

Avadh Narain Singh Vs. Additional Superintendent of Police and ors.

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SooperKanoon Citation : sooperkanoon.com/454551

Court : Allahabad

Decided On : Feb-13-1959

Reported in : AIR1960All304

Judge : S.S. Dhavan, J.

Acts : [Constitution of India](#) - Articles 154, 154(2), 226 and 311; [Police Act, 1861](#) - Sections 7; Police Regulations - Regulation 486; Code of Criminal Procedure (CrPC) - Sections 128

Appeal No. : Civil Misc. Writ No. 1263 of 1957

Appellant : Avadh Narain Singh

Respondent : Additional Superintendent of Police and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : S.C. Khare, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S.S. Dhavan, J.

1. This is a petition under Article 226 of the Constitution impugning the legality of an order passed by the Additional Superintendent of Police, Varanasi, dated 10-11-1955, reducing the petitioner in rank for a period of two years, and also of an order of the Deputy Inspector General of Police, Eastern Range, Varanasi dated 26-6-1956 dismissing the petitioners' appeal against the aforesaid order of reduction, and of the order of the Inspector General of Police, Uttar Pradesh dated 20-3-1957, rejecting the petitioners' revision petition.

2. The facts, as stated in the petitioners' affidavit are these : He was enlisted in the U. P. Police force in 1931 and claims to have a good record of meritorious service (this claim is not denied by the State). On 15-8-1955, the petitioner was posted as Station Officer-in-charge of the Police Station at Moghalsarai in the district of Varanasi. Just before that time a firing had taken place in the State of Bihar, as a result of which several students had died. This led to agitation among the students in Uttar Pradesh as well and demonstration took place on 15th August.

A large crowd of students and others collected at Moghalsarai in the morning and went round the town shouting slogans. At or about 9.30 A.M. a procession consisting of nearly 3,000 persons, mostly students, marched to the Police Station Moghalsarai and began to shout slogans. They wanted that the national flag hoisted on the building should be half-masted out of respect for the memory of students who were killed in the firing at Patna. The crowd stated that if this demand was not granted it should be fired. The petitioner, who was incharge of the Police station, had already telephoned to the Senior Superintendent of Police, Varanasi, and requested him to send re-enforcements to enable him to deal with the situation.

This was done by him before the arrival of the procession. But no re-enforcements turned up and the crowd reached the Police station and made the aforesaid demand for the half-masting of the national flag. The petitioner states that he again telephoned to the Senior Superintendent of Police informing him of the demand made by the students. He told him that the situation was critical and requested him to send police aid immediately, as the Police force available at the station was wholly inadequate to deal with the crowd. The petitioner further states that the

Senior Superintendent of Police directed him on the telephone 'to handle the situation, tactfully' (this allegation is admitted by the State).

3. All this caused delay which made the crowd restless, insistent and increasingly aggressive. The Police reinforcement did not arrive. The petitioner states that, in these circumstances, there were only 'two alternatives open to him either to ask the processionist to disperse, and on their refusal, to use force and resort to firing if necessary, for to avoid blood-shed by acceding to the request for the half-masting of the national flag. It is alleged by the petitioner that the crowd assured him that they did not mean any disrespect for the national flag which, they considered to be their own flag, but they only wanted it to be half-masted in memory of the students who had died as a result of the police firing at Patna.

In these circumstances, the petitioner, having failed to persuade the mob to disperse, realised that its attitude made it clear that any formal order to disperse would be resisted. He also realised that the Police force at his disposal was wholly inadequate to meet the situation, and that the station building was so constructed as to preclude any defensive resistance against a defiant mob of such a big size. In these circumstances, the petitioner used his own discretion and decided, in the best interest and prestige of the Government, to avoid blood-shed and destruction of Government property by conceding the crowd's demand for half-masting the national flag. He, therefore, directed the flag to be lowered by one root for a few minutes. During this interval the crowd approached the flag and observed silence for a few minutes in memory of the students, who had died in the Patna firing. After this, they saluted the national flag and departed. The flag was then hoisted at full-mast once again.

4. The petitioner claims that his decision not only saved the lives of a large number of citizens but also the honour of the national flag and the prestige of the Government. It also saved Government property (presumably he means that the mob would have resorted to arson and destruction of property if it had got out of control). The petitioner states that, some time after this incident on the same date, the Commissioner of Varanasi, the Senior Superintendent of Police, the Deputy Inspector General of Police and the District Magistrate came to Moghalsarai. The

petitioner related to them the happenings earlier in the day and they expressed their full satisfaction 'in the manner in which the (petitioner) had handled the situation' (This statement has not been controverted by the state). The petitioner also sent a written report to the Senior Superintendent of Police on the same day and also to his other immediate Officers.

5. The petitioner states that, suddenly, on 22-8-1955, he received an order from the Senior Superintendent of Police suspending him. He alleges that no enquiry of any sort, as required by para 486(111) of the Police Regulations, was made to test the veracity of the report made against him. A charge-sheet dated 26-8-1955 was served on the petitioner under sec. 7 of the Police Act. It did not contain the names of the witnesses to be examined by the prosecution nor a list of documents which would be relied upon by them. On 10-9-1955, the petitioner was informed that the proceedings were about to begin and that he would have to cross-examine the prosecution witnesses.

This intimation was given to him only a few hours before the commencement of the proceedings. He moved an application that he should be given the names of the witnesses so that he was in a position to cross-examine them properly, but his application was rejected by the Additional Superintendent of Police, conducting the departmental enquiry against (him, The examination of the prosecution and the defence witnesses was completed, and the Superintendent of Police gave his verdict on 20-10-1955. A copy of his finding has been attached as Annexure 'E' to the petitioner's affidavit. It contains the following conclusion:

'I am to feel that the party charged was not led to his present lapse by any cowardice or deliberate desire to save himself at the cost of the national honour represented by the national flag but that the situation arose from his lack of Kill understanding of the implications of his action and his preliminary negligence in not keeping himself abreast of the situation. Under the circumstances 'therefore, while I am of the opinion that he does not deserve the severest punishment of dismissal, I do not consider him absolved of the initial negligence leading to the situation which necessitated his exercise of discretion and the consequent permitting of the lowering of the flag without use of power vested in him under

Section 128 Cr. P. C. facts of which are not denied by the defence. In view of the overall situation and the existence of extenuating circumstances and a good Character Roll, I am inclined to deal with the party charged leniently. It is proposed to reduce him to the lowest grade for a period of two years. The party charged will appear before me on 1-11-1955, at the Police Office at 11 A.M. and show cause why this punishment should not be inflicted'.

6. The petitioner states that he submitted a written explanation in response to the show-cause notice in which he brought to the notice of the punishing authority a number of instances in which, under similar circumstances, other authorities had acted in the same manner as the petitioner. He pointed out that the Governor of Bihar had permitted the lowering of the national flag in circumstances similar to the case of the petitioner, with this difference that the Police force at the disposal of the Governor was sufficient to enable him to order the dispersal by force of the mob confronting him, whereas the petitioner had no adequate force to meet the situation.

His explanation was rejected and the Additional Superintendent of Police passed an order that the petitioner should be reduced to the lowest grade of pay in his rank for a period of two years. A copy of this order has been attached to the petitioner's affidavit as Annexure 'H'. The petitioner then filed an appeal before the Deputy Inspector General of Police, Eastern Range, which was dismissed. A copy of the appellate order has been filed as Annexure to the petitioners affidavit. He filed a revision before the Inspector General of Police Uttar Pradesh at Lucknow, which was also rejected. A copy of the order in revision has been attached as Annexure 'K' to the petitioner's affidavit. Aggrieved by the order of reduction the petitioner has come to this court for relief under Article 226 of the Constitution.

7. The petition is opposed by the State. A counter affidavit has been filed which was sworn by one Vakil Ahmad, described as Circle Inspector of Police, Varanasi. It consists of 9 paragraphs of which the first two have been verified as true to the personal knowledge of the deponent and the remaining paragraphs 'as based on information and perusal of the record of this case.' The first paragraph merely contains the formal statement that the deponent is the Circle Inspector of Police,

posted at Varanasi and fully acquainted with the facts given in the affidavit.

The second paragraph asserts that the petitioner , was found guilty of permitting the lowering of the national flag without making use of the powers under Section 128 Cr. P. C. and that the charge was fully enquired into by the departmental authorities and it had been held to have been established. It also contains a submission of law that there is no error apparent on the face of the record. The allegations in these two paragraphs are more or less innocuous. All the remaining paragraph contain allegations based on hearsay information. Some of them merely contained the personal information of the official making the affidavit; for example, paragraph 4 of the counter affidavit runs as follows :

'4 That in paras 13, 17 and 18 of the applicants' affidavit it is to state that the lowering or half-hoisting of the national flag in the circumstances of the case was a gross disrespect to it. The question of the assurance the processionist gave to the applicant is immaterial. The applicant has dishonoured the national flag.'

8. It has been pointed out again and again by, this Court that the allegations in an affidavit in proceedings under Article 226 must be confined to statements based on the personal knowledge of the person swearing it, and must not contain any expression; of opinion or submissions of law. These warnings had been repeated a large number of times but the habit of including irrelevant and even improper allegations continues. I regret to say that affidavits filed on behalf of the State very often include all the undesirable features frequently condemned by this Court.

The counter affidavit of Vakil Ahmad in these proceedings is a fair specimen of what ought not to be. As the allegations made in it are inadmissible under the law, I reject the counter affidavit as an affidavit but direct that it shall remain on the record as the written statement of the State in reply to the petition. Consequently the allegations contained in the petitioner's affidavit shall be deemed to have been uncontroverted.

9. Learned counsel for the petitioner, Mr. S.C. Khare, impugned the legality of the decision to reduce the petition on seven grounds. First, he contended that no preliminary enquiry, as contemplated by Regulation 486(3) of the Police

Regulations, was made and therefore the entire proceedings before the Enquiry Officer (Addl. Superintendent of Police) were without jurisdiction and illegal. Secondly, the petitioner had been convicted for an offence different from the one shown in the original charge.

Thirdly, the refusal of the Senior Superintendent of Police to summon the confidential reports of the Senior Superintendent of Police and the District Magistrate of Varanasi, which were sent by those Officers to Government immediately after the incident and in which the petitioner's action had been approved, had gravely prejudiced the petitioner in the enquiry. Fourthly, the refusal of the prosecution to supply the names of the prosecution witnesses to the petitioner had materially prejudiced the petitioner in his cross-examination. Fifthly, the commencement of the enquiry proceedings within two hours of the information to the petitioner that he would have to cross-examine the witnesses (no list) having been given) had gravely prejudiced the petitioner, as the interval at his disposal was too short to enable him to cross-examine the prosecution witnesses effectively. Sixthly, the record shows on the face of it that the petitioner committed no offence under the Police Act.

10. Before I deal with the arguments of the learned counsel for the petitioner on merits, it is necessary to clarify the position as regards facts. The material facts; are not in dispute, except as regards one or two points. The following material facts are either admitted by both parties or alleged by the petitioner and not disputed by the State :

(1) The petitioner was in-charge of the Police Station at Moghalsarai on 16-8-1955,

(2), A few days earlier, several students had been killed as a result of police firing at Patna in the State of Bihar.

(3) The Patna firing had resulted in agitation among the students.

(4) On 15-8-1955, a large crowd of students collected before the Police Station Moghalsarai, which was under the charge of the petitioner.

(5) The crowd consisted of about 3,000 persons, mostly students.

(6) The crowd demanded that the national flag be half-masted to show respect for the memory of the students who were killed in the Patna firing, and made it clear that officer-in-charge would have to concede the demand or disperse; the students by firing.

(7) The petitioner sent more than one telephone message to the Senior Superintendent of Police at Varanasi informing him of the situation and making urgent requests for additional force to enable him to cope with the situation.

(8) Senior Superintendent of Police, in reply, directed the petitioner to handle the situation tactfully. To quote his exact words, "I told the Sub-Inspector that the flag should not be lowered and that he should handle the situation tactfully and should try to keep the students at bay till Officers and force reach from Banaras I told the Station Officer to handle the situation tactfully but I never told him that no force should be used as mentioned in Ext. P. 6.'

This is one of the most important facts in this case.

9. The Police enforcements demanded by the petitioner did not arrive in time and consequently he had to deal with the situation as best as he could, subject to the directions given by the Senior Superintendent of Police on the telephone.

10. The petitioner had two alternatives either to handle the situation tactfully without the use of the force or to direct the crowd under Section 128 Cr. P. C. to disperse and to resort to force in case of refusal.

11. The petitioner, in the exercise of his discretion, and in accordance with the direction of the Senior Superintendent of Police to handle the situation tactfully, acceded to the request of the crowd for half-masting the national flag.

12. The flag was half-masted by one foot. The crowd observed a few minutes silence and afterwards saluted the national flag and went away.

13. After this the flag was again flown at full-mast.

11. In addition to the above facts, learned Standing counsel for the State made a statement at the Bar, on a question from me, I pointed out to him that the District Magistrate of Varanasi had given evidence in the enquiry proceedings against the petitioner in which he stated that he received a report of the incident of 15th August at Moghalsarai from the Senior Superintendent of Police, which he forwarded to Government with his comments. I asked! him whether he was prepared to make a statement confirming or denying the allegation in the petitioner's affidavit that the district authorities as well as the Commissioner of Varanasi and the Deputy Inspector General of Police had expressed their full satisfaction with the manner in which the petitioner had handled the situation at the Police station on 15-8-1955.

In response to my suggestion, the learned Standing counsel, after obtaining an adjournment to obtain Instructions, stated that all the senior officers of the district, that is, the Commissioner, the Deputy Inspector General of Police, the District Magistrate and the Senior Superintendent of Police, had visited Moghalsarai soon after the incident and had agreed that the petitioner had a very difficult situation to face and handled the situation as best as he could at the spur of the moment without worsening it. I was shown a letter written by the Senior Superintendent of Police, Banaras, on 28-5-1956, and addressed to the Deputy Inspector General of Police, Range (e), which contained a statement almost identical with the one made by learned counsel for the 'State at the bar. This is letter No. S/SSP/R-14 dated Banaras 28-5-1956.

12. It is also important to bear in mind the exact terms of the charge which the petitioner was asked to defend himself against. It is as follows ;

'S. I. Shri Avadh Narain Singh is charged under Section 7 of the Police Act for remissness in the discharge of his duties and unfitness for the same, in that, while posted as Station Officer, Moghalsarai, on 15-8-1955, he, without making use of the powers vested in him under Section 128 of the Cr. P. C. permitted the lowering of the national flag at the Police Station Moghal Barai some time between 8.30 A.M. and 11 A.M. when a mob of agitators, forming an unlawful assembly, demanded the lowering thereof in sympathy with the students killed at Patna in a

police firing earlier.

II- 'S. I. Shri Avadh Narain Singh will appear before me on Monday, 5-9-1955 and put in his written statement as to whether he accepts or; denies the charge.

Sd./- R. N. Shivapory I. P. C.

Additional Supdt. of Police,

Banaras.

26-8-55.'

13. It is noteworthy that the petitioner was accused of the offence of remissness in the discharge of his duties. He was also served with the particulars of the offence attributed to him. He was told that he had failed to make use of the powers vested in him under Section 128 Cr. P. C. when faced with the demand of a mob of agitators (forming an unlawful assembly) that the national flag flying over the police station should be lowered in sympathy with the students killed in a police firing at Patna. It is important to take note of those particulars, for if the record shows, on the face of it, that the petitioner was held to be guilty of some other offence or offences not included in these particulars, he will have established his case that he was not given a reasonable opportunity of showing cause against the action proposed to be taken against him as required under Article 311 of the Constitution.

14. I confess that I have given the most anxious consideration to this case which raises issues of public interest and far-reaching constitutional importance. Some of the facts loading to the petitioners' reduction are wrapped in mystery which was not cleared up during the hearing of this case. There is not the slightest doubt that his action in dealing with a very difficult situation was at first approved by all his superior officers without a single exception. But all of a sudden, for some reason not revealed in the record, it was decided to censure the petitioner for having acquiesced in the half-masting of the national flag, and he was formally charged with the offence for not having dispersed the crowd by force.

Learned counsel for the petitioner suggested, during his arguments, that the change in the attitude of the authorities was due to a speech made by the Prime Minister, shortly after the incident in which he had observed that no insult to the national flag should be tolerated. In fact, counsel opened his argument with the remark that 'this was a very unfortunate case, in which the whole trouble was caused by a speech of the Prime Minister after a few incidents in which the students had demanded that the national flag should be lowered in the memory of students who were killed in the Patna firing and on the refusal of the authorities to do so, had hauled down and burnt the flag.' Learned counsel said that, after the speech, the petitioner was made a scapegoat by the authorities to please the Prime Minister.

15. If properly proved, this allegation would be yet another proof that human nature (particularly official nature) has not changed very much since the day when (29th December 1175 A.D.) the four English knights-De Tracy, De Morville, Fitz Urse, and Le Breton rode out to Canterbury to carry out what they considered to be the pleasure of their royal master Henry II 'to be rid of the turbulent priest, and murder Thomas Becket, Archbishop of Canterbury in his own Cathedral. But no foundation has been laid for this suggestion in the petitioner's affidavit. There is not even a mention of the Prime Minister's speech to which learned counsel referred in his very first sentence of his opening argument. Such a foundation could have been laid.;

It was not necessary for the petitioner to make any accusations or insinuations. It would have been sufficient to 'give the date of the speech alleged to have been made by the Prime Minister and a summary of its contents as reported in the press. If the petitioner could have shown that his immediate superiors had approved of his action before the alleged speech and that the sudden change in their attitude took place after it, the sequence of events would have been, in the absence of any alternative explanation from the State, more eloquent than any argument of counsel. The petitioner might then have been in a position to suggest that the authorities had surrendered their independent judgment and had exercised their powers under Section 7 of the Police Act in accordance with what they considered the sentiments of the Prime Minister. But, as no foundation of fact was laid in the petitioner's affidavit, learned counsel's suggestion is no more than

an insinuation. I am afraid it is; not possible for this Court to take notice of alleged events which are not proved by the record,

16. But I cannot help noticing that the sudden reversal of the attitude of the authorities, from unqualified approval of the petitioner's action to its downright condemnation is wrapped in mystery. For example, on 28-5-1958, the Deputy Inspector General of Police, Mr. S.U. Ahmad visited Moghalsarai and appears to have concurred with the view of the Senior Superintendent of Police Mr. Prem Swamp that the petitioner had a very difficult situation to face and handled it as best as he could at the spur of the moment without worsening it. But the same officer on June 27, 1956, in his order dismissing the petitioner's appeal observed, 'I agree with the finding of the Additional Superintendent of Police that the appellant was negligent in dealing with the situation and that he was weak for handling the mob'.

17. But, this Court cannot interfere with the decision of the executive authorities on any consideration of alleged injustice as such interference would amount to a usurpation by this Court of powers which the Constitution has vested exclusively with the executive branch of Government. The High Court can issue an order, in the exercise of its powers under Article 226 of the Constitution, only in accordance with well recognised principles. An order removing an official of the State can be quashed by this Court only if it was passed without jurisdiction or in excess of Jurisdiction or without complying with the conditions laid down in Article 311 of the Constitution, or if there is any other illegality or irregularity which vitiates the decision.

If, however the order was within jurisdiction and not otherwise illegal, it cannot be set aside by this Court on the ground, that in its opinion, it is harsh or unjust or oppressive. The function of the High Court is to ensure that no illegality is committed by the authorities in the exercise of their powers conferred by law. Beyond this limited function, the Court cannot interfere with the decisions of the executive and, in particular, it cannot presume to be wiser than the executive in matters exclusively within the sphere of the latter and substitute its own Judgment for that of the executive.

18. I shall now consider whether the procedure leading to the decision to reduce the petitioner: In rank violates any provision of the law or Constitution to such an extent as to justify the intervention of this Court, Learned counsel for the petitioner has advanced a number of reasons against the legality of the order. But the starting point of any discussion of this controversy must be the fundamental fact that the petitioner is a member of a service of the State of Uttar Pradesh. His tenure of office is therefore governed by Article 310 of the Constitution; he holds office during the pleasure of the Governor.

This rule is subject to the limitations laid down in Article 311 of the Constitution. One of them is that a civil servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed. The other is that he shall not be dismissed or 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 (in certain cases this procedure may be dispensed with but that point does not arise in the facts of this case).

These are the only two fetters on the power of the Governor to terminate at his pleasure the services of any civil servant in the employment of the State. There are a few other limitations expressly provided by the Constitution in the case of specified classes of State employees. They are mentioned, inter alia, in Arts. 124. 148. 218 and 324 which respectively provide expressly that the Supreme Court Judges the Auditor General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except by an order of the President passed after an address by each House or Parliament supported by the requisite majority (specified in the particular Article applicable), has been presented to him in the same session for such removal on the ground of proved misbehaviour or incapacity.

Another exception, is provided by Art 317 in the cases of the Chairmen and Members of the Union and 'State Public Service Commission : it lays) down that such Chairman or Member shall only be removed from his office by order of the President on the ground of misbehavior after the Supreme Court, on reference made to it by the President, has, on enquiry held in accordance with the procedure

prescribed in that behalf in Article 145, reported that the Chairman or such other Members, as the case may be, ought on any such ground to be removed. Subject to these express exceptions, the [Constitution of India](#) by Article 310(1), has adopted the English Common Law Rule contained in the Latin phrase *durante bene placito* and laid down that public servants hold office during the pleasure of the President or Governor, as the case may be, subject to the limitations imposed by Article 311.

As observed by the Supreme Court in *P. L. Dhingra v. Union of India* : (1958)ILLJ544SC , Article 311: operates as a proviso to Article 310(1). Subject to the limitations contained in it the power of the Governor to dispense with the services of a civil servant is absolute. It was observed by a Division Bench of this Court (Mootham and Chaturvedi, JJ) in *Jagarmath Prasad v. State of U.P.* : AIR1954 All629 .'

The Governor's power to dismiss at pleasure is subject only to the express provisions of the Constitution. Power is conferred upon the Governor by Article 309 to make rule regulating the conditions of service of civil servants of the State Government, but such power is subject, *'inter alia'*, to the provisions of Article 310, and no rules can be made which fetter or restrict his power to dismiss at pleasure. We find ourselves in agreement, if we may say so with respect, with the views of Dixit J., on this point in *'Mrs. Lilawati v. State of Madhya Bharat'* AIR 1952 Madh B 105. The disciplinary Rules were made prior to the commencement of the Constitution, and assuming they were validly made they can, in our opinion, have no greater effect or stand on a higher footing than rules made by the Governor under Article 309. These rules (except Rule 10(1) 1 are in our opinion administrative rules, and the contravention of their provisions will not confer upon the petitioner a cause of action.'

19. In the *Madhya Bharat* case quoted with approval by the learned Judges (AIR 1952 Madh B. 105) it was held that any rules made by the Governor in the exercise of his powers under Article 309 of the Constitution do not in any way abridge or control the powers of the President or the Governor to dismiss at pleasure a civil servant. It was further held that these rules are merely

administrative rules for the guidance of officers of the Government in the, imposition of penalties and in the conduct of departmental enquiries against Government servants. The dismissal, removal, or reduction in rank of a civil servant in violation of the rules would not by itself entitle him to come to the High Court (under Article 226 of the Constitution).

It was further made clear that only a breach of Article 311 would give to a civil servant the right to approach the High Court or a civil court for redress. In other words, it was held that no breach of any rule would invalidate the decision till removed or reduced in rank a civil servant unless such breach amounts to violation of the conditions prescribed in Article 311 of the Constitution. The same principle was laid down by the Privy Council in *Venkatarao v. Secy, of State* 0043/1936 in which the meaning of the phrase, 'shall hold office during the pleasure of the Crown' was explained.

It was laid down that no redress was obtainable from the courts by action if a civil servant was removed without complying with the procedure prescribed in the rules made under the Government of India Act. It is noteworthy that the Privy Council were dealing with a case in which, to quote their own words, there had been 'a serious and complete; failure to adhere to important and indeed fundamental rules' and in which 'mistake of a serious kind had been made and wrongs had been done which called for redress'. But the aggrieved employee's suit was dismissed on the ground that the power of the Crown to dismiss a civil servant at its pleasure had been made absolute under the Constitution and could brook no limitation.

It is settled law that under our Constitution, excepting cases expressly reserved by the Constitution and also those where the employee's tenure is fixed by a special contract, a servant of the state cannot impugn the legality of an order of dismissal or removal or reduction unless he can show that it was passed in violation of the conditions prescribed by Article 311 of the Constitution. If, in answer to any action by the employee, the State can show that these conditions were complied with, the Courts will uphold the dismissal or removal or reduction in rank and no breach of rules, however gross or blatant, will avail the aggrieved employee. The principle underlying this harsh rule is that, in their wisdom, the makers of our Constitution

gave an absolute power to the President or the Governor (as the case may be) to dismiss or remove or reduce in rank any employee at his pleasure.

They thought that it was in the public interest that the State should not be answerable in the courts of law if it took action against its employees except to a limited extent and that it should have a whip hand over its servants in this respect. The Governor wields a power conferred by the fundamental law of the land and it cannot be abridged by any act of the Legislature or rule made under any statute. It can, be abridged or taken away only by an amendment of the Constitution itself.

20. Another, limitation is imposed by Part III of the Constitution. In the recent case of *Moinuddin v. State*, Writ Petn. No. 3660 of 1956, I pointed out that the view expressed by Agarwala, J. in *Raj Kishore v. State of U.P.* : AIR1954 All343 that Article 810 being a special provision is not controlled by Article 14 is in conflict with that of the Supreme Court in *State of Madhya Pradesh v. G. C. Mandawar* : (1954)IILLJ673SC .

I held in that case that Article 310 is not a special provision within the area of Part III of the Constitution, that the orbits of Article 310 and Part III are different, and that the injunctions against discrimination in Arts. 14, 15 and 16 transcend and control every power under the Constitution and that there are no exemptions except those specified in the Constitution itself. I further held that the power of the State under Article 310 is not exempt from the control of these three Articles and that a Government servant is entitled to relief against victimisation for motives of religious bigotry racialism, casteism, provincialism or on the ground of sex. However, these considerations do not arise in the present case.

21. The petitioner is a member of the Police force a fact of vital significance in this case. The action against him was not taken by the Governor or any authority acting on his behalf under the authority vested in him under Article 310. (This casa does not appear to have reached the Governor officially). The petitioner being a Police officer of subordinate rank, the disciplinary proceedings resulting an, his reduction were initiated under Section 7 of the Police Act (Act V of 1861). That Act was passed in 1861 and amended by the Police Act (Amendment: Act VIII of 1895). It is effective today. Section 7 of this Act is as follows:

'7. (Subject to such rules as the Provincial Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police-officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same; (or may award any one or more of the following punishments to any police-officer (of subordinate ranks) who shall Discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely :

(a) fine to any amount not exceeding one month's pay;

(b) confinement to quarters for a term not exceeding fifteen days, with or without punishment drill, extra guard, fatigue or other duty;

(c) deprivation of good-conduct pay;

(d) removal from any office of distinction or special emolument)'.
'

22. This section invests the three authorities Specified thereunder with certain disciplinary powers against police officials of subordinate rank. They are, of course subject to the limitations specified in the Section. First, they are subject to the rules, if any made by the State Government. The rules in this case are the Police Regulations. Secondly, the punishment can be inflicted under this section only for remissness or negligence in the discharge of duty or unfitness for the same. Thirdly, there must be a finding by the punishing officer that the subordinate has discharged his duty in a careless or negligent manner or has, by any act, of his own, rendered himself unfit for the discharge of his duty. Fourthly, the punishment must be confined to the categories specified in the Section. By the U. P. Act of 1944, a new category of punishment was added 'withholding of increments or promotions including stoppage at an efficiency bar.'

23. These powers, under Section 7, are derived from a statute which existed prior to the Constitution which now invests the Government with absolute control over the tenure of service of every State servant. The question is whether, after the

commencement of the Constitution, the powers vested under Section 7 in the Superintendent, Deputy Inspector-General, and Inspector-General of Police, have been superseded by Article 310 or have merged in the powers of the Governor. If they have, it follows that, after the Constitution, these authorities shall be deemed to exercise this power on behalf the Governor.

The point is of importance, for if the powers under the Police Act have, after the Constitution merged in the powers of the Governor and are exercised by the three authorities on his behalf. Article 310 will apply; and the authority of this Article will be a good defence against any attack on the legality of an order passed under that Article, unless it can be shown that the mandatory provisions of Article 311 had not been complied with and that the official concerned was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But no breach of the Police Regulations or any other rules will avail a petitioner who seeks relief under Article 226 unless he can show that such breach has resulted in a violation of Article 311.

24. But if on the other hand, the powers of the Superintendent, Deputy Inspector General and the Inspector General of Police under Section 7 are exercised, even after the commencement of the Constitution, independently of the Governor's powers under Article 310, they must be subject, in addition to the transcendent control of Article 311, to all the limitations and conditions in the statute creating these powers. It is, therefore, necessary to consider the effect of the Constitution (including Article 310) on the powers of the three authorities under Section 7 of the Police Act.

25. Article 310 deals with the tenure of office of State servants and says in effect that every servant shall hold office during the pleasure of Government. This provision is borrowed from the British Constitution under which every servant of the Crown holds office during Her Majesty's pleasure. If the Crown wishes to remove or take action against any State servant, it acts in its jurisdiction.

26. Wade and Phillips, in their treatise, Constitutional Law, 5th Edition, have pointed out that the power of the Crown in regard to the civil service is a part of the prerogative powers of the Crown that is, the executive powers of the State. In

India, too, the tenure of a Government service is at the pleasure of the President or the Governor but the actual action against any State servant is taken under the executive powers of the State. Now, under Article 53, the executive power of the Union is vested in the President and may be exercised by him through officers subordinate to him. But Clause (2) of this Article clearly states that nothing in this article shall be deemed, to transfer to the President any functions conferred by any existing law on the Government of any State or other authority.

There is an exactly similar proviso to Article 154 vesting the executive power of the State in the Governor which says that nothing in that Article shall be deemed to transfer to him functions conferred by existing law on any other authority. It, therefore, follows that the powers of the Superintendent, Deputy Inspector General and the Inspector General of police under Section 7, having been conferred by a law existing on the date of the Constitution, were not transferred to the Governor but continued to be vested in those three officers. No question of supersession or merger of these powers arises. These authorities exercise their powers under Section 7 of the Police Act, not on behalf of the Governor but by virtue of the authority vested in them by statute. I am fortified in this opinion by the following observation of a Division Bench of this Court (Mootham and Chaturvedi, JJ.) in : AIR1954 All629

'Now Section 7 of the Police Act provides that (subject to Article 311 and to such rules as the State Government may make) certain specified officers may dismiss a police officer of the subordinate ranks. There is nothing in the Act which touches on the power of the Crown to dismiss a police officer and nothing which is inconsistent therewith; on the other hand, Rule 479-A of the Police Regulations, which is a rule made under Section 7 of the Act, contains an express reservation of the Governor's powers of punishment with reference to all officers. The powers vested by Section 7 in the Inspector General and certain other Officers to dismiss subordinate ranks of the police Force is not, in our opinion, a delegation to them of the Crown's power of dismissal at all but is a separate statutory power which is neither a substitute for, nor restricts the constitutional power of the Crown to dismiss its servant at its pleasure.'

27. In that case their Lordships were considering the effect of Section 241 of the Government of India Act, 1935, on the powers under Section 7 of the Police Act. But Article 310(1) incorporates the principle contained in Section 241 that the tenure of office of every Government servant shall be at the pleasure of Government. Therefore the observation of Moo-than and Chaturvedi, JJ. in : AIR1954 All629 is equally applicable to Article 310. I, therefore, hold that the power under Section 7 of the Police Act are not delegated by the Governor but created by statute and therefore subject to all the conditions and limitations prescribed by that statute. It follows that any serious violation of the conditions of transgression of the limitations will invalidate any decision made under Section 7.

28. I shall now proceed to consider whether the proceedings which led to the order reducing the petitioner are vitiated by any irregularity or illegality which calls for the interference of this Court under Article 226.

29. Learned counsel for the petitioner contended that no preliminary enquiry, as prescribed by Regulation 486 (III) was made and therefore the entire subsequent proceedings before the enquiry officer were without jurisdiction. 486 (III) is as follows :

'When a Superintendent of Police sees reason to take action on information given to him, or on his own knowledge or suspicion, that a police officer subordinate to him has committed an offence under Section 7 of the Police Act or a non-cognizable offence (including an offence under Section 29 of the Police Act) of which he considers it unnecessary at that stage to forward a report in writing to the District Magistrate under rule II above, he will¹ make or cause to be made by an officer senior in rank to the officer charged, a departmental inquiry sufficient to test the truth of the charge.

On the conclusion of this inquiry he will decide whether further action is necessary, and, if so, whether the officer charged should be departmentally 'tried, or whether the District Magistrate should be moved to take cognizance of the case under the Criminal Procedure Code; provided that before the District Magistrate is moved by the Superintendent of Police to proceed criminally with a case under Section 29 of the Police Act or other non-cognizable, section of the law against an inspector,

sergeant or sub-inspector, the concurrence of the Deputy Inspector General must be obtained. Prosecutions under Section 29 should rarely be instituted and only when the offence cannot be adequately dealt with under Section 7.'

30. This clause provides in effect that there shall be a preliminary investigation before it is decided that a regular departmental enquiry shall be held against a Police official. The language of this clause shows that this investigation is a very informal affair. It can be very largely oral and even written statements need not be recorded verbatim. The purpose of the investigation appears to be to enable the Superintendent to decide whether, on the material before him, any further action against the officer charged shall be worthwhile. It is not required that the accused officer shall be heard at this stage. The investigation should satisfy the Superintendent that there is *prima facie* a case against the Officer.

But where the facts are not open to dispute, the omission to hold a preliminary investigation will not invalidate the subsequent departmental enquiry. The mission to make a preliminary investigation will 'not be fatal to the subsequent proceedings if no prejudice has been caused to the accused official by the omission. The preliminary enquiry under Clause III is not in the interest of the accused officer but for the satisfaction of the Superintendent of Police. If, without holding an enquiry, he is satisfied that proceedings should be taken against the officer, the omission to comply with the provisions of Clause III will not invalidate the departmental proceedings, unless the officer can show that he has been materially prejudiced by this omission in the subsequent departmental enquiry.

In the counter affidavit of the 'State (rejected by me as an affidavit but retained on the record as a written statement), it is admitted that no enquiry under Clause III was held but it is explained that, as it was considered by the departmental authorities that proceedings under Section 7 should be taken against the petitioner, a preliminary enquiry was not considered necessary. Learned counsel was not able to explain how the petitioner has been prejudiced by the omission to hold the investigation. I hold that the omission to make a preliminary enquiry under Section 486(III) does not invalidate the subsequent proceedings.

31. Next it was contended that the refusal of the Senior Superintendent of Police to summon the confidential reports which were sent by the local authorities to Government immediately after the incident and in which the petitioner's action had been approved, had gravely prejudiced the petitioner in, 'the enquiry. The record shows that both the District Magistrate and the Superintendent of Police were summoned as witnesses in the departmental enquiry and cross-examined by the petitioner. The petitioner could have put any question to both of these officers to elicit the fact that they had sent their reports and if so, to prove their contents. But no such question appears to have been asked.

The petitioner had a fair opportunity of proving all the facts favourable to his case and cannot make a grievance of his own failure to avail of this opportunity. Moreover, during the hearing of this petition, counsel for the State conceded that the petitioner's action had been approved by the Superintendent, the District Magistrate, and the Commissioner of Varanasi, and the Deputy Inspector. General of Police. The Superintendent's letter No. ST/. SSP/R-14 dated Banaras May 18, 1956 was read out in Court. Counsel for the petitioner was not able to show that the initial approval of the petitioner's action by these local authorities does not advance the petitioner's case in law, though it may excite sympathy for the petitioner. There is no substance in this contention.

32. It was then contended by learned counsel that the refusal of the prosecution to supply the names of the prosecution witnesses to the petitioner had materially prejudiced him in his cross-examination. It was also contended that adequate notice, of the commencement of the enquiry proceedings was not given to him and he was asked to take part in the enquiry within two hours of the information given to him. These two contentions can be disposed of together. I would have been disposed to take this grievance seriously if there had been any dispute regarding facts. But in the present case all the material facts are undisputed. In an earlier part of this judgment I have enumerated 13 sets of material facts which are common ground between the petitioner and his accusers.

The entire controversy centres round the question whether his action in not resorting to firing amounts to negligence or failure to discharge his duty within the

meaning of Section 7 of the Police Act. This question can be decided on the basis of admitted or uncontroverted facts, and it is difficult to understand what further material would have been added to the evidence if the petitioner had been given a longer notice of the proceedings. Learned counsel' for the petitioner was not able to show, in spite of repeated questions from me, how the petitioner was, materially prejudiced by the alleged short notice or what material facts would have been elicited by him in cross-examination if he had been given more time I, therefore, hold that no prejudice was caused to the petitioner by the alleged shortage of notice,

33. It was then contended by the learned counsel that the petitioner had been convicted for an offence different from the one shown in the original charge. The charge-sheet served on the petitioner under Section 7 has been quoted verbatim in an earlier portion of the judgment. It accuses the petitioner of having failed to make use of the power vested in him under Section 128 Cr. P. C. when he was asked by the crowd to lower the national flag at Police station Moghalsarai on 15-8-1955. The essence of the charge therefore is based on the petitioner's failure to use force against the so-called unlawful assembly which faced him at the Police station on 1.5th August. The verdict of the enquiry officer is contained in the concluding paragraph of his finding which is as follows :

'Under the circumstances therefore I am of the opinion that he does not deserve the severest punishment of dismissal, I do not consider him absolved of the initial negligence leading to the situation which necessitated his exercise of discretion and the consequent permitting of the lowering of the flag without use of power vested in him under Section 128 of the Cr. P. C., facts of which are not denied by the defence.'

33a. This paragraph shows that the enquiry officer convicted the petitioner of the offence of having permitted the lowering of the national flag without use of the power vested in him under Section 128 Cr. P. C. The paragraph also contains reasons which led the Enquiry officer to give this finding. It is true that he says that the petitioner by his own initial negligence created for himself a situation in which he was compelled to agree to the lowering of the flag without being able to use

force under Section 128 Cr, P. C. But the petitioner has not been convicted of his alleged initial negligence.

The Enquiry officer observed, 'On a careful scrutiny of the evidence put up before me, I am, of the opinion that the party charged in spite of clear orders issued from Headquarters was not keeping abreast of the developments in the students world of his political circle and did not consider legal action against students advisable at any stage.' He then gave the finding quoted above which held him guilty of the offence stated in the charge. It may be that any consideration of some previous act of remissness of duty on 15-8-1956 may affect the; validity of the Enquiry Officer's finding. But I am unable to agree that the petitioner has been convicted of an offence different from the one he was charged with. Whether the conviction is legal is another matter,

34. I shall now consider the last contention of the petitioner that he was not guilty of any offence under the Police Act. In effect, the petitioner asks this court to hold that the finding of the enquiry officer that the petitioner was remiss in the discharge of his duties because he permitted the lowering of the national flag without making use of the powers vested in him under Section 128 Cr. P, C. is wrong'. On the other hand, it is ' contended on behalf of the State, that this court has no jurisdiction to interfere with this finding in proceedings under Article 226 of the Constitution.

It is also contended that this is a finding of fact which cannot be interfered with in proceedings under Article 226. Junior 'Standing Counsel contended that, even if this Court is of the opinion that it would have given a different decision on the same set of facts, it cannot substitute its own opinion for that of the Enquiry officer. The two opposing contentions raise a question of far-reaching importance relating to the power of the High Court under Article 226 of the Constitution to interfere with the findings of judicial or quasi-judicial tribunals on the ground that they are erroneous,

35. It is beyond dispute that the departmental enquiry under Section 7 of the Police Act read with Clause 489 of the Police Regulations is quasi-judicial in nature. A charge sheet has to be served on the accused officer. Evidence must be

led on both sides, The testimony of witnesses must be direct and not hear-say. The entire evidence must be recorded by the Superintendent of Police himself in the presence of the party charged, who must be allowed to cross-examine the witnesses. On the basis of the material before him, the Superintendent of Police must give a finding. He is enjoined 'to confine himself strictly to the subject of the charge and to the evidence on the record and must discuss every relevant plea raised by the officer charged'.

Thus, this enquiry has all the characteristics of a quasi-judicial proceeding pointed out by the Supreme Court in *Province of Bombay v. S. Khushaldas Advani* : [1950]1SCR621 . In fact, the various provisions of the Police Regulations make the enquiry almost indistinguishable from a regular criminal trial. That being so, the proceedings are amenable to the jurisdiction of this court under Article 226 and, on sufficient cause being shown, a writ of certiorari can issue.

36. In *T. C. Basappa v. T. Nagappa* : [1955]1SCR250 the Supreme Court held that certiorari will issue if the tribunal has acted without jurisdiction or in excess of it. It will also issue if the tribunal acts in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it violates the principles of natural justice. Certiorari will also issue if there is a manifest error on the face of the proceedings as for example, when it is based on clear ignorance or disregard of the provisions of the law. To quote the words of the Supreme Court, 'It is a patent error which can be corrected by certiorari but not a mere wrong decision'.

In the present case no question of absence of excess of jurisdiction arises,, as it is common ground? that the Additional Superintendent of Police had' the power to conduct the departmental enquiry against the petitioner. I have already rejected the contentions of learned counsel for the petitioner that there has been any serious irregularity or illegality in procedure or failure to observe the principles of natural justice. The sole remaining question, therefore, is whether there is such a manifest error in the findings of the Enquiry officer as to justify the issue, of a writ of certiorari.

37. In the subsequent case of *Hari Vishnu Kamath v. Ahmad Ishaq* : [1955]1SCR1104 , the 'Supreme Court considered what amounts to a manifest

error. It observed; 'It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face' of' the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case.

When does an error cease to be a mere error and become an error apparent on the face of the re-cord? The fact is that what is an error apparent on the face of the record cannot be defined precisely or, exhaustively there being! an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case,'

In no subsequent case, have their Lordship given a more precise definition of 'an error apparent on the face of the record', for the simple reason that they have already held in Hari Vishnu Kamath's case : [1955]1SCR1104 that this phrase 'cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature'. They left to the High Courts to decide each case on its own facts, This court has adopted, as indeed it was bound so to do', the approach of the Supreme Court to this question. In Registrar, University, Allahabad v. Dr. Ishwari Prasad : AIR1956 All603 , a Division Bench of this court observed:

'It is clear that no exhaustive definition can be given to the words 'error apparent on the face of' the record.' It will not entirely depend upon the nature of the error or upon the degree of the error. Each case will have to be determined on its own facts. A superior court or tribunal will have to examine an order itself and decide whether the order, in the circumstances of that particular case, can be regarded as erroneous on the face of the record or a mere error of law.'

38. From these authorities, it is clear that a, writ of certiorari will issue to correct an error of law' only if it is manifest or apparent on the face of the record. A writ will not issue if it is a mere error of law, and certainly not if the error relates to a finding of fact. I have therefore to consider whether, in the present case, the finding of the Enquiry officer is erroneous and if so, whether this error is one of law and manifest on the face of the record.

39. The charge against the petitioner was that he 'without making use of the powers vested in him under Section 128 of Cr. P. C., permitted the lowering of the national flag at the Police Station Moghalsarai some time between 8.30 A.M. and 11 A.M., when a mob of agitators, forming an unlawful assembly, demanded the lowering thereof in sympathy with the students killed at Patna in a police firing earlier' and that this failure amounts to 'remissness in the discharge of his duties and unfitness for the same'. In his evidence before the enquiry officer, the Senior Superintendent of Police stated that he had directed the petitioner 'to handle the situation tactfully'.

His exact words are 'I told the Sub-Inspector that the flag should not be lowered and that he should, handle the situation tactfully and should try to keep students at bay till officers and force reached from Banaras I told the Station Officer to handle the situation tactfully but I never told him that no force should be used as mentioned in Ext. P. 6'. From, this statement it is clear that the petitioner had received the command of a superior officer 'to handle the situation tactfully',

It is equally clear that if he had violated this command he would have been guilty of the offence of disobedience of orders. The controversy therefore resolves itself into a simple question : Can an officer who has been commanded 'to handle the situation tactfully' be guilty of remissness in the discharge of his duties if he does not make use of the powers vested in him under Section 128 Cr. P. C. The word 'tact' has been defined in Webster's Dictionary as 'peculiar ability to deal with others without giving offence.'

Is it open to an officer who has received such an order to make use of his powers under Section 128 Cr. P. C. when dealing with the crowd in regard to which he has received the order to handle it tactfully? I think any use of powers under Section 128 is clearly excluded. This is made clear by an examination of the provisions of this section. Section 128 occurs in Chapter IX of the Code which bears the title 'Unlawful Assemblies'. It consists of six sections 127 to 132A. Section 127 says that 'any Magistrate or officer in charge of a Police station may command an unlawful assembly to disperse'. Section 128 gives him the power to use force in case of refusal by such assembly to disperse. It is as follows :

'128. Use of civil force to disperse, If, upon being so commanded, any such assembly does not disperse or if, without being so commanded it conducts itself in such manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the Presidency towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer, soldier, sailor or airman in the armed forces, and acting as such for the purpose of dispersing such assembly, and, if necessary arresting and confining the persons who form part of it, in order to disperse such assembly Or that they may be punished according to law.'

40. Section 129 deals with a situation when the force at the disposal of the officer concerned may not be sufficient to disperse an unlawful assembly facing him. It invests the Magistrate with the power to cause it to be dispersed by the Armed Forces. Section 130 imposes a duty on any Officer commanding troops, when required by a Magistrate, to disperse such an assembly, to obey this requisition and to use as little force as may be consistent with dispersing the assembly. The same Section empowers the Magistrate to arrest persons forming part of the assembly. Section 131 deals with, a situation when public security is manifestly endangered by such an unlawful assembly but no Magistrate can be communicated with. In such an emergency any Commissioned Officer of the Armed Forces may disperse such assembly with the help of the Armed Forces under his command and may arrest and confine any person forming part of it.

Section 132 gives statutory protection to officers against prosecution for acts done under this Chapter. It is therefore clear that an officer who gives the order under Section 128 Cr. P. C. commanding an assembly to disperse must leave all considerations of tact behind him, ignore any express direction to handle the crowd tactfully and must be prepared to take all such further measures including the use of Armed Forces, if necessary, to ensure that his command is obeyed by the assembly or the mob. It is equally clear that an officer who is under orders to deal with an assembly tactfully cannot invoke the powers under Section 128 Cr. P. C. for the injunction to use tact contains the implied command not to use force. It is impossible to conceive of an order which simultaneously requires a Police official to use tact in dealing with a crowd and at the same time requires him to disperse it

by force.

41. In his finding the enquiry officer has relied on the statement of Mr. Prem Swarup, then Senior Superintendent of Police Banaras, who deposed before him 'I told the Station Officer to handle the situation tactfully but I never told him that no force should be used.' But the enquiry officer did not pause to consider that the order to handle the situation tactfully contained an implied prohibition against the use of force. The enquiry officer has also relied on the following statement of the Senior Superintendent of Police :

'I told the Sub-Inspector that the flag should not be lowered and that he should handle the situation tactfully and should try to keep the students at bay till officers and force reach from Banaras.' The enquiry officer attached some importance to the direction of the senior Superintendent of Police that the national flag should not be lowered. He also appears to have been, considerably influenced by the fact that the national flag had been 'insulted'. He observed: 'The honour of the national flag is one of the primary and the most cherished values of the nation, and as such, permitting any insult to this, no matter what the stake on the other side cannot be considered to be a Justified and correct use of discretion.'

42. This observation shows that the enquiry officer lost sight of the fact that he was not trying the petitioner for any alleged offence of permitting any insult to the flag but for the offence of remissness, in that he permitted the lowering of the flag without making use of the powers vested in him under Section 128 Cr. P. C. He was not charged with any offence of commission but of omission that is, failure to use force. The language of the charge makes this clear, for the words are 'remissness in the discharge of his duties'. Remissness means, according to the Websters' Dictionary, the offence of 'showing neglect or inattention'.

Now, the lowering of the national flag was a positive act in the performance of which no question of neglect or inattention could arise. The petitioner was not accused of having done something amounting to misconduct but of having omitted to do something, such omission amounting to remissness. The lowering of the flag was not the offence charged though it appears to have aroused the sentiments of the enquiry officer. The essence of the charge of negligence lay, not in the

lowering of the flag, but in the omission to use force under Section 128 Cr. P. C. In considering this charge the enquiry officer committed an error.

43. He ignored the fact that the orders of the Senior Superintendent of Police to handle the situation tactfully contained an implied command not to use force. As the petitioner could use force only by invoking his powers under Section 128 Cr. P. C. it follows that the order of the Senior Superintendent of Police requiring him to handle the crowd tactfully contained an implied direction not to invoke his powers under Section 128 Cr. P. C.

44. The question may be viewed from another angle. Suppose the petitioner had ignored the direction to handle the situation tactfully, ordered the crowd to disperse, and on their refusal scattered it by force. The numerical odds against him being over-whelming 12 against 2000 to 3000 he could have dispersed it by force only by firing upon the crowd. In any subsequent inquiry, could he have defended himself against the charge of disobeying orders on the ground that there was no order NOT to use force and he was therefore free to ignore the direction to be tactful and to prevent the lowering of the flag by using force? I do not think this defence would have prevailed, and he would have been convicted of the offence of having disobeyed the order to handle the situation tactfully.

45. In his finding, the Enquiry Officer has observed, 'Permitting any insult to this (the national flag) . . . cannot be considered to be a justified or correct use of discretion'. In appeal, the Deputy Inspector. General expressed himself even more strongly against the alleged insult to the national flag. He has observed :

'The weakness of the appellant in allowing the lowering of the National Flag even if it was for one minute was definitely an insult to the flag and it was a serious offence under Section 7 of the Police Act . . . The appellant has mentioned the gravity of the situation . . . This however does not absolve the appellant from his own responsibility in protecting the honour of the National Flag which was under his trust He had a delicate and important duty to perform in protecting the honour of the National Flag.

But he did not prove to be equal to the task. ... It is an admitted fact that the flag was lowered by about a foot and it was then that the mob observed silence and paid respect to it by saluting. This was definitely disrespect and not respect of the National Flag . . National Flag has got to be respected at all times and in all conditions and if any officer allows disrespect to be shown to the Flag, he is guilty of disloyalty to Government.

46. In revision, the Inspector General of Police Mr. M.S. Mathur, exuded the same sentiment in even stronger language. Dismissing the petitioner's revision, he observed:

'The charge as established against the petitioner was of a very serious nature and he should consider himself lucky that he was not dismissed from the service for allowing the honour of the Flag to be besmirched.'

47. Thus the phrases 'insult to the National flag', 'disrespect for the national flag' 'failure to protect the honour of the national flag', 'allowing the honour of the flag to be besmirched', have been freely used against the petitioner. They certainly leave an impression that throughout the proceedings the minds of the S. P., the Deputy Inspector General and the Inspector General of Police were possessed with the idea that the National Flag had been insulted and the petitioner was to blame for this insult. These observations which coloured the judgment of all the three authorities, is open to serious criticism on several grounds. In the first place, the petitioner was not being accused of the offence of wrong exercise of discretion in the matter of the flag but of remissness in not using force. Secondly, it is difficult to understand how, on the evidence on the record, it is possible to conclude that the national flag had been 'insulted'.

I have examined the entire record and have not discovered any evidence of any 'insult' to the flag. The District Magistrate deposed that 'according to the report received by him, about two to 'three thousand people had collected insisting on the lowering of the flag at the thana, and that at their insistence the flag was lowered by about 1 foot and was thereafter saluted by them and put right.' In his report to the Senior Superintendent of Police sent on the day of the incident (annexure 'A' of the petitioner's affidavit), the petitioner wrote that 'the crowd observed one

minute's silence under the flag and after paying their respects to the National Flag they went back'. He also reported that before the flag was lowered one of their leaders, Ram Nuresh Singh, delivered a short speech and 'emphasised that they had not come to dishonour the 'national flag'".

48. This was the evidence on the basis of which the Superintendent, the Deputy Inspector General and the Inspector General concluded that there had been an 'insult to the national flag. It is not possible to understand how a crowd which salutes a flag can be deemed to have 'insulted' it. The enquiry officer and the other two authorities erroneously imagined an 'insult' to the flag. They seem to have made the lowering of the flag synonymous with insulting the flag. But the lowering of the flag does not of itself involve any insult to it. Learned Junior Standing Counsel was not able to refer to any Act of the legislature or rules or notification or orders or instructions of Government suggesting that any lowering of the flag should be deemed of itself to be an act of insult to it, nor am I aware of the existence of any such law or rule or practice.

This is corroborated by the order of the Additional Superintendent dated 10-11-1955 (reducing the petitioner) in which he replied to the petitioner's submission in paragraph 18 of his reply to the show-cause notice (annexure G of the petitioner's affidavit). The petitioner had submitted that 'there is no law on the subject, nor any rules framed or departmental instructions issued as to the manner in which an officer should conduct himself and behave in respect of the hoisting of the National flag'. The petitioner had further submitted that 'in the absence of any such statute or order prescribing any duty on the public servants in general and the police officers in particular no departmental proceedings under Section 7, of the Police Act can be held for remissness or negligence in the discharge of duty or unfitness for the same.' The Additional Superintendent rejected this submission and observed :

'The behavior of officers towards the National Flag is a matter of world-wide custom and needs no Specific rules or law to teach individual officers the way of behaving it. Any departure from, normal behaviour is tantamount to remissness and negligence in the discharge of duty towards the flag.'

49. Neither the Additional Superintendent, nor subsequently the Deputy Inspector General nor the Inspector General cared to enunciate this 'normal behaviour' towards the flag, any departure from which might, according to the Inspector General even render an officer liable to dismissal from service for the offence of allowing the honour of the Flag to be 'besmirched', to quote his own word.

50. If the lowering of the flag of itself amounts to insulting it the Union, and the State Government have been guilty of this offence frequently. They lowered the flag in 1952 when it was directed to be flown at half-mast on the death of His Britannic Majesty King George VI, and again in 1953 to mourn the demise of His Excellency Joseph Vassrianovich. Stalin, Premier of the Union of Socialist Soviet Republic. It is thus obvious that the lowering of a flag is in itself no indication of 'insult' to it. To decide whether it amounts to an insult or not, one must look to the circumstances in which and the motives, with which the flag was lowered. By way of illustration, if a hostile mob attacks our embassy in a State P, hauls down the flag and burns it, this, will be an insult.

But if a crowd wants to compel the Government to show respect to the memory of persons whom they regard as martyrs and, on the flag being lowered by one foot, they stand to attention and salute the flag, there is no insult to the flag. They may have coerced the authorities into showing respect for the dead persons, and this coercion may perhaps be galling to them; but the coercion of an official or even the Ministry is not synonymous with 'insult to the flag'. It is noteworthy that even the charge sheet does not use the word 'insult'. But the very idea of insult to the flag appears to have coloured the judgment of the three officers and vitiates their decisions for two reasons. First it introduced a consideration which was extraneous to the issue in controversy. Secondly, the finding that the national flag was insulted could not, on the evidence before them, have been arrived at by any reasonable person and is erroneous on the face of it.

51. The Enquiry Officer's finding is vitiated by another and graver error. His conclusion that the petitioner was remiss in permitting the lowering of the flag without use of his powers under Section 128 Cr. P. C. is based largely on his other conclusion that some initial negligence of the petitioner led to the situation on the

15th August. To quote once again from his finding, 'I am inclined to feel that the party charged was not led to his present lapse by any cowardice or deliberate desire to save himself at the cost of the national honour represented by the National Flag but that the situation arose from his lack of full understanding of the implications of his action and his preliminary negligence in not keeping himself abreast of the situation. Under the circumstances, therefore, while I am of the opinion that he does not deserve the severest punishment of dismissal I do not consider him absolved of the initial negligence leading to the situation which necessitated his exercise of discretion and the consequent permitting of the lowering of the flag without use of power vested in him under Section 128 of Cr. P. C., facts of which are not denied by the defence.'

52. Thus the Enquiry Officer held the petitioner guilty of 'Preliminary negligence' or 'initial negligence' on an earlier occasion and, on the basis of this finding, convicted him of remissness or negligence on 15th August. This is clear from his earlier finding which is :

'On a careful scrutiny of the evidence put up before me I am of opinion that the party charged in spite of clear orders issued from Headquarters was, not keeping abreast of the developments in the students world of his political circle and did not consider legal action against students advisable at any stage.'

53. This finding was based largely on the evidence of the Circle Inspector which was considered and accepted by the Enquiry Officer in, these words :

'He (Circle Inspector) has also given evidence that a Circular Order No. 32 was issued by the S. S. P. on 16-7-55 which had given instructions regarding registration of cases arising from indiscipline among students. This order is exhibited as Ex. P2 and states clearly that students found guilty of acts of lawlessness must be dealt with according to law. Another order which is Secret Order No. ST (R.A.) 5-1-55 dated 25-7-55 was issued by the Addl. Supdt. of Police, Banaras, in which attention has been invited to the indisciplined acts of the students 'and the staff has been advised to develop source of information within the educational institutions, so that their preparations and developments can be known * to the police and their illegal activities, planned, may be suppressed

before any adverse plan materialises;

This order is exhibited as Ex P. 3. Ex, P 2 has been proved by P.W. 4 H.C/S6 C. P. Satya Deo Pathak to have been seen by the Station Officer Sri Oudh Narain Singh (party charged) on 21-7-55 as is apparent from the Circular Order file of P. S. Moghalsarai. Ex. P3 was a Secret Order issued to C. Os and C. Is. and has been proved by P.W. 1 and P.W. 3 Sri Vakil Ahmad, to have been shown to the party charged among other Station Officers of the circle and their reports called as required in that order. P.W. 1 has further proved that at Moghalsarai there V had been two incidents previously also during 1955, in which students were involved on 2-4-55 and 13-4-55 in which a Communist leader and a student of the Notified Area Inter College, Moghalsarai, were reported to be the main agitators.

The report C. I. Sri Vakil Ahmad (PW 3) submitted in reply to Ex. P3 which gives these details is exhibited as Ex. P4. A report of P. S. Moghalsara giving details of these incidents is exhibited as Ex.P5. O. D. report No. 29 dated 15-8-55 of P. S. - Moghalsarai timed at 10.30 A.M. giving details of the incident on which P.W. 1 passed orders on 18-8-55 for the registration of a case under Section 143 IPC has been exhibited as Ex P6. The case registered has been challaned.'

54. The question arises; was it open to the Enquiry Officer to take into account any alleged earlier negligence in convicting the petitioner of remissness on the particular occasion specified in the charge. I think it was not.

55. Clause 4 of Regulation 490 of the Police Regulations prescribes what information must be contained in the charges and says :

'the substance of the accusation must be reduced to the form of a charge which should be framed immediately after the preliminary enquiry, if any. This should' be as precise as possible so as to give the officer charged full information of the matters alleged against him. The charge must be read to the officer before his oral statement is recorded and in the case of an officer required to file a written statement a copy of the charge must be given to him.

56. Thus in an enquiry held under sec 7 of the Police Act (which is governed by the procedure prescribed in the Police Regulation) the charge must contain (1) the substance of the accusation and also (2) full information of the matters alleged against him. The word information is synonymous with facts : Clause 7 of Regulation 490 deals with Finding which the Enquiry Officer is required to give, It says:

'7. The Superintendent of Police himself must write a finding. In the finding he must confine himself strictly to the subject of the charge and to the evidence on the record and must discuss every relevant plea raised by the officer charged. After arriving at a conclusion on the facts in issue, he should, if he has found the charge proved take into consideration the character and previous conduct of the officer charged before deciding what punishment, if any, as prima facie suitable.'

57. This clause enjoins that the Enquiry Officer must not go outside the subject of the charge. The combined effect of Clauses 4 and 7 of the Regulation may be summed up thus; the accused officer must be served with a charge sheet which should give him in precise terms the gist of the offence together with full facts on which the offence is sought to be based. The object of this prosecution is obviously to enable the accused to collect such evidence as will enable him to contradict or explain the facts on which the charge is based. It is also intended to prevent his being taken by surprise by some entirely new facts or information disclosed during the inquiry. The injunction to give 'full information' is intended to be strictly enforced, for it is followed up by a further injunction in Clause 7 to the Enquiry Officer to confine himself 'strictly' to the subject of the charge.

58. It appears to me that the Enquiry Officer, in basing his finding on information relating to some earlier acts of negligence, did not confine himself to the subject of the charge. The charge has been quoted verbatim by me in an earlier part of this judgment. It accuses him of the offence of 'remissness in the discharge of his duty and unfitness for the same'. These are words copied from Section 7 of the Police Act and are the standard formula used in almost every charge. By themselves they would reveal almost nothing and leave the accused officer no wiser than, say a person who is told that he is 'charged with murder'. The substance of the charge

and the facts ('information is the word used by Clause 4 on which it is based) is contained in the words which follows :.

'In that, while posted as Station Officer, Moghal Sarai, on 15-8-1955, he, without making use of the powers vested, in him under Section 128 Cr. P. C. permitted the lowering of the National flag at Police Station, Moghal Sarai sometime between 8.30 A.M. and 11 A.M. when a mob of agitators forming an unlawful assembly demanded the lowering - thereof in sympathy with the students killed at Patna in a Police firing earlier.'

59. The substance of the charge is quite precise and the facts on which it is based are fairly detailed. As framed, it was clear enough to enable the accused officer to know the facts alleged against him. But what is the charge as revealed by the facts contained in it? It draws his attention to an incident which took place at a particular place and specified occasion and says to him in effect 'These facts prove that you were remiss in the discharge of your duties'. The petitioner came prepared to meet these factual allegations, and no others. The charge, as framed would give any reasonable person the impression that his conduct on that particular occasion was in question, and he was called upon to explain why he had permitted the flag to be lowered without using force under Section 128 Cr. P. C.

60. But in his Finding the Enquiry Officer did not confine himself to the subject of the charge. He considered facts relating to events which had taken place on earlier occasions. He perused documents as evidence of facts not stated in the charge. These relate to events which took place as early as April and July 1955. The petitioner has stated in para 23 of his affidavit that none of these documents were indicated in the charge sheet, a statement not denied by the respondent.

Reference to these documents is in itself a violation of Clause 3 of Regulation 490 which enjoins : 'when documents are relied on in support of the charge they should be put in evidence as exhibits and the officer charged must, before he is called upon to make his defence, be allowed' to inspect such exhibits.' This clearly implies that if the information supporting the charge under Clause 4 includes documentary evidence, the document should be indicated in the charge and the petitioner should be given an opportunity to examine the information disclosed by

them before he is called upon to file his written statement. Furthermore, any consideration of information contained in documents of a hearsay nature is forbidden by Clause 3, Some of the information contained in the exhibits filed by the prosecution witness 'Vakil Ahmad Circle Inspector Banaras was clearly hearsay.

61. These points are not included in the Ground of the petition nor were they argued before me in the form in which they are enunciated above. But in examining the correctness of the findings of a tribunal in quasi-judicial proceedings, this Court can, in the interest of justice, take notice of any error which is manifest. The order of the Enquiry Officer shows that he held the petitioner guilty of remiss-ness partly because he had been remiss on an earlier occasion. This he was clearly not entitled to do for three reasons:

First, the Police Regulations forbid the consideration of any material in violation of Regulation 490. Secondly, the petitioner did not have fair opportunity of proving that he was not remiss on any earlier occasion, and the Enquiry Officer's reliance on the information relating to these occasions offends against the principles of natural justice. Thirdly, the Enquiry Officer was required to hold the petitioner guilty of negligence in the incident specified in the charge sheet on the basis of facts relating to that incident : he could not hold him guilt of negligence on that day because he had been negligent on a previous day.

The earlier acts of remissness or negligence should have been made the subject of a separate or distinct charge. The Enquiry officer, in considering the charge before him, took into account matters which, were extraneous. As observed by the Supreme Court in *Arajai Singh v. Kartar Singh* : [1951]2SCR258 , 'A finding (of fact) reached on the basis of additional evidence which ought not to have been admitted would justify interference on the ground that an error of law had been committed.'

62. For the various reasons detailed above I hold that the finding of the Enquiry Officer that the petitioner was guilty of remissness of duties and un-fitness for the same because he, without making use of the powers vested in him under Section 128 Cr. P. C. permitted the lowering of the National Flag at the Police station

Moghal Sarai sometime between 8.30 a.m. and 11 a.m. when a mob of agitators forming an unlawful assembly demanded the lowering thereof in sympathy with the students killed at Patna in a police firing earlier 'is manifestly erroneous'.

63. Learned Junior Standing Counsel contended that, however erroneous, this is a finding of fact which cannot be interfered with in proceeding under Article 226. I do not agree. I have pointed out the manifest errors in the Enquiry Officer's findings which are clearly errors of law apparent on the face of his order. But even, if it were regarded as a finding of fact, it exhibits an error of such, a nature as will justify the issue of a writ of certiorari. For this principle no authorities were cited at the bar, and there is no specific judgment of the Supreme Court or any High Court dealing with a case similar in facts to the present petition. But on the authority of two recent English judgments I have come to the conclusion that the error committed by the Enquiry officer can be quashed by certiorari.

64. The first is a judgment of the court of Appeal in *R. v. Medical Appeal Tribunal Ex Parte Gilmore*, (1957) 1 All ER 796, in which a writ of certiorari was issued by the Court on the ground that the Tribunal which had passed the impugned order had come to a conclusion which could not reasonably have been entertained by them if they had had proper regard to a certain Regulation. The facts of the case were these. The petitioner Robert Gilmore lost the sight of his left eye in an industrial accident. He thus became entitled to disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. Certain Regulations were made under the Act, and under Regulation 2(5), his disablement was to be assessed as if the injury to his right eye was incurred as a result of losing the sight of his left eye: and, under, schedule 1 to the regulations, of the disablement for blindness in one remaining eye was to be assessed in such circumstances at a hundred per cent but a medical appeal tribunal failed to apply Regulation 2(5) and assessed the applicant's disablement at twenty per cent. The facts on which the tribunal based their decision did not appear on the face of their written adjudication, but the adjudication contained a quotation from the report of a specialist who had examined the petitioner and had detailed the full facts relating to the previous injury in 1936 and to the injury in 1955. It was conceded on behalf of the Ministry of Pension that the decision of the Medical Appeal Tribunal was erroneous in law,

but, nevertheless, the Court of Appeal considered the question whether the error of the tribunal appeared on the face of the record. Denning, L.J. observed as follows :

'The first point is whether the error of the tribunal appears on the face of the record. It does not appear on the face of their written adjudication of 13-6-1956. There is not a word there about the right eye, or even the left eye for that matter; but the tribunal gave an extract from the specialist's report and thereby, I think, they made that report a part of the record. Just as a pleading is taken to incorporate every document referred to in it, so also does an adjudication. Once the specialist's report is read with the record, we have before us the full facts about the previous injury to the right eye and the subsequent injury to the left.

These facts are sufficient to disclose the error in law : for it is then apparent that the award of twenty per cent, must be wrong. No reasonable person, who had proper regard to Reg. 2(5), could have come to such a conclusion. It is now settled that, when a tribunal comes to a conclusion which could not reasonably be entertained by them if they properly understood the relevant enactment, then they fall into error in point of law; see *Edwards v. Bair-stow*, (1955) 3 All ER 48. When the primary facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to warrant the intervention of this court by certiorari'

65. The judgment in *Gilmore's case*, (1957) 1 All ER 796 referred to and followed the principle adopted in a previous judgment of the House of Lords in (1955) 3 All ER 48. This is the second authority mentioned by me. That case did not arise out of proceedings for certiorari but out of a case stated in income-tax proceedings. It was held in that case that although an appellate court may allow an appeal from the Commissioner's determination only if it is erroneous in law, yet, where a case stated shows on the face of it no misconception of law, if it should appear to the appellate court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination. The facts of that case were these. A man called Harold Baristow

and his partner Fred Harrison were assessed to income-tax in respect of profits made by them from the re-sale of machinery which they had purchased from Messrs, Whitworths. It was stated in the Statement of the Case submitted for the opinion of the High Court that the assesseees had no intention of holding the plant 'what they desired was a quick purchase and re-sale'. The plant was bought for 10,000 and resold in parts to five different purchasers. The assesseees made the purchase on 20-11-1946 and the process of re-selling commenced on 27-11-1946 when the bulk of the plant was sold to a firm called the International Export Company for 15,439-13-6.

The subsequent transaction of re-sale took place respectively on. January 28, June 26, and October 22. 1947 and February 20, 1948. It was common ground that the assesseees Bairstow and Harrison made at profit of 18,225-11-3 on the transaction which was equally divided between them. On behalf of the Crown it was contended that the buying and selling of the plant constituted a trade or adventure in the nature of a trade and that the profits and gains arising therefrom were assessable accordingly.

The assesseees contended that this was a transaction the profits of which could not be liable to income-tax because none of the four conditions which must be present to establish the liability existed in their case, (a) the existence of an organisation, or (b) activities which led to the maturing of the assets to be sold, or (c) the existence of special skill, opportunities, in connection with the article dealt with, or (d) the fact that the nature of the asset itself should lend itself to commercial transactions. The Commissioners for the General Purposes of the Income Tax gave their original decision in these terms :

'We, the commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable and discharge the assessment'.

When the matter came before the High Court on the Case stated, Upjohn, J. considered this determination unsatisfactory and remitted the matter to the General Commissioners with a direction that they were to consider whether, the transaction being an isolated transaction, there was, nevertheless, 'an adventure

in the nature of trade' which was assessable to tax under case 1 of Schedule D of the Statute. He further directed that the Commissioners should be assisted in their finding by legal arguments (under, the English law income tax under 'Schedule D is charged in respect (inter alia) of profits arising 'from ' any trade, profession, employment or vocation' and 'trade' includes 'every trade, manufacture, adventure or concern in the nature of trade.'). The Commissioners accordingly met again and, after hearing arguments and further considering the matter, submitted a Supplemental Case in which they expressed their further determination as follows :

'We find that the transaction, the subject-matter of this Case, was not an adventure in the nature of trade.'

After this supplemental finding, the case went again before the High Court, this time before another Judge, Wynn-Parry, J. That learned Judge took the view that the question before the Court was purely a question of fact and that the finding of the Commissioners could not be upset unless it was so perverse that, as a matter of law, it could not stand. He further held that it was not possible for him to hold that the Commissioner's finding was perverse and dismissed the Crown's appeal with costs.

He considered himself bound by previous authority to hold that the question was one of fact. From the decision of Wynn-Parry, J. the Crown appealed to the Court of Appeal which unanimously upheld: the reasons given by the learned Single Judge and dismissed the appeal. The Crown finally appealed to the House of Lords. The appeal was allowed, the decision of the Commissioner was set aside and the original assessments were confirmed. In his speech Viscount Simonds said inter alia:

'Before, however, examining the authorities in any detail, I would make it clear that, in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as pure finding of fact, or as the determination of a question of law, or of mixed law and fact, the same result is reached in this case. The determination cannot stand : this appeal must be allowed and the assessments must be confirmed.

For, it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by Commissioners in this case.

For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference of conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand.

I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel on what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these, on examination, seemed to help him, not at all.

For, if it is a characteristic of an adventure in the nature of trade that there should be an 'organisation, I find that characteristic present here in the association of the two respondents and their subsequent operations. I find 'activities which led to the maturing of the asset to be sold', and the search for opportunities for its sale, and conspicuously. I find that the nature of the asset lent itself to commercial transaction. And by that I mean what I think Rowlatt J., meant in *Leeming v. Jones* (1930) 1 K.B. 279 that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.'

He further observed :

'When the commissioners, having found the so called primary facts which are stated in para 3 08 their case, proceeded to their finding in the supplemental case that

'The transaction, the subject-matter of this case was not an adventure in the nature of trade', this is a finding which is, in truth, no more than an inference from the facts previously found. It could aptly be preceded by the word 'therefore.' Is it then an inference of fact? Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which to-inferred is a matter of fact. To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has, or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or in other words, what the statutory language means.

It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder; a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction.. The commissioners making an inference of fact that a transaction is, or is not, an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.'

Viscount Simonds further observed that the assumption that the commissioners were rightly directed in law 'was displaced by a finding which was, on that assumption inexplicable. The misdirection may appear on the face of the determination. It did so here, I think, in the Case as originally stated. For, in effect, that determination was that the transaction was not an adventure in the nature of trade because it was an isolated transaction, which was clearly wrong in law. But sometimes, as in the case as it now comes before the court, where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case, it is easy either to say that the commissioners have made a wrong inference of

fact because they have misdirected themselves in law or to take a short cut and say that they have made a wrong inference of law.'

66. Viscount Simonds' concluding observation was in the following significant words :

'..... It is true that the decision of the commissioners is only impeachable if it is erroneous in law, and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the case stated. But it can not be, and has not been questioned, that on inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law on the grounds that I have already mentioned, and this is, I think, the safest way to leave it. We are warned by learned counsel for the respondents that to allow this appeal would open the floodgates to appeals against the decisions of the general commissioners up and down the country. That would cause me to alarm if decisions such as that we have spent some time in reviewing were common up and down the country.'

Lord Radcliffe in his speech, observed, inter alia as follows :

'..... If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the commissioners, special or general, to the effect that a trade does or does not exist is not 'erroneous in point of law'; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I expect the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and, therefore, as questions of fact. . . But, of course, in 'proper circumstances as a case can be described as one of fact, or as purely one of fact (if the testimonial adds anything), without going through the procedure of explaining that that is so because it is one of degree and, the facts

fairly admitting of the determination come to, there is no error which justifies the court's intervention.'

He further observed:

'Nor do I think that there can be any real divergence of opinion as to what constitutes error of law for this purpose. Naturally, judges have not always expressed it in exactly the same terms. I will take one or two instances. As I have said, where there is an actual statement in the case which shows a misconception of the law, no one feels any difficulty. But, equally, no one supposes that the court's light, or as I would say, duty, to intervene stops at this, for example, in *Cooper v. Stubbs*, (1925) 2 KB 753 Rowlatt, J. was prepared to overrule the commissioners' determination that no trade existed because, as he said (133 L.T. 582 at page 585) : 'If one were trying a question of this sort with a jury, one would have to say upon those facts, 'well, now a trade is proved', and I think that what the commissioners have done is merely to give the wrong name to a state of fact which in law amounts to something else.'

Lord Radcliffe summed up his view of the principles governing the intervention' of the court in a finding of fact in these words :

'..... If the case contains anything *ex facie*, which is bad law and which bears on the determination, it is obviously erroneous in point of law. But without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. 'So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination or as one in which the true and only reasonable conclusion contradicts the determination.'

He then proceeded to apply the test laid down by him to the finding of fact arrived at by the Commissioners and observed :

'..... I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sale of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money or one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course they do sell it, in five separate lots, as events turned out, And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the costs of organising the venture and carrying it through.

This seems to me to be, inescapably, a commercial deal in second-hand plant. What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else?' It is said that there was no organisation for the purposes of the transaction. But, in fact, there was organisation as much of it as the transaction, required. It is true that the plant was not advertised for sale, though advertisements asking for plant were answered by the respondents. But why should they incur the cost of advertising if they judged that they could achieve the sale of the plant without it? It is said that no work had been done on the maturing of the assets to be sold.

But such replacement and renovation as were needed were, in fact, earned out, and I can see no reason why a dealer should do more work in making his plant saleable than the purpose of sale require, It is said that 'neither of the respondents had any v special skill from his normal activities which placed him in an

advantageous position for the purposes of this transaction. It may be so, though one of them was the employee of a spinning firm.

In any case, the members of a commercial community do not need much instruction in the principles and possibility of dealing, and I think that, given the opportunity, the existence or non-existence of special skill is of no significance whatever. It is said, finally, that the purchase and sale of plant lent itself to capital, rather than commercial transactions. I am not sure that I understand what this is intended to mean. If it means that, at the relevant period there was no market for second hand plant in which deals could take place, there is no finding to that -- effect, and all the facts that are recited seem to be against the contention. If it means anything else, it is merely an attempt to describe the conclusion which the respondents would wish to see arrived at on the whole case.'

67. I make no apology for quoting extensively from the speeches of the Noble Lords who delivered the leading judgments in this case, for the case may well prove to be another land-mark in the history of certiorari. The Court examined a finding by the Commissioners to the effect that a particular transaction was not an adventure in the nature of trade. There was no error or misconception of law in this finding *ex facie* but it was held that the finding could not stand because, on the facts, no person acting judicially and properly instructed as to the law could have given it. The Court examined the various links in the chain of reasonings of the Commissioners and held, in effect, that not one of them could stand the strain of rational argument. Viscount Simonds made it clear that the magic phrase 'finding of fact' would not deter him from interfering with a decision which, though, a pure finding of fact, could not reasonably be entertained.

To quote from his speech once again 'I would make it clear, that in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact, or as the determination of a question of law, or of mixed law and fact, the same result is reached in this case. The determination cannot stand : this appeal must be allowed and the assessment must be confirmed.' This decision is an authority for the principle that a finding of fact may be quashed by certiorari if on an

examination of all the relevant facts on the record, the superior court holds that no reasonable person could have arrived at it.

68. It is significant that the commissioners' finding was quashed by the House of Lords in a case where there was no lack or excess of jurisdiction and no error of law *ex facie*. The commissioners had jurisdiction to determine whether, on the facts before them, the assessee had engaged in an adventure in the nature of trade. They held that they had not; but the superior court found the reasonings of the commissioners so unreasonable as to be inexplicable. Accordingly, they re-examined the record and held that the facts were consistent only with one finding which must be contrary to that of the commissioners. If I may say so with deep respect, these two cases taken together will rank with *R. v. Bolton*, (1841) 1 QB 66, *Banbury v. Fuller*, (1854) 9 Ex 111 and *R. v. Northumberland Compensation Appeal Tribunal Ex Parte Shaw*, (1952) 1 KB 838 as one of the landmarks in the history of *certiorari*.

69. If I may adopt the reasoning of the House of Lords in *Bairstow's case*, (1955) 3 All ER 48 the finding of the Enquiry Officer that the petitioner's permitting the National Flag to be lowered without making use of his powers under Section 128 Criminal Procedure Code amounted to remissness in the discharge of his duties and unfitness for the same cannot stand, whatever be the test adopted. Whether it is regarded as a pure finding of fact or as a pure question of law or a mixed question of law and fact the conclusion is the same. The decision must be quashed. Whether his conclusion that the lowering of the flag of itself amounts to an insult is regarded as perverse or completely extraneous to the question of petitioners' remissness, it must be set aside.

There is no evidence to support it, alternatively the evidence is completely inconsistent with and contradicts this finding. The only reasonable conclusion from the evidence must be that no insult to the National Flag was intended or offered and this is fatal to the impugned decision. Similarly, his conclusion, that though the petitioner was under orders to handle the situation tactfully, his action in permitting the lowering of the flag without using force under Section 128 Cr. P. C. amounted to remissness cannot stand, whatever be the legal character of this finding. If a

finding of fact, it could not reasonably have been founded on the material before the Enquiry Officer. If a finding of law it must be held that no person acting judicially and properly instructed as to the relevant law (including Section 128 Cr. P. C.) would have made this decision, and it must be assumed that there has been a misconception and misapplication of the law.

70. A question which has caused me considerable anxiety in this case is whether this court should interfere in a matter relating to discipline concerning the State Police. This court has always shown the utmost reluctance to invoke its very wide powers under Article 226 for interference in such matters. The petitioner belongs to a service charged with the maintenance of public order. Discipline is the pillar on which rests the morale and efficiency of the service and any crack in this pillar may have serious consequences. In the armed forces and the police the emphasis is laid on duties and obligation of the members rather than rights.

Even the Constitution recognises this fact, for Article 33 empowers Parliament to pass a law restricting or even abrogating any of the fundamental rights in their application to the Armed Forces or the Forces charged with the maintenance of public order 'so as to ensure the proper discharge of their duties and the maintenance of discipline among them.' Thus the makers of the Constitution felt that if the Republic is ever faced with a situation in which there can be a conflict between the enforcement of fundamental rights and the maintenance of discipline among these Forces, the latter should prevail and Parliament was invested with sufficient powers to deal with the situation accordingly.

71. The English Courts have shown an even stronger reluctance to interfere with the exercise of a disciplinary power in a service. In *Ex Parte Fry* (1954) 2 All ER 118, Lord Goddard, C. J. rejected an application by a fireman employed in a Fire Brigade for quashing a decision of the Chief Fire Officer of the Brigade holding the petitioner guilty of disobedience of orders in administering a caution. He relied on his own observation in the earlier case of *R. v. Metropolitan Police Commissioner, Ex Parte Parker*, (1953) 2 All ER 717 (721).

'Where a person, whether he is a Military Officer, a Police Officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary

powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has'

72. I have to consider whether in the present case, this court should interfere with the decision of the Superintendent of Police (confirmed by the Deputy Inspector General and the Inspector General) even if the petitioner is able to prove that irregularities took place in the proceedings which ended in his reduction.

73. This case has features which are peculiar, if not unique. It is admitted by the State that the Senior Superintendent of Police and the Deputy Inspector General of Police (as well as the District Magistrate and the Commissioner of Varanasi) visited Moghalsarai after the incident on the same date and approved of the manner in which the petitioner had handled the situation. As late as 19-8-1955--5 days after the occurrence -- the District Magistrate in his D. O. No. 354/S, entirely agreed with the views of the Senior Superintendent of Police Varanasi and so did the Commissioner Shri S. W. Shiveshwakar in his D.O. No. St/L and O. BNS dated 20-8-1956 to Mr. M.G. Kaul (the then Home Secretary to U. P. Government) and had stressed that it would be most unfair to take any action against the Station Officer, Moghalsarai.

All these letters are referred to in the letter of the Superintendent No. ST/SSP/R-14 dated Banaras May, 28, 1956, mentioned above. But suddenly on 22-8-1955, the petitioner was suspended, and on 26th August served with a charge sheet accusing him of remissness and negligence in the discharge of his duty. Therefore, some thing must have happened between 20th August and 22nd August which compelled Senior Superintendent of Police to reverse his earlier views and, indeed, to take a complete somersault.

We do not know what happened except the departmental action was taken against the petitioner 'under instructions of the Inspector: General'. The State has given no explanation why it revised the decision of the local authorities who were the petitioner's immediate superiors. The petitioner's counsel insinuated during his arguments that the change in attitude was due to a speech made by the Prime Minister in which he is alleged to have said that the lowering of the National flag

must be treated as an insult to the flag. But there is no mention of it in the petitioner's affidavit, and the Court cannot proceed on the basis of counsel's insinuations.

But it seems obvious that the local authorities who exercised immediate discipline over the petitioner, would, if left to themselves, have approved of the petitioner's conduct on 15th August. In fact they had done so already. The interference came from above, whatever be the reasons and motive for it. This is therefore, strictly speaking, not a case in which the Court will be interfering with a disciplinary action taken by a superior officer against his subordinate. It will be a case of interference with interference that is preventing illegal interference by a higher authority, for reasons of policy, with the decision of officers who were the real custodians of discipline on the spot.

74. There is another feature of this unfortunate case which deserves attention. In his defence, the petitioner had proved that a few days prior to the occurrence at Moghal Sarai a parallel incident had taken place in the Government House at Ranch when the Governor of Bihar had, at the insistence of students, lowered the flag over the Government House at half mast. The incident is described in the petitioner's explanation to the charge-sheet in the following words (quoted from a newspaper report): 'Seven students were injured, one seriously in a lathi charge by the mounted police when a body of students broke into the Raj Bhawan in an attempt to persuade the Governor to fly the flag at half mast on Government House. The Deputy Commissioner Ranchi also received injury when the students pelted stones at the mounted police. All the seven students' were carried and admitted into the Sadar hospital. Later the Governor on insistence of the students called five of them in and they lowered the flag of the Government House at half-mast.'

75. The petitioner in his explanation drew attention to the fact that the Governor of Bihar had at his disposal sufficient force consisting of armed and mounted Police to meet any situation, whereas he had no adequate force. To quote the petitioner's own words, 'on the one hand, the Governor permitted the lowering of the National Flag in spite of sufficient force being present, while on the other hand, I did so

because of the inadequacy of the force'. He then gave the Enquiry Officer this significant reminder, 'It is also a fact that the Governor still continues to be the head of the Bihar State.

I most humbly request you to pay your kind attention to his part of your defence.' The Enquiry Officer noted the petitioner's reference to the Bihar incident but completely ignored it in his conclusions though he discussed all the other incidents of a similar nature cited by the petitioner in which the flag had been lowered. However in his order reducing the petitioner the Additional Superintendent discussed the Bihar incident and observed, 'The example of the occurrence at Government House, Bihar, quoted by the party charged can also not be examined in the course of these proceedings in details as the circumstances obtaining for or against the matter are not available and are not directly relevant to the present case.

The fact that there were certain circumstances obtaining in the present case parallel to the alleged occurrence at the Government House, Bihar had already been taken (into) account in proposing the punishment to the party charged and continuing to retain in his original rank, which punishment in its totality is lighter than could normally have been proposed in such a case.'

76. It is necessary to understand the import of this observation. It starts by saying that what the Governor of Bihar did was not relevant in considering what the petitioner did, but ends by saying that what the Governor of Bihar did was taken into account and consequently a comparatively light punishment was proposed in the petitioner's case. The implications of this observation are very significant. It means that as the Governor of Bihar had done precisely what the petitioner had, he was being leniently treated and reduced instead of being dismissed. This attitude may be contrasted with the epithets used by the S.P., the D.I.G. and the I.G. in expressing their views about the petitioner's conduct in permitting what they considered to be an 'insult' to the national flag.

If these epithets are any index they thought that the petitioner had committed one of the most serious acts of disloyalty to the State. But as they were faced with the fact that the Governor of Bihar had committed precisely the same act they let the

petitioner off lightly. All this could not but leave an impression, not only on the petitioner but on the entire police force, that there is one code of conduct for persons in high places and another for officials of subordinate rank. I think it is the duty of the court when a case of this nature comes before it to dispel any impression of inequality of treatment. I hope the moment will never arrive in this republic when the common man begins to feel that if an ordinary citizen does something he will be punished but if a Governor does the same thing he will get away with it.

The courts have distinct duty to discourage this impression and I have to weigh this aspect of the case against any reluctance to interfere in a matter relating to discipline. Any feeling of unequal treatment is far more likely to undermine the discipline and morale of the Police Force than interference by this Court according to law. I had these considerations, inter alia, in mind when in the case of *Shyam Bihari Misra v. Banaras University*, Civil Misc. Writ No. 2142 of 1957 I considered the application of Lord Goddard's observation in *Ex Parte Fry*. (1954), 2 All ER 118 to Indian cases, and observed as follows :

'I doubt whether it would be in the public interest, under the Indian conditions, to convert this principle of non-interference in disciplinary matters into a law of the Medes and Persians. This observation by an English Court must be considered in the back-ground of English traditions. In England, certain things are not done, even if there exist the power to do them. Cases of mala fide exercise or abuse of power due to bias or personal interest are rare in England. But in our social climate the temptation may not be so easy to resist. I would therefore be cautious in transplanting this English principle to 'Indian soil, and would not go so far as to lay down that this Court should never interfere in cases of the exercise of disciplinary powers.'

77. Though this court has been reluctant to interfere in matters relating to discipline it has not hesitated to do so in suitable cases. In *Lalta Prasad v. Inspector General of Police* : AIR1954 All438 , a Division Bench of this Court (Mootham and Sapru JJ.) quashed the order of the Deputy Inspector General and the Inspector General of Police dismissing a Station Officer, on, the ground that

the enquiry under Section 7 of the Police Act was conducted in such a manner as to deprive him of an adequate opportunity of defending himself.

In *Mohd. Ibrahim v. State of U.P.*, Writ Petn, No. 449 of 1955 a Division Bench of this Court quashed an order of dismissal on the ground that there was no legal evidence to support the finding of the Enquiry Officer that the accused official was guilty of the offence imputed to him. In *Darbari Ram Sharma v. State of U.P.* : (1956) IILLJ146 All Mehrotra, J, quashed an order dismissing a Sub Inspector of Police on the ground that the procedure adopted in the enquiry against him violated the provisions of the Police Regulations.

In *Dharmendra Kumar Dikshit v. Superintendent of Police, Kanpur* : AIR1956 All172 the same learned Judge quashed an order of the Superintendent of Police Kanpur dismissing a head constable from service on the ground that it was without jurisdiction. In *Babu Ram Upadhyaya v. Uttar Pradesh Government* : AIR1958 All584 a Division Bench of this Court quashed an order dismissing a sub-inspector of police on the ground that the departmental inquiry against the sub-inspector violated the provisions of the Police Regulations. There have been several other cases of a like nature. Thus, this court has not been prevented by considerations of discipline to interfere, in suitable cases, with orders passed by the Police authorities in the exercise of disciplinary powers.

78. Taking into consideration these authorities, I feel that this is not a case in which this court should hesitate to grant relief to the petitioner, when a proper case has been made out. I think the petitioner is entitled to the protection of this Court.

79. There remains the question what relief the petitioner is entitled to receive. The finding of the enquiry officer has to be quashed. As this finding is the foundation of the subsequent order of the Additional Superintendent of Police reducing the petitioner's rank, that order too cannot stand. The orders of the Deputy Inspector General in appeal and the Inspector General in Revision confirming the orders of reduction, being likewise founded on the Enquiry Officer's finding, must be set aside.

I allow the petition and quash the finding of the Enquiry Officer dated 20-10-1958, holding the petitioner guilty of remissness in the discharge of his duties and unfitness for the same on the ground that while posted as Station Officer Moghal Sarai on 15-8-1955, the petitioner, without making use of the powers vested in him under Section 128 Cr. P. C. permitted the lowering of the National Flag at the Police Station, Moghal Sarai sometime between 8.30 a.m. and 11 a.m. when a mob of agitators forming an unlawful assembly demanded the lowering thereof in sympathy with the students killed at Patna in a police firing earlier. I also quash the order of the Additional Superintendent of Police Varanasi dated 10-11-1955 reducing the petitioner to the lowest grade of his rank for a period of two years; and the order of the Deputy Inspector General of Police Eastern Range Varanasi, dated 26-6-1955 dismissing the petitioner's appeal and of the Inspector General of Police Uttar Pradesh dated 20-3-1957 rejecting the petitioner's revision. The respondents shall pay Rs. 300/- as costs to the petitioner.

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