointing authority in respect of a member of the judicial service of a State being the Governor, the actual dismissing authority must also be the Governor. That only means that the actual order of dismissal has to be made by the Governor. It does not however mean that in supersession of the control of the High Court under Article 235 of the Constitution the Governor or the Government will be entitled to conduct disciplinary proceedings or set up disciplinary Tribunal apart from the High Court. Different Articles of the Constitution on the same subject should, wherever possible, be read consistently and not in resistance with one another. The best reconciliation of these different articles

[2] AIR 1957 SC 246

[3] AIR 1959 And Pra 497

of the Constitution will lie in the High Court conducting the disciplinary enquiry and sending its report at the conclusion of the enquiry to the Government to make the appropriate order of dismissal or removal. That the Government may not in a particular case accept the report and recommendation of the High Court exercising disciplinary jurisdiction cannot alter the interpretation of the Constitution when it provides dual authority first by vesting control in the High Court under Article 235 and secondly by resting appointment, tenure and dismissal with the Government under Articles 233, 234, 310 and 311, of the Constitution. This duality is not an unmixed evil but is an example of that wholesome constitutional principle of checks and balances so that no one institution can afford to be tyrannical in the exercise of its powers and thereby ensuring the much needed security of public services in India.

29. It is necessary to add here one more reason to say why the argument is unsound that because the dismissing authority in this case is the Governor or the Government the particular dismissing authority should alone conduct the disciplinary enquiry or set up the disciplinary Tribunal. The reason is this. Disciplinary enquiry may not necessarily involve or ultimately result in either dismissal or removal or even reduction in rank. It may involve other penalties such as censure and denial of promotion which do not attract the limitations under Article 311 of the Constitution or it may find that the public servant is not guilty at all in which event there will be no penalty. Before a disciplinary authority actually makes the enquiry and comes to a finding, it is not possible to anticipate whether it will result in dismissal or removal or reduction in, rank, so as to attract the operation of Article 311. Therefore the provisions of Article 311 of the Constitution cannot be read as divesting the control which Article 235 vests in the High Court, but only as regulating and prescribing the conditions under which such control has to operate in the three cases of (1) dismissal, (2) removal and (3) reduction in rank. After the disciplinary authority has conducted the enquiry and reported on its finding, the High Court in case of dismissal or removal must send it to the Governor, and in case the punishment of dismissal or removal or reduction in rank is going to be imposed as a penalty by the appropriate authority, reasonable opportunity must be given to the person concerned against whom the action is proposed to be taken under Article 311(2) of the Constitution.

30. In the facts of this case the High Court did not conduct the disciplinary proceedings nor was it consulted by the Government before the Tribunal or the Enquiry Officer was appointed by the Government to conduct the enquiry. All that was done by its letters dated 15 July, 1953 and 11th July, 1953 was to present to the High Court the accomplished fact that (i) charges had been framed against the petitioner and the results obtained on the enquiry held by the Anti Corruption Department and (ii) the appointment of the Commissioner of Burdwan Division had been made to hold the departmental enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. By the letter of the 15th July, 1953, the Government proposed inter alia to post some one else as an Additional District Judge in place of the petitioner under suspension and sought the opinion of the High Court by its letter dated 17th July, 1953 only on such posting and the High Court replied stating that there was no objection to the posting proposed. The High Court however was neither asked to constitute the Tribunal nor conduct the departmental proceedings nor take disciplinary action against the petitioner.

31. I am therefore of the opinion that the appointment, constitution, proceedings and the report of the disciplinary tribunal are wholly without jurisdiction and unconstitutional in violation of tile Article 235 of the Constitution and therefore void and must be set aside. I answer questions (3) and (4) on the order of Reference set out above, in the affirmative.

32. The second important question for determination on this reference is whether after the age of compulsory retirement there can at all be simultaneous extension and suspension of service only with a view to begin, conduct and conclude a departmental enquiry, and thereby to punish a public servant. Learned counsel for the petitioner has bitterly criticized such extension of service as conscription and as reducing public service to slavery and described such extension as a kind of forced labour prohibited by Article 23 of the Constitution.

33. This question has to be judged with reference to the service conditions of the petitioner contained in West Bengal Service Rules. The most relevant Rule on the point is Rule 75(a) of the

West Bengal Service Rules. This Rule appears in Ch. X of the West Bengal Service Rules under the title "compulsory retirement". Rule 75(a) reads as follows :

> "Except as otherwise provided in this Rule, the date of compulsory retirement of a Government servant, other than a member of the clerical staff or a servant in inferior service, is the date on which he attains the age of 55 years. He may however be retained in service beyond that date with the sanction of the Government on public ground which should be recorded in writing : but he shall not be retained after attaining the age of 60 years except in very special circumstances."

34. These Rules were made and amended from time to time by the Governor under Section 241 of the Government of India Act 1935. Rule 1 says that these West Bengal Service Rules came into force on 1st January, 1941. They continue to be in force. Rule 2 expressly provides that subject to the provision of the Government of India Act 1935 and except where it is otherwise expressed or implied these Rules apply to all members of services and holders of post whose conditions of service the Government of West Bengal are competent to prescribe. Among such services the petitioner's judicial service is included. It is conceded by the learned Advocate General that these West Bengal Service Rules alone apply to the petitioner, and the Fundamental Rules under Section 96-B of the Old Government of India Act 1919 do not apply. Having regard to this concession it is unnecessary to give detailed reasons why Fundamental Rules can no longer apply to the petitioner.' This view is supported by a decision of a single Judge of this Court in *Hirendra Nath, Ray v. State of West Bengal*[4], at p. 457 holding, that the West Bengal Service Rules are comprehensive and self-contained. This conclusion can also be fortified by Section 276 of the Government of India Act 1935 which continued the pre-existing Fundamental Rules "until other provision is made under the appropriate provisions of this part of this Act." As "other provisions" have been made by the West Bengal Service Rules under Section 241 of the Government of India Act, they and not the Fundamental Rules must apply on this point of compulsory retirement. Rule 75(a) of the West Bengal Service Rules deliberately selected only Rule 56(a) of the Fundamental Rules and

[4]59 Cal WN 450

consciously discarded sub-rule (d) of Fundamental Rule 56. I shall presently show the effect and importance of this conscious departure.

35. Rule 75(a) of the West Bengal Service Rules is one of the terms and conditions of the Judicial Service. The words "be retained in service" mean in plain language that he has to be in service even after 55 years. To be "in service" can only mean that he must be doing or performing his service even after he attains 55 years. It is plainly intended to retain Government servants even after the age of compulsory retirement when their services to the public are thought to be indispensable. Performance of the service is the very breath of this Rule. There can be no "retention in service" within the meaning of that Rule if the public servant is prevented from performing that very service by an order of suspension. "Public ground" under Rule 75(a) of the West Bengal Service Rules, therefore must be a ground which recognizes his continued employment in and his continued performance of service. This Rule in its ordinary signification cannot therefore import a case of retention, in service by suspension. In my view it cannot mean that service can be extended only with a view to suspend the public servant. That will be building a legal myth entirely inconsistent with the whole context and purpose of extension of service

beyond 55 as contemplated in Rule 75(a) of the West Bengal Civil Service Rules. Extension of service by suspension is a plain contradiction on the language and construction of Rule 75(a) of the west Bengal Service Rules.

36. The only argument put forward to meet this situation is that the purpose of conducting a departmental enquiry against the Govt. servant is itself a public ground for which his services may be retained even after the age of compulsory retirement. Departmental, enquiry is contended to be a "public ground" for the reason that such an. enquiry is made to uphold and maintain the morale, integrity and standard of public service. I am unable to accept that argument for many reasons.

37. My first reason is that words "be retained to service" and the words "public ground" must mean that the public ground is based on his performing the service on the interpretation and reasons of construction I have just stated, I shall enforce this conclusion by a comparison with Fundamental Rule 56 in Chapter IX relating to "compulsory retirement". Fundamental Rule 56(a) is in material particulars similar to rule 75(a) of the West Bengal Service Rules but there are different sub-clauses (b), (c) and (d) in the said Fundamental Rule 56. Sub-clause (d) of Fundamental Rule 56 expressly provided :

> "Notwithstanding anything contained in clauses (a), (b) and (c), a Government servant under suspension on a charge of misconduct shall not be required or permitted to retire on reaching the date of compulsory retirement, but shall be retained in service until the enquiry into the charge is concluded and a final order is passed thereon by competent authority."

38. This crucial provision in sub-clause (d) of Fundamental Rule 56 has not been re-introduced in the West Bengal Service Rules. Rule 75(a) of the West Bengal Service Rules does not incorporate this particular provision. The effect of its absence in the West Bengal Service Rules cannot but be obvious. The Fundamental Rues realised that under Fundamental Rule 56(a) the Government servant under suspension could not be continued in service after the age of compulsory retirement and therefore, an express special provision was made to extend that age of compulsory retirement by the period of the departmental enquiry against his misconduct. Fundamental Rule 56(d) therefore used the words "notwithstanding anything contained in clause (a)" which means that Fundamental Rule 56(a) left to itself would not have permitted this kind of retention in service, after the age of compulsory retirement only for the purpose of departmental enquiry. Therefore, as no provision similar to Fundamental Rule 56(d) appears in Rule 75(a) or any other Rules of the West Bengal Service Rules, the petitioner's service cannot be retained after the age of compulsory retirement by suspending him from that very service, only for the purpose of departmental enquiry and disciplinary action. Indeed the very language of Rule 75(a) expressly excludes such extension by the opening words "except as otherwise provided in this rule." It is to my mind not "otherwise provided" in Rule 75(a) on its own interpretation to include such, retention.

39. My second reason is that departmental enquiry is not a "public ground" in the context of the present case. The morale, integrity and standard of public service can be maintained and upheld by a public trial in this case of the Government servant concerned in the public courts of law. A

glance at the charges will at once show that the Government servant concerned in this case could be dealt with by the ordinary law of the land in respect of all of them. For instance the charges (1) for drawing false travelling allowances whose amounts are not specified but which counsel states amounts to about Rs. 10/-, (2) for duping an old woman by purchasing more than one bigha of land from her in the name of his wife at an under-value without any complaint by the alleged duped woman and despite the fact of full disclosure of the same in the annual returns of the petitioner to this High Court under Government Table 10 of Form (S) 31 under Rule 809, Chapter XXXVII of the Civil Rules and Orders disclosing assets held by Judicial Officers and their wives and notwithstanding the fact, we are told that the Government itself is a lessee of this very property, paying rents to the wife, (3) for breach of peace and dispossession of one Kasem Ali which was subject to criminal proceedings for mischief under Section 425 I.P.C. (4) of not paying for alleged fish where the petitioner had no opportunity to bring the most crucial evidence of the Nazir to prove payment, (5) of not paying house rent in spite of the fact that even the previous District Judges did not do so in respect of the particular house which was an old dilapidated and neglected house which District Judges used to occupy by bearing the burden of periodic repairs1 and the correspondence exchanged between the landlord and the petitioner never even suggested that there was any complaint about alleged non-payment of rent and notwithstanding the offer to pay rent after deduction for repairs as appearing from letters exhibited before the Enquiry and (6) finally charges about the use of peons and sweepers for private purposes and demanding a black cow are all charges which, certainly could have been investigated and tried in a public trial under the civil and criminal public courts of law without a departmental enquiry and specially under Chapter IX and such Secs. as 161 to 169 of the Indian Penal Code. The interest of the public service as well as the interest of the public and the Government could perhaps he equally if not better served by such public trials and actions than by private departmental enquiry of this nature where rules of evidence do not operate, where compulsory attendance of witnesses and production of documents cannot be arranged and where the petitioner was denied the assistance of a lawyer even to take notes. I am therefore satisfied that it is not a "public ground" in the context of facts of this case.

40. I do not want to be misunderstood by these observations to lay down any proposition that when two courses are open against a public servant, one a departmental enquiry and another a civil or criminal proceeding in the public courts of law, the latter and not the former must be followed. I express no opinion in this Reference on that point. Indeed, in case of a public servant in service, and not retired after the age of superannuation, he may himself prefer a departmental enquiry to a public trial, under the terms and conditions of his service. I am not unaware of the decision in *Karuppa Udayar v. State of Madras*[5], where Rajagopalan, J. appears to express the view that cognisability under the Penal Code does not exclude departmental enquiry although the Report does not give any reason. It may be that this question will have to be exhaustively reviewed in future. Where two procedures are available, one that denies the public servant effective protection by testimonial compulsion, summons for compelling witnesses and documents, and by excluding the Evidence Act is applied to prejudice him in preference to the other procedure which does not create such handicaps, raises serious question of discrimination, and violation of equality before the law and equal protection of laws under, Article 14 of the Constitution, and that question will need a final decision in an appropriate case in future. For the present all that I wish to emphasise on this point In the Reference before us is that where a public servant has reached the age of compulsory retirement under his conditions of service, his service cannot under Rule 75(a) of the West Bengal Service Rules be simultaneously extended and suspended as a "'public ground" only for the purpose of departmental enquiry, when the charges

can be publicly tried and determined.

41. This view denying extension by suspension is then said to render possible the escape of public servants who commit culpable acts just on the eve of their retirement. It does nothing of the kind. They do not escape by their retirement if they are guilty of acts which the law can enforce either in civil or in criminal courts which still remain open to the Government and aggrieved persons even after their retirement. If again these culpable acts are such that they cannot be brought in for trial in such Courts, then the short answer is, amend consistently with the Constitution, the West Bengal Service Rules on the lines of Fundamental Rule 56(d) and provide a procedure for departmental enquiry in conformity with the Constitution of India.

42. I therefore hold that there was or could be In law no extension of the petitioner's service under Rule 75(a) of the West Bengal Service Rules after he attained the age of 55 which was the age of his compulsory retirement under the terms and conditions of his service only for the purpose of suspending him from that extended service and to conduct a departmental enquiry against him. He must therefore be taken to retire under those conditions of service on the 1st August, 1953. I hold the extension to be illegal and void. A Government servant who has retired and no longer in law in service cannot be proceeded against in a departmental enquiry. Therefore also on this ground the departmental enquiry and the proceedings and report there under are without jurisdiction and void. At one stage the learned Advocate General suggested that the petitioner had waived his right to challenge the extension as illegal on the ground that he had accepted the subsistence allowance granted to him during his extended and suspended period of service. I am unable to uphold the suggestion that there has been any waiver in this case, first because that is not pleaded, secondly because the petitioner from the very beginning

[5] AIR 1956 Mad 460

has been protesting against such suspension and enquiry and therefore his acceptance of subsistence allowance must be taken to be under that protest and thirdly because there can be no waiver against the Statutory Rules and Conditions continued under the Constitution on the facts of this case.

43. In this view of the matter, it is unnecessary to deal with and decide three other minor submissions of the petitioner that (1) suspension itself was illegal and unconstitutional, (2) the alleged "public grounds" have not been reduced to writing within the meaning of Rule 75(a) of the West Bengal Service Rules and (3) that even the extension granted on 29th August, 1953 expired on 31st October, 1953 and there being no order of extension until the 14th November, 1953 communicated on 17th November, 1953 to the petitioner, purporting to grant retrospectively extension from 1st November, 1953, such retrospective order could not be made without the petitioner's consent, specially when he had ceased to be a Government servant when the extension expired on 1st November, 1953.

44. I shall now refer to the relevant Rule under the Civil Services (Classification, Control and Appeal) Rules under which the departmental enquiry was held in this case. It is necessary for two reasons. First to test the particular Rule in the light of the Constitution, secondly to judge how far if at all, there is violation of the principles of natural justice.

45. It is admitted by the Enquiring Officer's report and by the Government that the enquiry in this particular case was held under Rule 55 of the Civil Services (Classification Control and Appeal)

Rules. These Rules were originally made in 1920 by the former Secretary of State for India in Council under Section 96-B(2) of the Government of India Act 1919 and thereafter amended, modified and continued from time to time and are still in force even after the advent of the Constitution on the 26th January, 1950. Rule 55 of the Civil Services (Classification, Control and Appeal) Rules appears in Part XII dealing with "conduct and discipline" and provides inter alia as follows :

> "Without prejudice to the provisions of the Public Servants Enquiries Act 1850, no order of dismissal, removal or reduction shall be passed on a member of service (other than an order based on facts which have led to his conviction in a criminal court or by Court Martial) unless he has been informed in writing of the ground on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself.
>
> "The ground on which it is proposed to take action shall be reduced to the form, of a defined charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required within a reasonable time to put in a written statement of his defense and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs, an oral enquiry shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give the evidence in person and to have such witness called as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the finding and the grounds thereof".

46. The rest of the Rule is not material. The first point to emphasize regarding this Rule is that it does not say who shall conduct the enquiry and which authority shall conduct the enquiry and which authority shall be in charge of such departmental proceedings. Having regard to my conclusion on the relevant articles of the Constitution with particular reference to Article 235 of the Constitution, if Rule 55 implies any authority other than the High Court to conduct or direct departmental enquiry against a member of the judicial service in the State, then this Rule is ultra vires the Constitution in so far as it does so. The proper way however to read this Rule on the point is to read it consistently with the Constitution and not to give it an unconstitutional implication and thereby make it bad. Secondly, the rest of the provisions in Rule 55 can be read as giving reasonable opportunity to the person proceeded against within the meaning of that expression in Article 311(2) of the Constitution.

47. The third significant question on this Reference is the petitioner's charge of violation of the principles of natural justice. The petitioner's case is that the departmental enquiry has violated the principles of natural justice embodied in the said Rule 55 and also under Article 311(2) of the Constitution,

48-49. The points that the petitioner urges in support of his case of the violation of the principles of natural justice may be briefly summarized. The petitioner alleges ten breaches of the principles

of natural justice during the enquiry. First, it is alleged that the petitioner has been denied the use or assistance of a lawyer in these proceedings even to take notes. Secondly, the petitioner has been refused inspection of certain material documents before filing his first written statement in answer to the first show cause notice. It is alleged under this second point in paragraph 11 of the petition that the records of the Enquiry Case No. 2 of 1953 against Nihar Ranjan Sen, sheristadar of the court, who according to the petitioner played the role of a prime mover in framing up charges against him were not made available to the petitioner. Thirdly, it is also alleged, that the petitioner was denied the right to see the investigation report of the anti-corruption department which the Government apparently considered as will appear from their letter to the Registrar of this Court dated the 15th July, 1953. Fourthly, the petitioner's request to examine the investigation officer who was the real prosecutor and who drew up the proceeding was refused as alleged in paragraph 18 of the petition. Fifthly, the petitioner was denied opportunity and necessary assistance to call and procure attendance of his witnesses particularly the witness Kshitish Ganguli, former Nazir of the District Court as alleged in paragraphs 20-27 of the petition. Sixthly, witnesses not included in the list of prosecution witnesses were called at the eleventh hour and yet no time was given to the petitioner to effectively cross examine them and the petitioner was refused even the copies of the deposition of the prosecution witnesses. Seventhly, the petitioner alleged in paragraphs 28-31 of the petition that five documents were taken into consideration by the Enquiring Officer without giving him any opportunity to inspect or even without the knowledge of the petitioner, namely, (i) Criminal Case Record of Jinnat Bibi, (ii) the petition of Khagen Bauri, sweeper, to the Chief Justice, (iii) the statement before the enquiring Munsif culminating in the dismissal of the said Khagen Bauri, (iv) correspondence between the District Judge and the District Magistrate regarding the alleged violation of the/ Guest Control Order and (v) the Payrolls of the menials. Eighthly, the petitioner charges the respondents with refusal to call relevant necessary documents, such as, the annual confidential enquiry report of the petitioner against Nihar Ranjan Sen, the sheristadar. Ninethly, that the charges against him are too vague and indefinite, Tenthly, the charges are unsupported by any evidence.

50. The nature of departmental enquiry requires careful legal analysis before any decision. can be reached on the violation of the principles of natural justice. Such departmental Tribunals carrying on departmental enquiry are not real courts of law. They are governed in India by old fashioned miscellaneous collections of Rules inherited from a defunct political and constitutional order resulting, in the confusion typified in the trilogy of cases in *Venkata Rao v. Secretary of State*[6], *High Commissioner for India v. I.M. Lall*[7], and *State of Bihar v. Abdul Majid*[8], Their powers, procedure-and duty are usually prescribed by the Rules under which they work. To add to the confusion, these Rules vary from department to department and no uniform code or practice or standard is available. Not being strict courts of law these Departmental Tribunals are supposed not to have any power to compel attendance of witnesses and production of documents by issuing summonses. The law of evidence does not strictly apply to these Tribunals. (*New Prakash Transport Co. Ltd. v. New Suwarna, Transport Co*[9]. and yet they are supposed to take what is loosely called evidence and receive documents. Disciplinary Tribunals, on whose findings the whole life's career of a public servant depends, should not in fairness be allowed to remain in this state of primitive procedure, and distressing obscurity, which are not calculated' to offer and foster that sense of security in the service which is fundamental in any ordered society. When the Constitution has provided in Article 309 that Acts of the appropriate legislatures can be made to regulate the conditions of service, it is time that such Acts were made bringing order out

of the present chaos of Rules to provide some uniform standard for disciplinary tribunals and their powers and procedure consistent with the mandates of the Constitution.

51. In the present state of affairs in India the courts have to do the best in the circumstances when reports from such Tribunals come up for consideration before them. Indian jurisprudence has evolved out of necessity three principles which courts apply to deaf with the situation. The first principle is to insist that Rules under which these disciplinary Tribunals work must be strictly complied with. The principle laid down by Lord Roche in the Privy Council decision of 64 Ind App 55 : (AIR 1937 PC 31) that, Section 96B of the Government of India Act, 1919 and the Rules made thereunder only make provision for the redress of grievances by administrative processes and the '"pleasure" of the Crown was not justiciable by a suit in spite of the breach of those rules, is today considerably overshadowed and outmoded by the Constitution and its special mandates such as in Article 311 : and the wider jurisdiction under Articles 226 and 32. Lord Roche's principle received its first attack ten years later from Lord Thankerton in 75 Ind App 225 at p. 240 : (AIR 1948 PC 121 at p. 126) where the contrast between old Section 96-B of Government of India Act, 1919 and Section 240 of the Government of India Act 1935 is clearly brought cut to say that these Rules are not merely "permissive" but "prohibitory", They are all the more so under the Constitution. The Supreme Court in

[6]64 Ind App 55 : (AIR 1937 PC 31)
[7]75 Ind App 225 : (AIR 1948 PC 121)
[8]1954 SCR 786 : AIR 1954 SC 245
[9] AIR 1957 SC 232

1954 SCR 786 : AIR 1954 Supreme Court 245 delivered the second attack on Lord Roche's principle and Mahajan, C.J. definitely found in favor of justiciability on this point. The second principle is the application of the test of natural justice unless even that is excluded by statutory rules, which under the present disposition of the Constitution of India in cases coming under Article 311, cannot be excluded. The transformation of the protection of the Statutory Rules like Rule 55 into constitutional safeguard was pointed out by the Supreme Court in *Khemchand v. Union of India*[10], at p. 307 by the following observations :

> "In short, the substance of the protection provided by rules like Rule 55 referred to above, was bodily lifted out of the Rule together with an additional opportunity embodied in Section 240(3) of the Government of India Act 1935 so as to give Statutory protection to Government servant and has now been incorporated in Article 311(2) so as to convert the protection into a constitutional safeguard".

The third principle is that once the courts are satisfied that the disciplinary Tribunals have acted within the Rules and have complied with the principles of natural justice then the courts of law no longer sit in appeal on the facts and the merits of the findings of the disciplinary Tribunals and do not substitute their own opinion on the merits or facts even though they may differ from those of the Tribunal. The main desideratum of this procedure even after the application of these three principles, is that for the public servant in India, there is still no access to the courts of law on the merits of the findings of a disciplinary Tribunal. His sole remedy on merits still remains only "the administrative appeal. Although in the present judicial climate in India there is a tardy recognition of "no evidence" rule yet there is none about "substantive evidence" rule in respect of the findings of departmental tribunals.

52. We have therefore, now to analyse how far the decision of the Tribunal in this case is open to

challenge on the grounds of (1) breach of the Rules and (2) the breach of the principles of natural justice and (3) violation of the Constitution.

53. The petitioner's first grievance is that he was denied the use of a lawyer and, therefore, the principles of natural justice have been violated. Rule 55 which I have quoted elsewhere expressly requires "adequate opportunity" to be given to the public servants. The question then is, can the assistance of a lawyer be regarded as part of such "adequate opportunity". The learned Advocate General has relied on the well-known authority of *Rajagopala Ayyangar v. Collector of Salt Revenue, Madras*[11], and contended that the words "to be heard in person" in Rule 55 of the Civil Services (Classification, Control and Appeal) Rules expressly excludes the right to be represented by a lawyer in support of this contention. He has cited other authorities of *Qudratullah v. N. W. F. Province*[12], *Veeraswami v. Province of Madras*[13], *Lakshmi Narayan Gupta v. A.N. Puri*[14], and *Punjab State v. Bhagat Singh*[15], at p. 122.

54. The question now in India has to be judged not only on the expressions "adequate opportunity" and "be heard in person" in Rule 55 but also in the light of the expression "a

[10] AIR 1958 SC 300
[11] ILR 1938 Mad 127 : (AIR 1937 Mad 735)
[12] AIR 1944 FC 72
[13] AIR 1948 Mad 379
[14] AIR 1954 Cal335; AIR 1956 Mad 460
[15] AIR 1955 Pun 118

reasonable opportunity of showing cause" in Article 311(2) of the Constitution. If on the particular facts and complexity of a case, assistance of a lawyer is regarded as a part of reasonable opportunity, then denial of such an opportunity is violation alike of the constitutional protection under Article 311(2) and the principles of natural justice. The leading authority of the case of ILR 1938 Madras 127 : (AIR 1937 Madras 735) and the decision of the Federal Court and other Courts on the same subject, did not have occasion to consider this in the light of the Constitution. Assistance of a lawyer cannot always be regarded as a part of "reasonable opportunity to show cause". Courts in India on the particular facts of some cases have held that assistance of a lawyer was not part of a reasonable opportunity. It may on the facts of a particular case be a luxury, unnecessary or immaterial. What is reasonable opportunity in the Indian Constitutional context of Article 311(2) will depend on the facts of each case and the Constitution has laid down no hard and fast rule by defining reasonable opportunity for all cases.

55. What then are the facts in this case ? As many as 30 prosecution witnesses, 13 defense witnesses and 2 court witnesses were examined by the Tribunal. Can it be said on such facts that the assistance of a lawyer even to take notes which is all that the petitioner claims where so much, of deposition had to be noted marshalled and sifted, was not a part of reasonable opportunity ? Having regard to the volume of depositions, number of witnesses and documents, I have come to the conclusion on the facts of this case, the refusal to allow the petitioner the assistance of a lawyer even for the purpose of making notes was denial of "adequate opportunity" under Rule 55 and "reasonable opportunity" under Article 311(2) of the Constitution.

56. In this view of the matter, it will not be profitable to refer at any length to the American Law. The American Jurisprudence is greatly exercised on this point of right to legal representation. In the standard work of Administrative Law, Cases and Comments by Professors Walter Gellhorn and Clark Byse. 1954 edition at pages 908-913, the right to counsel and the cases thereon have been discussed and collected. Section 6(a) of the American Administrative Procedure Act

expressly provides inter alia

> "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied represented and advised by counsel".

India has no such express statutory right to counsel for her public servants. Incidentally, it is worth noticing that the words "in person" in that American statutory provision expressly co-exist with the right to counsel, so that the expression "in person" is not such an irreconcilable anti-thesis of representation by counsel as was supposed in the Madras case of ILR 1938 Madras 127 : (AIR 1937 Madras 735) or the Federal Court case in AIR 1944 FC 72. It is pointed out in this authority that even in the absence and independently of specific statutory provisions as in the American Administrative Procedure Act, the Courts in America have held that fair administrative hearing involves the right to be represented by counsel. At page 911 of that authority the case is cited of People ex rel *Ellett v. Flood*[16] where the statute allowed demotion of fireman for a cause after a hearing and said nothing more but an order of demotion of such a fireman was set aside solely on the ground that the petitioner was denied the right to be represented by counsel.

[16]71 N. Y. Section 1067

57. It has been said in the affidavit of the Government that the petitioner himself was a trained lawyer and a District Judge. So he was. But I do not consider it unreasonable to think how even the best of a lawyer can cope with the mass of witnesses and documents without any legal assistance. The fact also must be emphasised that he was an old man of 55 and naturally under a great mental distress in the inquiry. It is said that tile petitioner was allowed to take the help of a non-lawyer person but that was mistaken kindness as a non-lawyer in the mass of deposition whose copies were not even supplied, and in the plethora of documents, would be quite at sea to know and select what to cull and note. I have little hesitation in holding on the facts of the present case that the denial .of his claim to be represented by lawyer even for the modest purpose of taking notes was unreasonable within the facts and meaning of Article 311(2) of our Constitution, and meant failure to afford "adequate opportunity" within the meaning of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. If a physician is not the proper person to heal himself, a lawyer is not necessarily the proper person to conduct his own case at least unaided. I have also yet to know that all judges specially career judges in the State services who have hardly practised at the Bar, make good lawyers after their retirement. It was then contended by the Government on the strength of a circular letter No. 2208A dated 24-5-1944 from the Secretary, Home Department, to all District Magistrates that the Government did not approve the idea of permitting a pleader to represent a public servant under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and that the decision of the Government in 1929 was not to permit such pleader in departmental inquiry held under that rule. In 1929 the Rule was not in the same language as the present Rule 55. This circular in any event cannot override Rule 55" and its interpretation of "adequate opportunity nor the constitutional provision in the present Constitution for "reasonable opportunity" under Article 311(2) of the Constitution.

58. Secondly, the reliance by the Tribunal on certain documents without the knowledge of the petitioner and without giving him an opportunity to inspect them was a breach, of the principles of natural justice. The Supreme Court in *Union of India v. T.R. Verma*[17], has laid down the principle that no materials should be relied on without giving the petitioner an opportunity of explaining them. Venkatarama Aiyer, J. at page 885 of the report enunciates the principles in the

following terms :

> "Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that the party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross examining the witnesses examined by that party, and that no material should be relied on against him without his being given an opportunity of explaining them.

If these Rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in AIR 1957 Supreme Court 232 where this question is discussed".

[17] AIR 1957 SC 882

59. Applying those tests it is plain, that the consideration of the said five documents by the Tribunal without giving an opportunity to the petitioner to inspect or even without his knowledge is clearly a violation of the principles of natural justice.

60. On the same test, the refusal of the petitioner's request to examine the Investigation Officer was also a breach of the principles of natural justice. The position in this respect is serious. The petitioner's whole case is that the charges are not only false but are also the direct result of a definite conspiracy against him led by Nihar Ranjan Sen, the former Sheristadar of the Court whom the petitioner had suspended and ultimately transferred and who, the petitioner definitely alleged by his letter of 10-11-1953 to the Enquiry Officer to have sent false anonymous petitions to the anti-corruption Department and was supporting them by tutored witnesses. The Tribunal itself noticed these serious allegations in its Report but took the most inexplicably non-possumus attitude. The spectacle of a judge of the State Judicial Service being pilloried by sweepers, peons, nazir and sheristadar alleged to be sponsored and tutored by the anti-corruption department was not enough for this Tribunal to call even the investigating officer. It is admitted by the Tribunal by its order dated the 9th November, 1953 (set out in paragraph 20 of the Government's affidavit in opposition) that the petitioner wanted to examine the officer who drew up the proceedings against him and he told the petitioner that this point would be considered if he could show sufficient reasons for it. If charges of tutoring witnesses and the allegations that the anti-corruption officials were keeping, maintaining and coaching witnesses and with the help of the local police were summoning and producing witnesses and court rewords at their sweet will, (to quote the language of petitioner's letter of the 10th November 1953) are not sufficient reasons, I do not know what are. The Tribunal never thereafter had the fairness or courage even to make an order to say that sufficient reasons had not been shown. This is clear breach of Rule 55 which expressly requires the Tribunal to record in writing "special and sufficient reasons" for refusing to call a witness. An undersecretary of the Home Department is now made to affirm an affidavit, not the Enquiry Officer, to fill up the gap by saying that the petitioner did not show sufficient reasons. It is not for him to say now; it was incumbent on the Enquiry Officer to say so under Rule 55 when he refused to call the investigating officer. This affidavit is therefore useless on the point. It is elementary that even in Criminal Cases the non-production of the Investigating Officer is almost always a matter of adverse comment and it is all the more so here on the facts with such serious allegations. I am therefore satisfied that such denial is alike a breach of the

principles of natural justice and a plain violation of the express provisions of Rule 55.

61. The next breach of the principles of natural justice alleged by the petitioner is that he was refused time or adjournment for the purpose of cross-examining three witnesses ; (1) Usha Pati Lahiri, S. D. O. Cooch Behar, (2) Sitangshu Mohan Banerjee, a local resident teacher at Suri, and (3) Phani Mohan Lahiri, Subordinate Judge, Bankura, and that even copies of the deposition were not supplied to him. Applying the above principles formulated by the Supreme Court, this also is a breach of the principles of natural justice. The answer of the Government that they were only formal witnesses cannot be accepted, because they were called to prove material facts on the charge, for instance, witness Banerjee spoke on the value of the land the charge being undervalue, and witness P.M. Lahiri gave evidence on the mischief case under the Indian Penal Code concerning the charge. There is no excuse for not supplying copies of deposition to the petitioner.
62. The Government case is that the petitioner was permitted and was at liberty to make his own copies of deposition and documents by his own personal inspection. On the facts that was neither fair nor reasonable nor adequate. What are the facts ? They are recorded in the petitioner's letter to the Enquiry Officer dated the 10th November, 1953. He was asked to inspect and make copies while the proceeding was going on from 10 A.M. to 5 P.M. every day and the only time he was allowed to inspect was from 7 A.M. to 10 A.M. in the morning before the Tribunal sat for the day and again from 6 P.M. to 10 P.M. after the Tribunal rose for the day. For an old man like the petitioner of 55 years of age it was physically impossible and exhausting. On the present facts therefore I have no hesitation to hold that this was denial of reasonable opportunity to have the relevant and important materials, such as deposition of witnesses and copies of documents.

63. The learned Advocate General has relied on the well known decision in *Local Government Board v. Arlidge*[18], at pages 136-37 and 143 to contend that the inspection report could be withheld and such withholding here does not vitiate the proceedings or is not a breach of the principles of natural justice. He also relied on three other well-known English decisions in *Board of Education v. Rice*[19], at p. 182, *General Medical Council v. Spackman*[20], at p. 640 and *Wilson v. Esquimalt Railway Company*[21] The general principles of natural justice are today sufficiently settled by our Supreme Court which has taken into consideration some of these English decisions and it is unnecessary for me to deal individually with these English cases, except only to say that withholding of inspector's report in 1915 AC 120 is entirely distinguishable on the facts of that case and on the particular statute that it had to deal with. I need only add that the investigation report is not the only document but there were other material documents mentioned above, which were withheld, from the petitioner in this case.

64. On these findings it is unnecessary for me to deal with the further allegations of the petitioner regarding other breaches of the principles of natural justice such as, failure to arrange to call for or summon petitioner's witnesses and documents or to arrange for their production, which are also said to be even in breach of the terms of Rule 55 quoted above.

65. I do not propose to enter into the merits of each individual charge and the findings of the enquiring officer on each charge. I do not conceive the function of this Court under Article 226 of the Constitution to act as a court of appeal on the facts and merits, although it is only fair to record that strong criticisms have been made by the learned counsel for the petitioner characterising such findings as a travesty of justice, such as, on the 1st charge which the

petitioner's counsel contended that the Tribunal sat as a court of appeal to go behind even the judicial orders of the petitioner passed judicially in pending matters before him and acted on the evidence of a disappointed litigant, the common manager of Sural Estate, who if he had any grievance should have moved higher courts judicially to revise such orders if they were exceptionable. I refrain from expressing any opinion on this branch of the petitioner's arguments.

66. The learned Advocate General contends that the Court should not at all interfere if some and not all of the findings can be supported by some evidence even though

[18]1915 AC 120 [20]1943 AC 627
[19]1911 AC 179 [21]1922-1 AC 202 at p. 211: (AIR 1921 PC 234 at p. 238)

debatable. The point of this argument is that this Court then should uphold the order for dismissal. I am unable to hold that in such a case punishment of dismissal can be upheld. Punishment is the ultimate, conclusion and the cumulative effect of the findings on the different charges. If some charges are to supportable and other charges can be sustained then it is not for this Court to substitute its own view of punishment on the so called charges mode good and to uphold the order of dismissal. It is all the more impracticable, if not impossible on the facts of this case here when the Tribunal itself on its own findings was not in a position to judge what was a suitable punishment for the petitioner and could not recommend any particular punishment. Besides this point is immaterial because no part of the findings of this Tribunal in this case can be sustained because the Tribunal itself was unconstitutional and had no jurisdiction to conduct the enquiry against the petitioner.

67. I should therefore answer the points raised on the order of Reference quoted above in the following manner :

(1) Have not been complied with;
(2) Cannot be extended after the age of compulsory retirement is reached;
(3) Yes;
(4) Yes,
(5) Yes,
(6) Yes.

68. For these reasons I make the Rule absolute and confirm the writ of certionari quashing and setting aside the entire proceedings including the report of the Enquiring Officer and the Government order of dismissal based thereon. The petitioner is entitled to the costs of this application assessed at ten gold mohurs.

Bose, J.

69. This application under Article 226 of the Constitution involves determination of a number of questions of far reaching importance relating to the validity of an order of dismissal passed as a result of certain disciplinary proceedings taken against the petitioner.

70. The petitioner who was serving as officiating Additional District and Sessions Judge, 24 Parganas since April, 1953 and was due to attain the age of 55 years on the 31st July 1953, received on 21-7-1953 from Sri B. Sarkar, I.C.S., Commissioner, Burdwan Division, a letter

dated 18-7-1953 containing eleven charges against the petitioner. The charges related to certain acts and conduct of the petitioner while he was acting as District and Sessions Judge, Birbhum, during the period November 1951 to March 1953. By another letter dated the 14th July 1953 written by the Home Department of the State of West Bengal, the service of the petitioner was retained under Rule 75(a) of Part I of the West Bengal Service Rules for a period of one month with effect from the 1st August, 1953, the date of his compulsory retirement. It was stated in this 4etter that the retention of service of the petitioner under Rule 75(a) of the West Bengal Service Rules was in the interest of public service. It appears that the sole purpose of retaining the petitioner in service after the age of compulsory retirement was the taking of disciplinary proceedings against the petitioner. By another letter dated the 20th July 1953 of the Home Department of the Government of West Bengal, the petitioner was placed under suspension with effect from the date on which he was relieved, pending finalisation of the proceedings drawn up against him under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, and the petitioner was actually relieved of his charge, on 17th August, 1953. There were further orders of extensions of service made from time to time during the pendency of the departmental enquiry which commenced on 9-11-1953. The report of the Enquiry Officer Sri B. Sarkar containing the findings on the charges against the petitioner is dated the 21st December, 1953. After submission of this Report, by a notice dated the 8th March 1954 the petitioner was called upon to show cause why he should not be dismissed from service and on 27th May 1954 the order of dismissal was passed against the petitioner.

71. The first matter to be considered is whether the disciplinary proceedings taken against the petitioner at the instance of the Governor were invalid and without jurisdiction. The ground on which the validity of the disciplinary proceedings has been challenged is that as the substantive post of the petitioner was that of a Subordinate Judge and he was at the material time holding the post of a District Judge in an officiating capacity, and was never confirmed as a District Judge it is only the High Court which was competent to take any disciplinary proceeding against the petitioner under Article 235 of the Constitution and the initiation of the departmental proceedings under the order of the Governor was therefore bad.

72. In order to examine the force of this contention it is necessary to refer to the relevant provisions of Articles 233(1), 234, 235 and 236 of the Constitution. Article 233(1) : Appointments of persons to be and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Article 234 : Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 : The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 236: In this Chapter –

the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a Small Cause Court, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge; (b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

73. In the Government of India Act, 1935, Section 254 dealt with the recruitment and appointment, posting and promotion of district judges and Section 255 dealt with the appointments, posting, promotion and granting of leave to persons in the subordinate civil judicial service who were intended to fill civil judicial posts inferior to the post of a district judge. Sub-Section (3) of Section 255 was worded as follows :

(3) "The posting and promotion of and the grant of leave to persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of district judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appear required to be given to him by the foregoing provisions of this Chapter or as authorizing the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder".

74. It is thus, clear that the wordings of Sub-Section (3) of Section 255 of the Government of India Act 1935 which may be said to be the counterpart of Article 235 of the Constitution were different and the words "The Control over district courts and courts subordinate thereto" were not there in section 255(3) of the Act of 1935. As Legislature is not supposed to use words without a meaning this change of language can be reasonably presumed as suggesting a change of intention or purpose. The question is what was the kind of control intended to be vested in the High Court by the opening words of Article 235 ? Article 233(1) indicates that the matter of appointment, posting and promotion of district judges was left in the hands of the Governor subject to High Court being consulted. Now if in pursuance of Article 367(1) of the Constitution, Section 16 of the General Clauses Act (X of 1897) is applied to the interpretation of Article 233 the power of appointment conferred on the Governor will include the power of suspension or dismissal of the person appointed. So as a matter of construction the power of dismissal and suspension of a district judge is in the Governor. But before a district judge can be dismissed, reasonable opportunity of showing cause against the action proposed to be taken in regard to him, has to be afforded to him under Article 311(2) of the Constitution. What kind of reasonable opportunity is contemplated by Article 311(2) is brought out clearly in the decision of the Judicial Committee in the case of 75 Ind App 225 : (AIR 1948 PC 121) which has been approved by the Supreme Court in AIR 1958 Supreme Court 300.

75. The power of appointment of persons other than district judges to the judicial service of a State is similarly vested in the Governor, subject to consultation with the State Public Service Commission and the High Court, under Article 234. The power of suspension or dismissal of such persons is therefore also in the Governor under Section 16 of the General Clauses Act 1897.

76. So if these matters are eliminated from the purview of Article 235 the question that arises for consideration is what powers remain in the High Court which can be said to be comprehended in the expression "Control over district courts" as occurring in Article 235. Is the power of taking disciplinary proceedings against the district judges whose conduct calls for such proceedings, vested in the High Court ? It appears to me that the answer should be in the affirmative. In order that the High Court can exercise effective control over the district courts, which must necessarily include the district judges, the power to enforce obedience to its directions and mandates, and the power to take steps against persons disobeying the directions or mandates as also the power of calling in question the sets and conduct of district judges who are found to be guilty of any misconduct or remissness of duty, must inhere in the High Court. It is well-known that when a Statute confers a power or a jurisdiction, it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary for its effecutal execution or exercise. In my view there-fort; the power to take disciplinary proceedings against district judges or subordinate judges is vested in the High Court under Article 235 of the Constitution though the power of actual dismissal of such officers is vested in the Governor. In other words the High Court can enquire into the conduct of the person alleged to be guilty and recommend the punishment provisionally determined upon but it is the Governor who has the power of inflicting such punishment.

77. The view I have expressed above receives support from the decisions of the Andhra High Court in the cases of AIR 1955 Andhra 65 per Subba Rao, C.J. and Satyanarayana Raju, J. and (2) AIR 1959 Andhra Pradesh 497, Per Chandra Reddy, C.J. and Jaganmohan Reddy, J. The Supreme Court however did not express any view on this point in (S) AIR 1957 Supreme Court 246.

78. But the further question that arises is whether it is the High Court which has the exclusive jurisdiction to take disciplinary proceedings against the district judges and other judicial officers inferior to the district judges or the Government has also such power vested in it. It appears to me that Article 311(2) which postulates reasonable opportunity to be given to the person against whom the punishment of dismissal, removal or reduction in rank is proposed to be inflicted, makes it clear that the dismissing authority is burdened with the obligation of giving such reasonable opportunity after the High Court has made inquiry into the charges against the judicial officer concerned and determined provisionally that the punishment of dismissal or removal has to be inflicted upon the officer. Both under Article 227 and Article 235 of the Constitution it is the High Court which has jurisdiction to exercise both administrative and judicial control over the district courts and the subordinate courts, and so it is the exclusive jurisdiction of the High Court to hold an inquiry into the charges made against the judicial officer; and after the charges are established and the punishment of dismissal or removal mentioned in Article 311(2) is provisionally proposed by the High Court, the dismissing authority will then give a further opportunity of showing cause against the particular punishment proposed to be inflicted and finally determine whether the proposed punishment should be inflicted or not. This appears to be the scheme of the Constitution, and consequently the enquiry held by Mr. B. Sirkar into the charges leveled against the petitioner must be held to be without jurisdiction.

79. The next question that has been raised on behalf of the petitioner is that in the matter of holding the departmental inquiry there has been violation of the principles of natural justice. The

first grievance of the petitioner on this score is that he has been denied the assistance of a Iswyer, although he was entitled to such assistance under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and under Article 311(2) of the Constitution which provide for "adequate opportunity" and "reasonable opportunity" respectively to be given to the person whose conduct is being enquired into.

80. It has been held by the Madras High Court in the case of ILR 1938) Mad. 127 at p. 144 : (AIR 1937 Madras 735 at p. 740) that the words "to be heard in person" as appearing in Rule 55 of the Classification Rules must be given their natural and ordinary meaning and such a meaning is inconsistent with the idea of appearance by agent or counsel. This case has been followed in AIR 1948 Madras 379. In a later Madras case reported in AIR 1956 Madras 460 it has been held that refusal to grant permission to engage a lawyer to defend a public servant in his departmental enquiry does not amount to a denial of real and effective opportunities to the public servant to defend himself against the charges framed against him, particularly when there no specific rule governing such departmental enquiries which provides for assistance of counsel; nor can any principle of natural justice be invoked iii support of a claim that inv every charge leading to a departmental enquiry, assistance of counsel must be given.

81. In the case of AIR 1954 Calcutta 335 at p. 337, I had occasion to point out that where no special facts or circumstances had been established to show that the demand for a lawyer had been unreasonably refused nor was it shown that the case was of such an extraordinary nature that the service of a lawyer should have been allowed as a special case, the principles of natural justice could not be said to have been violated.

82. In a Punjab case reported in AIR 1955 Punjab 118 Kapur, J. held that in a departmental enquiry a Government servant has not a right to be represented by counsel. The learned judge in arriving at this conclusion placed reliance on the case in AIR 1948 Madras 379 and on certain observations of the Federal Court in AIR 1944 FC 72.

83. The learned counsel for the petitioner has relied in support of his argument on a decision of the Andhra High Court reported in *Dr. K. Subba Row v. State of Hyderabad*[22], where Subba Rao, C.J. observed as follows:

> "Rightly or wrongly when the petitioner was under a reasonable apprehension that the enquiry was the result of a preconceived plan and a concerted action on the part of the medical department, his request for professional help was certainly justified and the Enquiry Officer should have given him that opportunity. His refusal to accede to that simple request has certainly deprived the petitioner in the circumstances of the case of an opportunity to defend himself.

84. The learned counsel also referred to a decision of the Allahabad High Court reported in *Ramesh Chandra Verma v. R.D. Verma*[23],

85. The authorities thus make it quite plain that a public servant has no absolute right to be represented by a lawyer to defend himself against charges which are being enquired into in a departmental proceeding.

86. The letter which the petitioner wrote to the Enquiry Officer on 10th November 1953 (

[22] AIR 1957 And Prad 414

[23] AIR 1958 All 532

Part of Annexure-B to the petition) shows that the petitioner was asking for the assistance of a junior lawyer to help him in taking down notes of deposition adduced by the prosecution. If this was the real object of engaging a lawyer the object could have been better achieved by engaging a stenographer who could have taken more copious notes than what a junior lawyer would have taken down. It appears that the Enquiry Officer had made it clear to the petitioner before the hearing started, that he could have the assistance of a man in taking down notes but not a lawyer. The Enquiry Officer was faced with an Administrative Order dated 24-5-1944 (which is Annexure-A to the affidavit in opposition) which warned Enquiry Officers holding enquiry under Rule 55 not to grant permission for appearance of a lawyer in a departmental enquiry. So he had no other alternative but to refuse the demand for a lawyer.

87. The petitioner was himself an experienced judicial officer sufficiently conversant with law and the practice and procedure of conducting of cases, and so he was not as helpless as he represented himself to be. I do not therefore think that there was in the facts and circumstances of this case denial of natural justice to the petitioner in turning down the a latter's request for engaging a junior lawyer for taking down notes.

88. The next branch of the argument of the learned counsel Mr. Banerjee on the point of denial of natural justice is that the petitioner was not given inspection of certain records and documents on which the Enquiry Officer had relied, in arriving at his findings on the charges levelled against the petitioner, and this has prejudicially affected his defence. These documents have reference to charges Nos. II, III, VII and VIII and the particulars of the documents are set out in paragraphs 28, 29, 30 and 31 of the petition. The learned Counsel has relied on the decision of the Supreme Court in AIR 1957 Supreme Court 882 at p. 885 where it has been observed that no materials should be relied on against the person charged, without his being given an opportunity of explaining them. Reference was also made by the learned counsel to the cases reported in *Mangilal Karwa v. Stats of Madhya Pradesh*[24], *Kapur Singh v. Union of India*[25] and *Manmatha Nath Chose v. Director of Public Instruction*[26].

89. The learned Advocate General on the other hand referred to (1911) AC 179; (1915) AC 120 : 1943) AC 627 : AIR 1957 Supreme Court 232 and AIR 1958 Supreme Court 300 to show how the courts have understood and interpreted the principles of natural justice and he has argued that even assuming that with respect to some of the several charges the principles of natural justice have been violated, no such infirmity attaches to the remaining charges which have been established and which by themselves are sufficient to merit the punishment of dismissal; and consequently the inquiry so far as it relates to these remaining charges, and the order of dismissal are valid and not open to any challenge. The answer of Mr. Banerjee to this contention is that as the findings of the Enquiry Officer which are tainted with infirmity because of the violation of principles of natural justice, and the findings which are not so tainted, were all taken into consideration by the authority imposing the punishment of dismissal and it is not known which finding bad influenced the mind of the punishing authority and which not, it is nut possible to uphold the order of dismissal as a valid order and so the order of dismissal cannot stand

[24] AIR 1955 Nag 153 [26] AIR 195S Cal 49
[25] AIR 1956 Pun 58

but must be quashed. The learned Counsel relies on *Satyanarain Transport Co. v. Secretary, State Transport Authority*[27]. in support of his argument. It appears to me that where an order of dismissal is made by an executive authority based on the findings of an Enquiry Officer and some of the findings turn out to be not sustainable t it is not desirable or proper to allow the order of dismissal to stand inasmuch as it is not possible to ascertain to what extent the bad findings operated on the mind of the dismissing authority or whether the dismissal order would have been made at all if only the remaining findings had been before them. This principle was applied by the Federal Court in the case of ***Keshav*** *Talpade v. Emperor*[28], and approved by the Supreme Court in *Shibban Lal v. State of U.P*[29]. at P. 181.

90. The question which therefore assumes importance is whether the principles of natural justice can be said to have been violated in so far as the inquiry relating to the charges Nos. II, III, VII and VIII is concerned. It is now too late in the day, especially in view of the pronouncements of the Supreme Court to contend that the denial of opportunity to the petitioner to inspect the document referred to in paragraphs 28, 29, 30 and 31 of the petition and to offer his explanation thereto did not amount to violation of the principles of natural justice. I am therefore constrained to hold that the order of dismissal cannot stand and must be quashed.

91. A point was made that as the Investigating Officer's report, on the basis of which the disciplinary proceedings started, was not made available to the petitioner, there was denial of natural justice. But, it is to be noted that there is nothing to indicate that the Enquiry Officer placed any reliance on the Investigating Officer's report in arriving at his findings. So there is no violation of the principles of natural justice on this ground. (See *Dr. Tribhuvan Nath v. State of Bihar*[30],).

92. The learned Counsel for the petitioner made a strong endeavour to show that the findings of the Enquiry Officer are not justified by the Evidence adduced and the reasonings for his coming to the findings ore not correct. But it has been authoritatively settled that the High Court in exercising jurisdiction over inferior tribunals under Article 226 does not function as a Court of Appeal but its control extends to seeing that the inferior tribunals keep within their jurisdiction and that they observe the law. In other words the High Court acts in a supervisory capacity and does not substitute its own views for those of the tribunal as a Court of appeal 1 would do. As Lord Sumner Pointed out in the case of *R. v. Nat Bell Liquors Ltd*[31]., at p. 156 :

> "The supervision goes to two points : one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise."

93. In the case of *Hari Vishnu Kainath v. Ahmad Ishaque*[32], a Bench of the Supreme Court consisting of seven learned judges has laid down in clear terms that the court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction and one consequence of this is diat the Court will not review

[27]61 Cal WN 726 : (AIR 1957 Cal 638) [29] AIR 1954 SC 179 [31](1922) 2 AC128
[28]1943-D FCR 49 at pp. 70-71 : (AIR 1943 FC 1 at pp. 8-9) [30] AIR 1960 Pat 116 [32] AIR 1955 SC 233

findings fact reached by the inferior court or Tribunal even if they be erroneous. (Paragraphs 21 to 24 of the judgment - pages 240-244).

94. The other points raised in tin's application have been dealt with by my learned brothers. I do not wish to express any opinion on those points, as it is not necessary to do so in view of my findings on the other points. I agree that this Rule should be made absolute with costs and the order of dismissal quashed.

P. N. Mookerjke, J.

95. In this Rule, the petitioner, Sri Nripendra Nath Bagchi, complains against his dismissal from service as and by way of disciplinary action. The action was taken as a result of what may be conveniently termed, - and what has actually been termed, a departmental enquiry, held against the petitioner by the Enquiring Officer Sri B. Sarkar, then Commissioner, Burdwan Division, later on, Member, Board of Revenue, Calcutta, at the instance of the State Government of West Bengal. The enquiry was ordered by the State Government in the exercise of purported powers under the so-called disciplinary jurisdiction on certain charges, framed against the petitioner, for purposes of the said departmental enquiry and, upon the report of the Enquiring Officer, holding, inter all, that the majority of the charges had been established against the petitioner, he (the petitioner) was eventually dismissed from service by the State Government after notice to him to show cause why he should not be so dismissed.

96. The petitioner, Sri Nripendra Nath Bagehi, was in the judicial service of the State of West Bengal. He was duly appointed to act as a Munsif on November 10, 1927, and was confirmed in that grade or appointment on 17-7-1930, with effect from 17-2-1930. On November 22, 1944, the petitioner was appointed to act as a Subordinate Judge and, on 6-10-1949, the was confirmed in that grade with effect from 1-2-1946. In the meantime, he had been appointed an Assistant Sessions Judge and also to act as an Additional District and Sessions Judge and, further, promoted to the Higher Judicial Service of the State and, at the time of his above confirmation as a Subordinate Judge, he was actually officiating as an Additional District and Sessions Judge in the State's Higher Judicial Service. As an officiating District and Sessions Judge, the petitioner was posted at Alipore, 24 Parganas, on 18-6-1948. He was then transferred to Hooghly in June-July 1948 as an officiating District and Sessions Judge and, thereafter, to Cooch Behar in January-February, 1951, and, later on, to Birbhum in November, 1951, where he remained in charge up to about April, 1953. On April 14, 1953, the petitioner was transferred to Alipore as an Officiating Additional District and Sessions Judge. The petitioner was due to retire on July 31, 1953, upon his attainment of the age of 55 years, the age of superannuation or compulsory retirement under the relevant Service Rules (the West Bengal Service Rules) and, on 17-4-1953, he applied for leave, preparatory to retirement. On 12-6-1953, leave was allowed to the petitioner for three weeks from 17-4-1953, as also leave, preparatory to retirement, from 17-7-1953, to July 31, 1953, but leave for the intermediate period was refused.

97. On July 14, 1953, the State Government purported to extend too petitioner's service by sanctioning "in the interest of public service" his retention under Rule 75(a) of the aforesaid West Bengal Service Rules for a period of one mouth with effect from August 1, 1953, and his leave, preparatory to retirement, already sanctioned, from July 17, 1953, to July 31, 1953 was refused or cancelled. On July 20, 1953, the petitioner was placed under suspension with effect from the date, on which he is relieved (of his charge), pending finalization of the (departmental)

proceedings, drawn up against him under Rule 55 of tile Civil Services (Classification, Control and Appeal) Rules", 1930. On the next day, the petitioner received a copy of the said charges from the Enquiring Officer (Sri B. Sarkar, then Commissioner, Burdwan Division). On August 17, 1953, the petitioner was actually placed under suspension as per order, dated July 20, 1953, aforesaid. On August 29, 1953, the petitioner's service appears to have been further extended, on the same ground of "interest of public service", for a period of two months with effect from September 1, 1953, and on November 14, 1953, there was a similar further extension with effect from November 1, 1953, for two months or until the finalization of the departmental proceedings against him, whichever was earlier, and the process was repeated on 30-12-1953, and March 2, 1954, the proposed extension, as per the last order aforesaid, being for a month with retrospective effect from March 1, 1954.

98. In the meantime, the enquiry or the departmental proceeding had already commenced and the petitioner had received, as aforesaid, a copy of the charge-sheet, containing 11 charges from the Enquiring Officer Sri B. Sarkar, on July 21, 1953, and he filed his written statement on October 29, 1953. The enquiry actually began on November 9, 1953. On that day, the examination of witnesses started and the case (proceeding) contained up to December 4, 11953. In the course of the enquiry, 45 witnesses were examined - 30 by the prosecution (State Government) and 13 by the defence (petitioner) and two other witnesses, described by the Enquiring Officer as Court witnesses, - and a large number of documents were filed by the parties. On the conclusion of the enquiry, the Enquiring Officer (Sri B. Sarkar) submitted his report to the State Government on December 2, 1953, and, upon the same, action was taken by the latter, after notice to the petitioner, resulting in the petitioner's dismissal from service with effect from May 27, 1954. The petitioner's appeal to the Governor against the aforesaid order of dismissal was dismissed on December 23, 1954, and, thereupon, he moved this Court under Article 226 of the Constitution and obtained the present Rule from our learned brother Sinha, J., on February 23, 1955.

99. In the Rule, the affidavit-in-opposition was filed on June 13, 1955, and the petitioner filed his reply on June 27, following, but, thereafter, again, a supplementary affidavit-in-opposition was lived by the opposite parties on August 21, 1956, and, to that, the petitioner replied on August 27 of that year. On January 15, 1957, a further affidavit was filed in the Rule by the petitioner, to which as opposition was filed on February 11, 1957, and the petitioner's reply was filed on February 22, 1957. On the 9th March following, the petitioner took certain additional grounds in the Rule, challenging the jurisdiction and competency of the Enquiring Officer (Sri B. Sarkar), - or, for the matter of that, of the State Government itself, - under and in view of inter alia Article 235 of the Constitution and, in that connection, a supplementary affidavit was filed by him on 6-5-1957, followed by the State's reply in opposition on June 12, 1957.

100. On the aforesaid materials and in the above state of the records, the Rule came up for hearing before Sinha, J., on July 8, 1957, when, in view of the importance of the questions, involved in the Rule, - and, particularly, in the additional grounds, - our learned brother (Sinha, J.) recommended reference of the case to a larger Bench and, thereupon this reference was made by the learned Chief Justice to this Special Bench, constituted for, inter alia, the hearing of the reference. The hearing before us commenced on March 21, 1960, and it concluded on the 31st following, and, in the course of hearing, various topics of interest and questions of importance, public, private and constitutional, wore raised and discussed by the learned Counsel. These questions have all been fully dealt with by my Lords and, as I agree with them in their ultimate

conclusion, - and, generally, also, with their reasons, except on one or two points, which will be indicated presently herein, - I would confine myself only to a brief treatment of the important grounds under the three broad heads of (i) violation of the rules or principles of natural justice in the matter of the instant departmental enquiry, (ii) validity of the retention or extension of the petitioner's service for purposes of the said enquiry and (iii) the question of jurisdiction or competency of the Enquiring Officer, or, for the matter of that of the State Government itself in initiating and/or holding the departmental enquiry in question. This last question involves within it the larger and more fundamental issue of the State Government's authority if any, - and the scope, extent and limitation thereof, - in the matter of exercise of disciplinary jurisdiction over the Subordinate Judiciary of the State.

101. Under the first head, namely, violation of rules or principles of natural justice, it will not be necessary, for purposes of this proceeding, to travel beyond the provisions of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930, which, according to both parties, govern the present case, in the context, of course, of Article 311(2) of the Constitution. That Rule embodies sufficiently the principles of natural justice, so far as they are relevant for our present purpose, the words "adequate opportunity" which represents the substance of the Rule, being, as so representing, the synonym of "reasonable opportunity", as used in the Constitution Article 311(2) - and the preceding Government of India Act, 1935 (Section 240(3)), - at the initial or the actual proceeding stage of the enquiry vide AIR 1958 Supreme Court 300 at p. 307, where their Lordships made the following significant observation :

> "In short, the substance of the protection, provided by Rules like Rule 55, referred to above, was bodily lilted out of the Rules and, together with an additional opportunity, embodied in Section 240(3) of the Government of India Act, 1935, so as to give a statutory protection to the Government servants and has now been incorporated in Article 311(2) so as to convert the protection into a Constitutional safeguard".

The history of this transformation is indeed, a glorious chapter in the evolution of the statutory protection and Constitutional safeguard and it is of abiding interest and significance. It started in or about 1920, with prescribed rules of conduct under Section 96B of the Government of India Act, 1915 (as amended in 1919), for the guidance of the employing administrative authority, namely, the Executive Government, carrying "a statutory and solemn assurance that the employee's (servant's) tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule" but conferring no right of action to the aggrieved servant in case of its breach; it was amended and considerably modified and liberalized in or about May 1930, while the said Act was in force, still retaining its aforesaid character and contemplating no redress by action in Court; it became a statutory protection under the Government of India Act, 1935 (Vide Section 240, Sub-Sections (2) and (3)) and finally emerged as a full-fledged constitutional safeguard under the present Constitution (Art. 311). In its first or initial stage, when it existed merely as a rule of conduct and assurance, as aforesaid, - more or less permissive, - it failed to be effective in suits or actions, brought by the aggrieved employees for necessary redress, (Vide R.T. *Rangachari v. Secy, of State*[33],); in its second phase, when it became a statutory protection, as aforesaid, - no longer permissive in character but prohibitive, - it served as a sufficient protection to the aggrieved employee by providing Him necessary relief in appropriate suits (Vide AIR 1948 PC 121 : 75 Ind App 225) and, in its final shape, it is now a

constitutional safeguard, which is of much higher status and efficacy and which promises eternal guarantee to the aggrieved employee by placing him under the powerful aegis of the Constitution and by widening his mode and manner and scope of relief vide AIR 1958 Supreme Court 300. Whether, in the face of Article 311(2) of the Constitution, - and of its predecessor also, namely, Section 240(3) of the Government of India Act, 1935, - Rule 55 has become obsolete, outmoded and redundant, it is not necessary for me to say in this proceeding, but, if it has any legal existence and any use or utility, even as a practical guide, it has to be interpreted and given effect to in the light of the Constitution (Art. 311(2)) and consistently with it. In that context, "adequate opportunity" in the Rule can have only one meaning, - the one, which I have attributed to it, - namely, a synonym of "reasonable opportunity" under Article 311(2) of the Constitution, or, the Government of India Act, 1935 Section 240(3), and each case, dealt with under it, must be viewed in that light and from that point of view.

102. Now, Rule 55 definitely contemplates communication of the charges in writing to the person charged together with a statement of the allegations, on which each charge is based, and of any other circumstances, which it is proposed to take into consideration in passing order in the case, it thus rules out any action without communication, or, at least, disclosure, of the basic materials to the alleged delinquent. It also contemplates an oral enquiry if the said delinquent so desires, or, desires to be heard in person, or if the authority so directs. It, further, provides that, at the said enquiry, evidence should be taken and allowed to be given as to disputed or non-admitted allegations and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have witnesses, whom he wishes to call, called and examined on his behalf, with only this reservation that the Enquiring Officer may, for special and sufficient reasons, to be recorded in writing, refuse to call a particular witness. As I have said above, for purposes of this instant case, it is unnecessary to go beyond the above rule (Rule 55), so far as rules or principles of natural justice are concerned, and I would, accordingly, examine the matter before me from that point of view.

103. Before actually taking up the point whether, in the instant enquiry, now challenged before us, the rules or principles of natural justice were violated and adequate or reasonable opportunity to which the petitioner was entitled was denied to him, I would just dispose of one argument of the learned Advocate General, wherein he contended that, even if, in regard to some of the charges, the violation be established, that would not vitiate the findings of the Enquiring Officer on the other charges and those findings by themselves, may well sustain the impugned order of dismissal. To refute this argument, it is enough to state that, on the State's own submission as to the limited nature and scope of the present proceeding under Article 220 of the Constitution. - and that is almost an undisputed and indisputable position, - this Court cannot substitute itself for or in place of

[33]64 Ind App 40 : (AIR 1937 C 27) and 64 Ind App 55 : (AIR 1937 PC 3)

the dismissing authority, namely, the State Government, and consider for itself whether, merely on the said other findings, as aforesaid, of the Enquiring Officer, the impugned dismissal order can be sustained. It is impossible for us to say, on the materials before us, what findings really influenced the State's ultimate decision and in what manner. It is impossible also to say what influence the vitiated findings, as aforesaid had on its said decision. The only reasonable and possible inference is that the State's decision was the cumulative effect of all the findings of the Enquiring Officer, - good, bad, and indifferent, - and it is impossible to sever and separate them in the matter of their said effect or as to their respective contributions to the same. In that view,

the petitioner's dismissal order would have to be quashed, if any of the Enquiring Officer's findings be held vitiated by reason linter alia, of violation of principles of natural justice.

104. I turn now to the petitioner's several legations of violation of rules of natural justice.

105. The petitioner has alleged contravention of Rule 55 or violation of the rules or principles of natural justice, resulting, inter alia, in denial of

> "adequate" or "reasonable" opportunity on several grounds, which, shortly put, cover (i) refusal of permission, to him to inspect certain records before the filing of his written statement, (ii) refusal of permission to him to avail himself of the services of a lawyer for defending him or even of a junior lawyer either for assisting him in the conduct of his defense by taking notes of evidence during examination of prosecution witnesses, (iii) examination of prosecution witnesses, not cited or mentioned in the list of witnesses filed, and, at the same time, refusing him petitioner; time for their cross-examination and declining also to furnish him with copies of their deposition; (iv) refusal of opportunity to the petitioner to examine or to have examined the Investigation Officer either as a prosecution witness or as 3 defense witness or even as a Court witness, under which description some of the prosecution witnesses were examined by the Enquiring Officer; (v) refusal of opportunity or necessary assistance to the petitioner in the matter of calling or production of defense witnesses and documents, required or sought for by him, for purposes of proving his defense; and (vi) vagueness of the charges framed and non-communication to him in time of all the basic materials, on which they were framed. In the above connection, it has also been argued on behalf of the petitioner, - and that also is of special, nay, of somewhat paramount, importance, - that the Enquiring Officer, in his report, considered certain material documents behind the petitioner's back and without giving him (the petitioner) any opportunity to look into those documents or to meet and explain them. This is the seventh ground of complaint under this head and. as said above, it has a special and somewhat paramount importance in this case.

106. As said by my Lord (P.R. Mukharji, J.), for purposes of this Rule, it is unnecessary to go into all the above grounds, urged by the petitioner under the above head of violation of rules of natural justice. Some of the material grounds have been discussed in detail by my Lord in his elaborate and analytical judgment in the light of the relevant materials, fully set out by him therein, and he has accented all of them and, as I am in entire agreement with him in his said conclusion and, substantially, also, in his discussion, I do not propose or deem it necessary to say anything more on this part of the case, barring only a few words on the subject of lawyer's assistance and the Enquiring Officer's duty in the matter of calling defense witnesses and upon the impropriety of his considering any material behind the present petitioner's back.

107. On the question of lawyer's assistance, the learned Advocate General who contested the petitioner's claim in that behalf, even though that was very modestly nut as fist a claim for a junior lawyer's assistance for merely taking notes of depositions, relied strongly on the decision of the Madras High Court, reported in ILR 1938 Madras 127 : AIR 1937 Madras 735, and urged

that, under Rule 55, there was no scope for the employment of a lawyer in departmental proceedings or enquiries under the disciplinary Jurisdiction for any purpose whatsoever. I would, however, point out with respect, that, in king the above view, the learned Judges of the Madras High Court did not pay full or proper attention to the wording of the Rule itself, leaving apart all other considerations. The Rule, no doubt, speaks of a personal hearing or a hearing in person but that is apparently, only a ground for the oral enquiry, and, even otherwise, it only points to this that such hearing can be demanded by the person charged as of right and, if demanded, it cannot be refused. This is, possibly to emphasize that, in the absence of such a demand, the authority concerned may proceed ex parte or without hearing him. It only bespeaks of a right, open to the aggrieved person. It does not, however, necessarily exclude or rule out representation by a lawyer, or lawyer's assistance, if otherwise permissible, say, for example, under rules of natural justice, that is to say, when it is a just and reasonable request. As I read it, I find nothing in the Rule to suggest that, at the contemplated oral enquiry, as aforesaid, the person charged is limited to a hearing in person and cannot, under any circumstances, be heard or speak through a lawyer. The rule clearly contemplates hearing of evidence and examination and cross examination of witnesses and production and consideration of documents, too. It may be, as I have should above, that the person charged, cannot in such enquiries, demand as of right, to be heard through a lawyer or to be assisted by a lawyer, although he has, certainly, a light to be heard in person or to demand such (personal) hearing and an oral enquiry but the Rule does not, in my opinion, rule out the so-called delinquent's representation by a lawyer, even where that may be justly necessary for giving him "adequate" or "reasonable" opportunity to defend himself, as stated in the Rule itself. The question, indeed, has to be judged by the Enquiring Officer in the context of the provision for "adequate opportunity", as aforesaid, in the light of all the facts and Circumstances of the particular case and the answer, in each case, will depend upon its individual facts and circumstances, and, however, much it may be a matter of discretion with him (Enquiring Officer), that discretion has to be judicially exercised on a consideration of all those facts and circumstances. It will be wholly wrong to say that the Rule precludes, - and absolutely forbids, - a lawyer's engagement or assistance. The departmental circular (Letter No. 2208A, dated May 24, 1944), to which our attention was drawn an behalf of the State, is, in my opinion, wholly irrelevant and was, certainly not, binding on the Enquiring Officer in the matter of the present enquiry. Indeed, no reliance can or ought to be placed upon it in the matter, as it would directly contravene the Rule (Rule 55) itself, as above explained by me, and as, further, it was issued on the basis of an alleged Government decision of the year 1929, that is, of a time, when the Rule existed only in a severely inelastic, truncated and attenuated form (Vide the corresponding Rule XIV of the Civil Services Classification Rules (Fundamental Rules), 1920, as amended in 1924, containing no "adequate opportunity" clause as the 1930 Rule 55) which bears no comparison with the present Rule or its present form, so far as this particular aspect is concerned. I do not think that this view of mine really goes against any of the other decisions, cited before us on the point by the learned Advocate General, namely, AIR 1948 Madras 379; AIR 1954 Calcutta 335; AIR 1955 Punjab 118; AIR 1956 Madras 460, and AIR 1944 FC 72 which either negatived the alleged delinquent's right qua right to be represented by a lawyer in the departmental proceedings, or, on their own particular facts, held that refusal of representation by lawyer did not, on those facts, constitute denial of "adequate" or reasonable "opportunity to defend" and did not, accordingly amount to any violation of the rules or principles of natural justice. They, of course, as I have said above, negative the right qua right to be represented by a lawyer in these departmental proceedings or enquiries, but that merely shows that the person charged would have no right to such representation or, as I have said above, he cannot claim it as a matter of right and

the only right of hearing that he may, possibly, claim is a right to be heard in person, but that is entirely different from saying that the need of representation through a lawyer may not arise and may not have to be conceded to the person charged, or recognized or accepted, - as part of his "adequate" or "reasonable" opportunity to defend himself. The question, as I have said above, depends upon the facts and circumstances of each particular case and no hard and fast rule can be laid down, one way or the other.

108. So, now the only question on tins branch of the petitioner's submission is whether, in the facts of this particular case, a junior lawyer's service for taking clown notes of depositions etc., should have (been allowed to the petitioner. On this particular question, I am at one with my Lord (P.B. Mukharji, J.) that the petitioner's prayer for such assistance should have been granted by the Enquiring Officer, having regard to the large number of witnesses, the large volume of oral and documentary evidence and the nature thereof and the petitioner's plight in having to work practically ceaselessly from seven in the morning to ten in the night and that, again, to put it mildly, in very very unfriendly surroundings. If necessary, I would have gone further and held that, having regard, inter alia, to the legal issues, involved or arising in the enquiry in this particular case, the petitioner's prayer for permission to engage a lawyer for defending himself would also have been well justified. It is no answer to say that the petitioner is a retired District and Sessions Judge and, therefore, he had the necessary legal training, acumen and capacity to defend himself and did not require the assistance of a lawyer, as the points involved might well have baffled even experienced lawyers and as, besides, more often than not a lawyer feels handicapped in conducting his own defense.

109. On the above question of lawyer's assistance in departmental proceedings under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, nothing more need be said in this case; but, for completing my reference to case law on the point, I may just draw attention to AIR 1957 Andhra Pradesh 414, where the view taken was even more extreme, almost conceding a right in this behalf to the person charged, - and that decision directly helps the petitioner in the instant case, - as, here also, he alleges and apprehends a pre-conceived plea and conspiracy and concerted action against him, - and to the Allahabad decision in AIR 1958 Allahabad 532, where a view, more or less similar to mine, was expressed and given effect to and I may just add also that this view of mine would not be opposed to or contradicted by any of the leading English authorities, dealing with, administrative tribunals, as this particular question did not arise there for consideration and as, further, strictly speaking, none of them attempted to lay down any rigid or inflexible definition of natural justice - or to force it into any Procrustean bed, - beyond equating it to essence or essential principles or substantial requirements of justice and beyond emphasising its contrast with the formal or technical rules of law or procedure, and, as, moreover, upon a reasonable view, all of them must be held to have left the term vague and sufficiently elastic (Vide (1943) AC 627 at pp. 638-640-1, 642 and 644, - where incidentally, representation by Solicitor appears to have been allowed, - containing, inter alia Lord Atkin's celebrated comment on Lord Loveburn, L.C's oft-quoted dictum in (1911) AC 179 at p. 182, developed or attempted to be developed in (1915) AC 120 at p. 132 (to justify my view of natural justice, not only on this particular point but in all its different aspects, relevant in this case.

110. As to the calling of defence witnesses, the Enquiring Officer's duty was clear. He had to take all necessary steps in the matter, reasonably within his power, even though he was not a Court or

a full-fledged tribunal with authority to enforce attendance of the witnesses and he could only refuse to call a witness for special and sufficient reasons, to be recorded by him in writing but not, certainly, on the sole and preliminary ground that he was not a Court or tribunal which could enforce the attendance of the particular witness. Ordinarily, as I conceive it, the prayer should not be refused, though, as I have said above, the Enquiring Officer is entitled to refuse it for special and sufficient reasons to be recorded by him in writing, such cases, normally, being, where the prayer does not seem to be *bona fide* or where it appears to have been made with some ulterior motive. The Enquiring Officer has indeed, to take all necessary steps in the matter, even though they may ultimately prove to be unavailing, and he cannot refuse to move, by merely pleading that he cannot enforce attendance of the particular witness, without making any attempt in that behalf. This indeed, appears to underlie the very apposite and pointed observations of the Judicial Committee in the well-known case, already cited, of 64 Ind App 55 at pp. 61-2 : (AIR 1937 PC 31 at p. 33), which I may usefully quote here as follows :

> "An excuse was made that the procedure prescribed was not followed because there was no power to compel the attendance of witnesses not in Government service. This excuse was not accompanied by any allegation or proof that an attempt to secure the attendance of such witnesses was made and that the attempt has failed".

It thus appears, that, in the instant case, - and I quote, again the observations of the Privy Council in the same Venkata Rao's case (supra) 64 Ind App 55 at p. 61 : (AIR 1937 PC 31 at p. 33) "a most definite and salutary rule was disregarded in most essential respects", and this was done by the Enquiring Officer to the grave prejudice of the petitioner, as discussed in detail by my Lord (P.B. Mukharji, J.), and the contention "that what was done was well enough is" in the words of the Privy Council, again,

> "a contention mischievous in tendency and ill-founded in fact".

111. The petitioner's complaint of prejudice by reason of consideration of some of the material documents behind his back and the examination of some of the prosecution witnesses, - not formal, as claimed by the State or the Enquiring Officer, - without giving him adequate opportunity for their cross-examination or for preparation for the purpose, also seems to be well justified on the authority of the Supreme Court in AIR 1957 Supreme Court 882, at p. 885, and the principles, underlying the relevant observations there. For material facts in this connection, so far as the instant case is concerned, I have only to refer, again, to the detailed judgment of my Lord (P.B. Mukharji, J.) and to his masterly analysis of the same.

112. I would now conclude my discussion of this oft-recurring point of violation of natural justice by referring incidentally to the Government's own printed departmental instructions in the matter of enquiries or proceedings under Rule 55 which, - it is somewhat refreshing to note, largely proceed on the same lines and almost on the view of the Rule as I have indicated and adopted in this judgment.

113. The validity of the retention or extension of the petitioner's service after the age of superannuation or compulsory retirement in the manner, it was done in the present case, and, particularly, for disciplinary action and departmental enquiry for the purpose, is not altogether

free from doubt, but, in the facts of this case, I agree with my Lord (P.B. Mukharji, J.) in answering the said point in the negative. Rule 75(a), no doubt, by its very terms, contemplates and permits extension or retention of service after the age of superannuation or compulsory retirement, hut that can be done only "on public grounds to be stated in writing". It is at least, doubtful whether the mere use of the expression "in the interest of public service" would suffice for the purpose, or, whether the holding of a departmental enquiry in the so-called disciplinary jurisdiction would be "interest of public service or public ground" in the facts of this particular case, or, at all, for purposes of the above Rule, particularly, when, in enacting the said relevant Rule 75(a) of the West Bengal Service Rules, the State Government has chosen to omit the express provision for such cases, contained in its predecessor, Rule 56 of the Fundamental Rules (vide clause (d)), and the benefit of this doubt must go to the person charged, that is to say, to the petitioner in the instant case.

114. I do not, of course, agree with the petitioner's learned counsel that the State Government could not suspend the petitioner pending the enquiry without following the procedure under Rule 55 even in that respect. The argument is, apparently, based on a misconception. This suspension, pending enquiry, is not a punishment or a penalty under Rule 49 and it does not attract Rule 55. If any authority be needed in support of the above view or of the underlying principle or for explaining the position, it is enough to refer to *Om Prakash Gupta v. State of Uttar Pradesh*[34], at p. 603 (See also *Gurudeva Narayan Srivastava v. State of Bihar*[35], The learned Advocate-General's argument also that the suspension, as aforesaid, would suspend the entire contract of service or employment, that is, in regard to all its tennis, provisions end conditions including the term or provision (condition) of superannuation or compulsory retirement at the relevant age (55 years) and put the same too out of commission or application, may well be open to serious doubt. The reliance that was placed, for the purpose, by the learned Advocate-General on the three English cases, reported in *Hanley v. Pease and Partners Ltd*[36]., *Wall work v. Fielding*[37], and *Bird v. British Celancse Ltd*[38]., and on the *Secretary of State v. Surendra Nath*[39] and the *Management Hotel Imperial v. Hotel Workers' Union*[40], may not be sufficient or of much

[34] AIR 1955 SC 600
[35] AIR 1955 Pat131
[36](1935) 1 KB 698
[37](1922) 2 KB 6
[38](1945) 1 KB 336,
[39]42 Cal WN 1186; (AIR 1938 Cal 759)
[40] AIR 1959 SC 1342

assistance, as all those cases may well be distinguished. The cases cited were concerned with entirely different matters and the point that arose there was, strictly speaking as to the effect of suspension on the contract between the parties as regards terms, operative or effective during its life or currency, which, obviously, would be limited, in point of time, by and to the period, mentioned or contemplated in that behalf in the contract in question, and, in the instant case, up to the age of superannuation or compulsory retirement, namely, 55 years, under Rule 75(a) of the West Bengal Service Rules (subject of course, to the exception or provision for extension or retention as mentioned therein), which, as a condition of service of the petitioner's employment, forms a statutory term or part of his contract of service. That age of superannuation or compulsory retirement would not and cannot, by its very nature and in the above view, and aforesaid contest, be affected by the suspension or automatically extended by reason thereof. The view so expressed, may receive some support from the observations of Cotton L.J. in the case of Boston Deep be *Fishing and Ice Co. v. Ansell*[41], at p. 352 but even otherwise, it may, reasonably, be argued that the only effect of such suspension is that the employee is asked not to work and, if the suspension is valid or justified, he will not get his pay for the particular period and that such suspension does not affect the age of compulsory retirement or the duration of the contract

service so as to extend the service to wit, its tenure or period automatically.

115. As to the State's other plea on this part of the case, namely, that, by reason of his acceptance of the subsistence allowance, the petitioner's challenge to the above extension or retention of his service is barred by estoppel and/or waiver, it is enough to say that the said pleas are unavailable against violation or contravention of statutory rules.

116. In the above context, even though no final opinion, need be given here on the aforesaid point of law, there may be a good deal of force in the petitioner's contention that he ceased to be in service on and from August 1, 1953, or at least, from November, 1953, or, at any rate, from March 1, 1954, and, from that date, the enquiry proceeding in question or any step or action, taken in the matter, ceased to be legal, the proposed subsequent or relative extension of the petitioner's service being, obviously, invalid under the circumstances it having been made at a time when the petitioner's thrift of office or the relative prior extension had ceased or terminated and he had ceased to be a Government servant. I would not, however, rest my conclusion on the validity of the extension or retention of the petitioner's service beyond his age of 55 years on this ground. I prefer to rest it on the view, expressed above by me, of Rule 75(a) of the West Bengal Service Rules. If, in the result or ultimate analysis, the position becomes or proves to be unsatisfactory from the Government's point of view, the remedy lies in including or introducing, if possible, consistently with the Constitution, Rule 56(d) of the Fundamental Rules or some like provision in the West Bengal Service Rules.

117. I come now to the last but the most important aspect of the case. This has a difficult appearance but the difficulties disappear upon a cool and careful examination of the relative Constitutional provisions. The point relates to the competency of the Enquiring Officer, or, for the matter of that, of the State Government itself, or, of any authority other than this Court, to make the instant enquiry in question. The point is one of grave and fundamental constitutional importance and it involves consideration of the power,

[41](1888) 39 Ch. D. 339

authority and jurisdiction of this Court visa is the State Government in vital matters relating to and affecting the State's Subordinate Judiciary (including District Judges). Whatever the implication and whatever the consequence, I am perfectly clear in my mind that, under the Constitution, this Court, - and this Court alone, - has the undoubted and exclusive jurisdiction over the Subordinate Judiciary of the State, as regards matters like the present. The point appears to be perfectly clear on the three Articles of the Constitution, namely, Articles 233, 234 and 235, read with the succeeding Article 236 and in the context of Articles 124 and 217 and 309, 310 and 311 of the Constitution and the position is the same whether the officer concerned is in the cadre of the District Judge or in any inferior or Subordinate cadre in the Judicial Service of the State. Under the above Articles in the light of the studied division and arrangement, defined and indicated in the several relevant Parts and Chapters of the Constitution, containing, in and amongst themselves, their own code or codes of interpretation, the Constitutional scheme appears to be perfectly clear.

118. The three relevant Parts of the Constitution, namely, Parts V, VI and XIV, in their respective relevant Chapters (IV, V and VI and I and II), are sufficiently eloquent on the position of the Judiciary visa is the Legislature and the Executive, and they declare and define, in unmistakable terms, the Constitutional scheme and policy in the matter and the studied division and

arrangement which they openly manifest greatly aid a clear understanding of that Scheme and policy. Chapter IV of Part V is headed "the Union Judiciary" and it comprehensively deals with the same. Part V deals with the State Judiciary in two branches, namely, Chapter V, under the heading "High Courts in the States," deals with the State's superior Courts, namely, the High Courts, and Chapter VI deals with the Subordinate Judiciary of the State under the comprehensive description of Subordinate Courts. This Chapter VI, with which, inter alia, we are here erectly concerned, provides for the appointment, posting and promotion of the Subordinate Judiciary, including District Judges, and expressly also for leave in the case of officers below the rank of District Judges and it also, in clear, categorical and express terms (Vide Article 235) vests in the State High Court control over district and subordinate Courts, in manner to be presently mentioned. In Part XIV of the Constitution, Section 309, which appears in Chapter I, provides for regulation and recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union and the State, but the Article itself makes the above provision subject to the Constitution, that is, inter alia to Article 235. Article 310 of the same Chapter, under which the tenure of office of the Officers of the Union and the States is "during pleasure" respectively of the President and the Governor or the Rajpramukh, as the case may be, is also subject to express constitutional provisions to the contrary, that is, inter alia, to Article 311, and Article 235 in appropriate cases, - and, possibly, also Article 320, which last Article, however, is not mandatory but only directory, as held by the Supreme Court in *State of U.P. v. Manbodhan Lal Srivastava*[42], Of these two Articles, again, namely, Articles 311 and 320, the former embodies the constitutional safeguard, emphasised and eulogised by the Supreme Court in Khem Chand's case, Supra, and the latter, though directory, as said above, supplies a useful check by providing for consultation with the appropriate Public Service Commission Union or State, in matters of recruitment, appointment etc., and disciplinary action, concerning Government servants. It is to be noted also that Article 311(1) forbids removal or dismissal except by the appointing authority, which, in the light

[42] AIR 1957 SC 912

of Article 367, has, under Section 16 of the Indian General Clauses Act, 1897, the power also to suspend or dismiss; and Article 311(2) is the former 'reasonable opportunity' clause, whose vital importance and significance I have already sufficiently indicated and discussed.

119. From the above survey, it is perfectly clear that for our immediate purpose it is enough to concentrate on the three Articles 233, 234 and 235, which deal with "control over district and Subordinate Courts" and their judicial officers in the light of the connected definition Article (Article 236), defining 'district judge' and 'judicial service' to comprehend, broadly speaking, the entire Subordinate Judiciary, and the constitutional scheme and arrangement in the matter of the Judiciary, as broadly set out hereinbefore, and, to that task, I proceed immediately.

120. The power of appointment of all officers' in the 'judicial service' of the State lies with the State Governor, - in the case of District Judges, in consultation with the State High Court and, in other cases, in connection with the State Public Service Commission and the State High Court. As regards posting and promotion, in the case of District Judges, the authority is the State Governor, acting in consultation with the State High Court and, in the case of Subordinate Judicial Officers, that is, below the rank of the District Judge, the State High Court appears (vide Article 235) to have the exclusive authority, subject, possibly, right of appeal, etc., if any, as mentioned hereinafter. As regards leave also, the Subordinate Judicial Officers, as aforesaid, appear under the express terms of Article 235, to be under similar exclusive control of the State

High Court, but the position in regard to District Judges is not very clear, there being no express provision in that behalf in the Constitution. Subject, as aforesaid, however, the control over District Courts (which, obviously, include and must include District Judges also) and Courts, subordinate thereto, is, under the aforesaid Article 335 of the Constitution, vested in the State High Court, the only limitation or restriction being that this control will be subject to right of appeal, if any, in any particular matter under the relative conditions of service of the particular officer and subject, further, to this that the High Court cannot deal with him (the officer concerned) otherwise than in accordance with those conditions, This Constitutional scheme, which marks a wholesome and welcome departure from pre-constitution days (Vide, in particular, the new words "control over district Courts and courts subordinate thereto" in Article 235 of the Constitution and their absence in the corresponding Section 255(3) of the Government of India Act, 1935), has a fundamental importance of its own in our democratic Constitution, - that golden thread which binds the Union, the States and the people of this Country, - and forms a part, an essential part, of the bulwork of protection of the independence of the Judiciary. It may have been conceived from that point of view and as a step, - a major step. - towards the coveted and covetable ultimate goal of separation, - complete separation (vide, in this connection, Article 237 of the Constitution), - of the judiciary from the executive. Be that as it may, the constitutional position is clear and incontrovertible and it cannot be affected or allowed to be affected or altered by any action of the State Government and the High Court's power, authority and jurisdiction in terms of the same, cannot be allowed to be usurped or taken away or interfered with.

121. In the context of what I have said above, the new words "control over District Courts and Courts subordinate thereto" in Article 235 of the Constitution must receive a wide and liberal construction and must be held to comprehend full control over those Courts (including Judges thereof) except as expressly provided in the Constitution. They would thus embrace disciplinary jurisdiction too over those Officers, namely, District Judges, Subordinate Judges and Munsifs, as, without power and authority in that behalf, no effective control over them would be possible at feast from a practical point of view and the Constitution certainly did not disregard this essential or practical aspect and make unreal and useless provisions.

122. To complete this branch of my discussion. I would respectfully adopt, without unnecessary repetition, the reasons, given by my Lords, for ably demonstrating that no practical difficulty would arise upon our above view of the State High Court's exclusive jurisdiction over the Subordinate Judiciary, as aforesaid, in, inter alia, matters of disciplinary enquiries, notwithstanding the Constitutions' Article 311 and, I would add, Article 320 either, - and Section 16 of the Indian General Clauses Act, 1897.

123. I would, accordingly, hold that, irrespective of the question, whether, for purposes of the present enquiry, the petitioner should be regarded as a District Judge in view of his officiating appointment at the material time, or, as a Subordinate Judge in view of the substantive post, he was still then holding, the present enquiry must lie held to be invalid, void and unconstitutional and, accordingly, it must be quashed. A similar view was taken in the case of AIR 1955 Andhra Pradesh 65 (Vide also the same case in its final phase, as reported in AIR 1959 Andh Pra. 497 and, although when the case at an intermediate stage, went up to the Supreme Court on appeal (Vide AIR 1957 Supreme Court 246) this particular question was left open by their Lordships there, I have not the least hesitation in coming to the same conclusion on the above point of

jurisdiction in the matter of enquiries like the present, as the learned Judges of the Andhra Pradesh High Court (Vide AIR 1955 Andhra 65, supra). My Lords are also of the same opinion and I respectfully agree with them in answering this question against the State.

124. In the above view on the point of competency or jurisdiction as aforesaid, it is unnecessary to consider the petitioner's other argument that for purposes of the impugned disciplinary proceeding, he should be regarded as a Subordinate Judge which was his substantive appointment at all material times, which, if accepted, would probably make it easier for him to establish this Court's exclusive jurisdiction in the matter of the present enquiry. I would, however, respectfully point out that, notwithstanding the Supreme Court decision in *Parshotam Lal Dhingra v. Union of India*[43], (Vide p. 43), in which the Article under consideration was Article 311, and which, accordingly is distinguishable, for purposes of Article 235, the substantive appointment of the particular Officer at the material time may well be more relevant than his officiating appointment and the principle of the decision of this Court in the case of *Rabindra Nath Das v. The General Manager, Eastern Railway*[44], at pp. 865-6, and the observations made therein, on this particular question, may well be more appropriate and applicable. I, however, refrain from expressing any final opinion on this particular question of law, that being, as I have said above, unnecessary for purposes of this instant case.

125. In the above view, I would agree with the order, proposed by my Lords, and make

[43] AIR 1958 SC 36

[44] 59 Cal. WN 859

this Rule absolute with costs in terms thereof.

Rule made absolute.