

(1956) 10 BOM CK 0004

In the Bombay High Court

Case No : Appeal No. 48 of 1956 and Miscellaneous No. 47 of 1955

D.A. Koregaonkar

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 04-10-1956

Acts Referred:

Bombay Police (Amendment) Act, 1954 — Section 25(2), 29
Bombay Police Act, 1951 — Section 12A, 2(16)
City of Bombay Police Act, 1902 — Section 12, 167, 3, 5
Constitution of India, 1950 — Article 226, 311, 311(1), 311(2), 320
Government of India Act, 1915 — Section 40(1), 40(2)
Police Act, 1949 — Section 7

Citation : AIR 1958 Bom 167 : (1957) 59 BOMLR 22 : (1957) ILR (Bom) 120 : (1957) 2 LLJ 23

Hon'ble Judges : Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Advocate : L.M. Jhaveri, for the Appellant; A.G. and R.L. Dalal, for the Respondent

Judgement

Chagla, C.J.—This appeal arises out of a petition filed by the petitioner who was a member of the Bombay City Police Force against an order of dismissal dated 8-12-1954. On the 21-7-1953 a notice was served upon him to show cause why he should not be suspended. On the 24-7-1953 he submitted his reply and he was suspended on the 27-7-1953. Charges were furnished to him on the 2-11-1953 and the charges briefly were, first, that he joined one Rebello in engaging in trade in respect of certain watches which had been smuggled into India by Rebello, that he also contracted a debt in respect of these watches because although a sum of Rs. 2510/- was due to Rebello he had only paid him a sum of Rs. 1,400/-, and that his whole conduct appearing in these transactions was prejudicial and likely to throw discredit on the discipline and reputation of the Police Force. The second charge was that he was slack in his supervision, and the third charge was that he was found in his residence on the 16-7-1953 smelling of alcohol. On the 19-11-1953, the petitioner made a representation

against the inquiry officer. The inquiry officer was Assistant Commissioner Rane. That representation was rejected by Government and the inquiry went on. On the 13-7-1954, the findings of the inquiry officer were submitted. On the 8-10-1954 a show-cause notice was served upon him to show cause against the punishment proposed to be imposed. He submitted his reply on the 3-1-1954, and on the 8-12-1954, as already pointed out, Government passed an order of dismissal, and at the time of the order of dismissal the petitioner was holding the rank of an Inspector in the Police Force.

2. Now, the main ground which was urged before Mr. Justice Coyajee and which has been urged before us is that he was dismissed without reference to the Public Service Commission, and what is relied upon is the provision of Article 320(3) of the Constitution and that Article provides :

"(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted-

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;"

and admittedly Government before passing the order of dismissal did not consult the Public Service Commission. What was relied upon by Government before Mr. Justice Coyajee was a regulation which had been issued under the proviso to this Article and that proviso is:

"Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor or Rajpramukh, as the case may be as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted,"

Pursuant to this proviso the Governor made a regulation dated the 11-10-1951 and clause 15 of that regulation provides that it shall not be necessary for the commission to be consulted in any disciplinary matter relating, among others., to the posts and services specified in the Schedule, and item 21 of the Schedule provides: "All other services and posts to which appointments are made by authorities subordinate to Government except..." and the case of the Government was that this is a service or post to which appointment was made by the Commissioner of Police and -- therefore this service was taken out of the purview of the Public Service Commission. The petitioner was appointed an Inspector in 1947, by the Commissioner of Police and at one stage the Advocate General attempted to contend that if the petitioner was appointed by the Commissioner of Police then he belonged to that service or post to which appointments were made by authorities subordinate to Government. In our opinion, that submission is clearly untenable. Entry 21 in the Schedule does not

deal with actual appointment made of a Government Servant. It deals with the nature or character of the service or post which is excluded from the purview of the Commission, and therefore the relevant point of time to consider for the purpose of this entry is whether at the material time when the question of consultation with the Public Service Commission arises the service or post is one which is excluded from the purview of the Commission or not. Even though in 1947 the petitioner himself might have been appointed by the Commissioner of Police, the question is whether the post of Inspector continued to be a post to which the appointments were made by an authority subordinate to Government.

3. Now, on this aspect of the case, under Act, IV of 1902, which was the earlier Police Act, "subordinate ranks" was defined u/s 3(m) as meaning any ranks below that of the Deputy Superintendent. Therefore, while this Act was in force, an Inspector was a member of the subordinate rank, and a rule was framed by the Commissioner of Police u/s 12(a) of this Act by which Police Service was divided into two categories for the purpose of appointments, viz., Provincial Service and Subordinate Service, and in the Subordinate Service were to be found "Inspectors". Rule 2 dealt with appointments to the cadre of Superintendents of Police, which was placed in the Provincial Service. Rule 3 dealt with appointments to the cadre of Inspectors and it provided that appointments to this cadre shall be made by the Commissioner of Police by promotion of meritorious officers from the lower ranks of the Greater Bombay Police, Therefore, under the old Act and under these rules the position was clear that an Inspector belonged to the Subordinate Service and that appointments to this cadre was made by the Commissioner of Police. When the new Act, XXII of 1951, was passed, u/s 2(16) an Inspector no longer belonged to the Subordinate ranks because "subordinate ranks" was defined as members of the Police Force below the rank_ of the Inspector, and the whole argument of Mr. Jhavery under this head is that because an Inspector by Act, XXII of 1951, was made a member of the Provincial Service and ceased to be a member of the Subordinate Service, therefore, his appointment could only be made by Government and not by the Commissioner of Police. The short answer to this submission is that notwithstanding this change in the status of "Inspector", rule 3 continued in force and under that rule appointment to the cadre of Inspectors had still to be made by the Commissioner of Police. This Rule 3 was continued u/s 5, the first proviso to which enacts:

"Provided that -

(i) the rules or orders governing the recruitment, pay, allowances and other conditions of service of the members of the Police Force constituted under any of the Acts mentioned in Schedule I and deemed to be the members of the Police Force u/s 3 shall continue in force until altered or cancelled under clause (b)", (Act IV of 1902, was mentioned in Schedule I).

and section 167 also continued in force all rules which had been made under the earlier Police Act. Therefore, notwithstanding the repeal of the Act of 1902, the

rules made under that Act continued in force and one of those rules was rule 3 to which reference has been made. Therefore, it is under this rule that the Commissioner of Police was competent to make the appointment of Inspectors.

4. The Police Act of 1951, was amended by Act XXVIII of 1954, and section 12-A was incorporated in that Act and that section provides :

"Subject to the general or special orders of the State Government the Commissioner for the area for which he is appointed and the Inspector General for other areas shall appoint Inspectors."

This section has given support to Mr. Jhavery's contention that prior to the enactment of this section the Commissioner of Police had authority to appoint Inspectors, and in this connection attention is also drawn to certain other sections which were also altered by Act XXVIII of 1954, which enacted Section 12A. u/s 14 which deals with certificate of appointment, prior to the Act XXVIII of 1954 every Police officer below the grade of Inspector had to receive a certificate in the form provided in Schedule II, and by Act XXVIII of 1954 an Inspector was included in this section for the purpose of receiving a certificate. Under the proviso to Section 19 if the Police Officer is an officer below the grade of an Inspector the District Magistrate may report his conduct to the Inspector General, & by Act XXVIII of 1954 an amendment was effected to the effect, "of a grade higher than that of an Inspector." The power to punish an Inspector was conferred upon the Inspector General, the Commissioner and the Deputy Inspector General under Sub-section (2) of Section 25, and u/s 29, which deals with conditions under which a Police Officer may resign, an Inspector was included in the Police Officers for this purpose by Act XXVIII of 1954. From all these provisions Mr. Jhavery wanted to submit that it is only when Act XXVIII of 1954 was passed that power was conferred upon the Commissioner of Police to appoint an Inspector. As we have already indicated, these legislative changes, whatever their object, could not possibly affect the validity of Rule 3 under which the Commissioner of Police could make the appointment of an Inspector, and so long as that rule stood the Commissioner of Police had the power. Mr. Jhavery has raised a query that if that rule stood, it was unnecessary to make these legislative changes in the Act of 1951. Very often legislative changes are made for greater caution and to restate clearly the position in law. But these arguments have become rather academic because at a late stage Government produced a resolution passed on 20-12-1952, and by this resolution the Governor cancelled the order of 17-11-1938, in so far as it authorised the Commissioner of Police, Bombay, to make appointments to the posts of Inspector of Police. Therefore, it is now clear that after this resolution was passed the Commissioner of Police had no authority to make the appointment of Inspectors and this authority was only conferred upon the Commissioner of Police when Act XXVIII of 1954 came into force, which was on 12-4-1954. Therefore, between 20-12-1952 and 12-4-1954 only Government could make the appointment of Inspectors and therefore during that period the regulation to which we have just

referred would not apply to the post of an Inspector as that post was not a post to which, appointment could be made by an authority subordinate to Government.

5. If that be the position, then it is submitted on behalf of the petitioner that the order of dismissal cannot be sustained because no consultation was held with the Public Service Commission as required by Article 320(3). Two answers have been given by the Advocate General to this contention. Both raise questions of considerable importance and they must be carefully dealt with. The first answer is that the provision with regard to the consulting of the Public Service Commission contained in Article 320(3) is directory and not mandatory, and the other answer given is that even if it was mandatory, under clause 11 of the regulation dated 11-10-1931, it is not necessary for the Commission to be consulted until the case is ready for final decision and if Government proposes to impose any other penalty other than the penalty of censure, withholding an increment or promotion, or placing an officer under suspension, and therefore, what is urged is that the proper time for consulting the Commission was after the reply to the show cause notice had been submitted by the petitioner, which was on 31-11-1954, and it was only after that reply had been submitted that the case would be ready for final decision, and before the, final order was passed, viz., the order of dismissal, it would be incumbent upon Government to consult the Commission, and therefore it is said that at that relevant date Act XXVIII of 195-1 had already come into force and the service to which the petitioner belonged was a service to which appointments were made by authorities subordinate to Government, and therefore that service was excluded from the purview of Government and it was not necessary to consult the Commission.

6. Turning to the first contention of the Advocate General, we must first look at the scheme of the Constitution with regard to public services. Part XIV deals with services under the Union and the States and Chapter I of that Part is entitled "Services". That part contains important safeguards for the services and one of the most important safeguards is contained in Article 311 which ensures to the member of a civil service the right that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed and also 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. Chapter II of that Part deals with Public Service Commissions. It is clear from the provisions of this Chapter that our Constitution makers were most anxious to ensure to the civil services of the country security and fair play and they were equally anxious by setting up independent Public Service Commissions to see that there was proper recruitment to the services and that in all matters affecting the services they should be consulted by Government. It is in the light of this objective that we must consider the provisions of Article 320(3). Undoubtedly, although the language used in this Article is the language of obligation, viz., "shall be consulted", it is true that if the context so requires "shall" can be construed as "may". In other words, notwithstanding the language

of obligation it is open to the Court to come to the conclusion that the provision in this Article is directory in its nature and not mandatory. The books are full of cases where "shall" is construed as "may". Primarily it must depend upon the context in which the word "shall" is used, and therefore authorities construing this expression in different contexts are of not much assistance to us in construing this expression in this particular context. The question that we have to consider is, looking to the scheme of the Constitution, looking to the object that the Constitution had in mind in safeguarding the rights of the services, could it be said that the provision with regard to consulting the Public Service Commission with regard to disciplinary matters affecting a civil servant was only directory, or whether the Constitution required that this particular provision was mandatory and could be enforced by proper proceedings in a Court of law.

7. It is said that all that Article 320(3) requires is to consult the Public Service Commission, the opinion given by the Public Service Commission on that disciplinary matter is not binding upon the Government, and even in this case if the Public Service Commission had been consulted, whatever opinion the Commission might have expressed, it would have been open to Government to pass an order of dismissal. It is therefore urged that the failure to merely consult an authority whose opinion or decision in no way binding, cannot vitiate the order of dismissal which the Government was competent to pass, under the provisions of the Constitution. It is said that if proper safeguard has been afforded to the Civil servant, if Article 311 has been complied with, then it is not open to the servant to make a grievance of the fact that the Public Service Commission has not been consulted and therefore the final order passed by Government is open to challenge. Even if under Article 320(3) the only right that the Public Servant had was to have the Public Service Commission consulted before disciplinary action was taken against him, in our opinion it is an important and substantial right. Apart from anything else, even mere consultation must result in Government considering the opinion of an important, independent and impartial authority like the Public Service Commission, and we refuse to believe that any Government would not be influenced by the opinion formed by the Public Service Commission with regard to the case of any particular public servant. In this very case, if the Public Service Commission had been consulted, it would have been open to the Public Service Commission to take the view that the charge of misconduct had not been established, or that the benefit of the doubt should be given to the petitioner, or that the penalty sought to be imposed was much too severe. It is true that Government would not have been bound by the opinion of the Public Service Commission, but the Government would have passed the ultimate order and come to its final decision after considering the opinion of the Public Service Commission. How important the Constitution makers themselves considered that right to be is clear from certain other provisions of Article 320. Although it is open to Government to make regulations under the proviso to Article 320(3) which would entitle the Government to withdraw certain classes of cases from the purview of the Public

Service Commission, Clause (5) of Article 320 requires that these regulations

"shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the, case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."

Therefore, the question as to whether a certain matter should be within the purview of the Public Service Commission or not, or whether a certain class of service should be within its purview or not, is not left to the absolute arbitrary discretion of Government. The Legislature has been given the power to amend or even repeal any regulation made by Government for the purpose of excluding any matter from the purview of the Public Service Commission. The Constitution also considers a difference by Government from the opinion expressed by the Public Service Commission as a serious matter, and therefore under Article 323(2), where the advice of the Commission is not accepted, it is incumbent upon the Government to lay before the Legislature the reasons for such non-acceptance. Therefore, Government must consider very carefully and very seriously before it makes up its mind not to accept the advice tendered to it by the Commission with regard to the various matters embodied in Article 320. Therefore, in our opinion, this particular right conferred upon the public servant is not to be considered any less important than the right conferred upon him under Article 311. Whereas Article 311 gives him the right to defend: himself against any charge preferred against I him, and whereas that Article ensures to him that proper opportunity will be given of showing cause against the action proposed to be taken in regard to him, Article 320" interposes between him and the Government an impartial, responsible and independent authority which should be consulted and whose advice should be taken by Government before Government as employer takes action against the servant.

8. Now, if we are right in the view that we take as to the nature of the provision contained in Article 320(3)(c) and as to the right it confers upon the public servant, then it is not difficult to take the view that the provision contained in regard to this right should be held to be mandatory in its nature and not merely directory. Various reasons have been suggested by the Advocate-General as to why we should not adopt this construction of the expression used by the Legislature, and we will proceed to examine these reasons. The first and foremost is that the expression "shall be consulted" used in Article 320(3) governs not only Sub-clause (c) but the other Sub-clauses in that Article, viz., (a), (b), (d) and (e), and the Advocate General was at pains to point out to us that the provisions with, regard to Sub-clause (a), (b), (d) and (e) must in their very nature be directory and not mandatory, and what was urged is that if the provisions with regard to Sub-clause (a), (b), (d) and (e) are directory, then by a proper canon of construction we must construe the provision with regard to Sub-

clauses. (c) also as directory and not mandatory. Now, there are two answers to this argument. The first is that we are not called upon on this petition to decide whether the consultation of the Public Service Commission with regard to matters contained in Sub-clauses (a), (b), (d) and (e) are mandatory or directory. It will be wrong, in our opinion, by a mere side-wind to decide this important question. That question will be decided when it arises and when full and proper arguments have been submitted to us by both sides on this aspect of the matter. The other answer is that these matters enumerated in Sub-clauses (a), (b), (c), (d) and (e) are not inter-related, nor do they constitute parts of the same topic or subject, and it would have been quite competent to the Constitution makers, instead of drafting Article 320(3) by making the expression "shall be consulted" apply to all the Sub-clauses, to have either incorporated the expression "shall be consulted" in each of these Sub-clauses, or even to have had separate Articles with regard to these matters. Therefore, the ordinary rule of construction that when the Legislature uses one expression in one part of a section, that expression should be construed in the same way when used in any other part of the section, strictly does not apply to the provisions of Article 320(3). As we said before, whether the consultation is obligatory or not, whether the expression "shall" is mandatory or directory must depend upon the context in which this expression is used, and as the context of Sub-clauses (a), (b), (c), (d) and (e) is different, it would depend upon a consideration of that context as to whether it is obligatory upon Government to consult the Public Service Commission not only with regard to Sub-Clause (c) but also with regard to Sub-clauses (a), (b), (d) and (e).

9. It is then said that the expression "shall be consulted" is a positive injunction differing from a negative injunction, as for instance embodied in Article 311(1), and what is urged is that when obligation is expressed in positive language, that obligation is weaker than when it is expressed in negative language. Very likely the Advocate General is right, but it does not mean that the Legislature cannot incorporate in a statute or in a Constitution, a provision mandatory in character by expressing it in the form of a positive injunction rather than in the form of a negative injunction. Some point was sought to be made, and we are afraid we have not been able to appreciate it, as to the difference between the expression "the Public Service Commission shall be consulted" and the expression "the Government shall consult the Public Service Commission" and some sort of subtle distinction was sought to be made between these two expressions. The only difference that we can see is that one is the use of the active voice and the other is the use of the passive voice. Apart from that there does not seem to be much difference. The real fact of the matter is that the construction must depend not so much in the expression used, whether it is "shall", whether it is negative in form or positive in form, active in voice or passive in voice, as the nature of the injunction and the subject matter to which that injunction applies, and as we have said in *Ismail Papamia and Others Vs. Labour Appellate Tribunal of India and Another*, , one of the important tests that must always be employed in order

to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and if it does then the Court would say that that provision must be complied with and that it is obligatory in its character. Applying that test here, there cannot be the slightest doubt in our minds that the non-compliance of the salutary provision contained in Article 320(3)(c) is likely to cause injustice to a public servant. As we have pointed out, the failure on the part of the Government to obtain the advice of the Public Service Commission may seriously and prejudicially affect the interest of the public servant. In that case we also laid down another test and that was that the Court will not construe a provision as mandatory in its character if that is likely to defeat the object of the Legislature. In this case, far from the object of the Constitution makers being defeated by our construing Article 320(3)(c) as mandatory in its character, in our opinion it would advance the object which the Constitution makers had in making various provisions with regard to safeguarding the rights of public servants.

10. Our attention was then drawn to the provisos to Article 311. These three provisos deal with cases where it is not incumbent upon Government to afford to the public servant the rights contained in Article 311(2). One of them, for instance, deals with the case of the security of the State where- it may not be expedient to give to the person concerned a reasonable opportunity of showing cause, and the Advocate General's argument is that if we look upon Article 320(3)(c) as mandatory in its character, then this rather startling result will follow that even though in the interest of the security of the State a public servant may not be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, still Government would be bound to consult the Public Service Commission before action could be taken against the servant concerned. It may be open to argument -- and we express no opinion -- whether Article 320(3)(c) applies to cases to which the proviso to Article 311(2) applies. But whether Article 320(3)(c) applies or not, it has no bearing on the question that we have to consider whether the provisions of Article 320(3)(c) are mandatory or directory. If Article 320(3)(c) does not apply to the case covered by the proviso to Article 311(2), it is immaterial whether the provisions are mandatory or directory. If the provisions of Article 320(3)(c) do apply, then we have still to consider whether those provisions are mandatory or directory.

11. Our attention was drawn by the Advocate General to certain decisions which according to him should help us to correctly construe the provisions of Article 320(3)(c), and the first decision on which reliance was placed was a decision of the Federal Court reported in AIR 1945 67 (Federal Court) . The Federal Court was considering Section 256 of the Government of India Act. which provided that before magisterial powers or enhanced magisterial powers can be conferred upon a person, the Chief Presidency Magistrate has to be consulted, and the Federal Court held that this provision was directory and not mandatory, and the reason why the Federal Court came to that conclusion is given by Mr. Justice Zafrulla

Khan at p. 102 (of FCR): (at p. 68 of AIR):

"It seems to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendations for the grant of magisterial powers."

It is difficult to understand how non-compliance with the provisions of this section can possibly cause injustice to any party appearing before a Magistrate appointed without complying with the provisions of Section 256. Quite clearly Section 256 was procedural in character and conferred no substantive right upon any party.

12. Then reliance is placed on two decisions of the Calcutta High Court which has considered this very provision and come to the conclusion that it is directory in character and not mandatory. The first is a judgment of Mr. Justice Das and Mr. Justice Mookerjee in *Shiva Nandan Sinha and Others Vs. State of West Bengal*, . The main reason why this Bench came to the conclusion that the provisions of Article 320(3)(c) were not mandatory was that the Article required consultation with the Public Service Commission and it assumed that the advice given by the Public Service Commission may not be accepted in certain cases, and from that the Court inferred that failure to comply with the direction in this Article need not render the disciplinary proceedings inoperative. Now, we have pointed out that notwithstanding the fact that the Public Service Commission's advice may not be accepted, consultation with the Public Service Commission in itself affords an important right to the Public Servant. As a matter of fact the reason given in this judgment for coming to the conclusion has not been accepted in a later judgment of the Calcutta High Court in *Munna Lal Tewary Vs. Harold R. Scott and Others*, . That is the judgment of the learned Chief Justice Chakravarti C. J. and Mr. Justice Lahiri. It is a very carefully considered judgment by the learned Chief Justice but with very great respect we are unable to accept the reasons which led the learned Chief Justice to come to the conclusion that the provisions of Article 320(3)(c) were directory and not mandatory in character. The learned Chief Justice at p. 271 (OE Cal WN): (at p. 457 of AIR), concedes :

"I can see no necessary conflict between the provision for a consultation being mandatory and the advice given by the authority consulted not being binding."

Then the learned Chief Justice points out at P. 273 (of Cal WN): (at p. 458 of AIR), that the Article itself gives liberty to the President and the Governors to exempt themselves from its operation by regulations framed by themselves. The learned Chief Justice observes :

"A mandate which leaves it open to the mandated person to carry or not to carry out the mandate according to his pleasure or discretion cannot be a mandate, properly so called at all."

Now, in making this observation, with respect, the learned Chief Justice has

overlooked the provisions of Article 320(5)(c). The mandate cannot be carried out at the pleasure or discretion of Government. The Legislature is there to control the exercise of the mandate by the executive. Then further on the learned Chief Justice observes :

".....the fact that a particular provision is directory does not mean that it can be followed or not followed just as one pleases. It means merely that whereas in the case of a mandatory provision, strict compliance with every letter of the law is necessary and absence of such compliance will invalidate the act in the case of a directory provision, substantial compliance is sufficient and even where there is no compliance at all, the act is not invalidated by such non-compliance alone."

Now, if even substantial compliance is not necessary, then it is difficult to understand how Government can ever be compelled to carry out the provisions of Article 320(3)(c). We are not in the realm of morality, nor are we concerned with moral obligations. We are concerned with legal obligations. The question is whether the Government is under a legal obligation under Article 320(3)(c) to consult the Public Service Commission and if they fail to discharge their legal obligation then the Courts will be in a position to compel Government to discharge their obligations. Then the learned Chief Justice goes on to observe:

"It does not mean that where a provision is directory, the persons or authorities to whom it applies can make a habit of disregarding it on the ground that they are not imperatively required to follow it and can follow or not follow it as they choose. It is because the Constitution expects the President and the Governors of the States to consult the Public Service Commission in cases covered by Article 320(3) and because it assumes that normally and except in the case of an oversight, they will follow the provisions of the Article that a specific power is given to make consultation with the Public Service Commission unnecessary in certain cases by means of framing regulations in that behalf."

Again, with respect, even if Government were to make a habit of not consulting the Public Service Commission, it is difficult to understand how Government could be shaken out of that habit, nor do we understand this great confidence in the Government doing the right thing under the Constitution. Undoubtedly we do expect Government to do the right thing, but the Constitution has provided specific machinery to see that Government does the right thing and does not deviate from certain principles or standards laid down in the Constitution. If that were not so, it would be unnecessary to provide for fundamental rights, to provide for a judiciary, and to provide for the judiciary ensuring to the citizen his rights against Government and the executive. Therefore, the Constitution is not based on the expectation that Government would do the right thing, although no mandatory provision is contained in any provision of the Constitution. The learned Chief Justice has been considerably influenced in coming to the conclusion that he did by holding that the provisions of Article 320(5) are directory and not mandatory in nature. In the first place, we are not prepared to assume or to agree, with respect, with the learned Chief Justice" that the

provisions of Article 320(5) are not mandatory. The reason why the learned Chief Justice feels that the provisions of Article 320(5) are not mandatory is that the regulations would come into force before they were laid before the Legislature and therefore the learned Chief Justice assumes that by reason of that it was not obligatory upon Government to place these regulations before the Legislature. Now, even though the regulations may come into operation before they are placed before the Legislature, that does not in any way detract from the duty and obligation of Government to place these regulations before the Legislature, and it would be difficult for Government to resist an application on the part of any person to compel Government to place these regulations before the Legislature if the Government failed to carry out its duty under Article 320(5). The learned Chief Justice winds up his judgment by saying:

"Since Clause (5) is itself directory, it cannot require the construction of Clause (3) as directory, otherwise suggested, to be modified and one must come to the conclusion that all parts of the provision relating to consultation with the Public Service Commission as also those provisions, taken as a whole, cannot be construed to be of a mandatory character."

Therefore, again with very great respect, the whole judgment of the learned Chief Justice is colored by his view that the provision with regard to the obligation of Government to place regulations under Clause (5) before the Legislature is directory and not mandatory in character. If that assumption is not justified, then the assumption that the provisions of Article 320(3)(c) is also directory is equally unjustified.

13. The next decision relied on is the (1940) 8 ITR 635 (Privy Council) . The Privy Council there was construing Section 205 of the Government of India Act which dealt with a certificate to be given by the High Court to the effect that a case involved a substantial question of law as to the interpretation of the Act, in order to enable the appellant to prefer a direct appeal to the Federal Court, and the Privy Council held that the provisions of this section, which cast a duty on every High Court in British India to consider in every case whether or not any such question was involved and on its own motion to give a certificate accordingly, was directory and not mandatory in character, and Viscount Maugham at p. 377 (of Bom LR): (at p. 233 of AIR), points out:

".....the duty is imposed on the Judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The responsible persons -- in this case the Judges of the High Court -- may be "blamable" -- as Lord Blackburn observed in the instructive case of *Justices of Middlesex v. The Queen* (1884) 9 AC 757 -- but third parties have nothing to do with that."

So this was a case which, while it cast a duty upon the Judges of the High Court to carry out a certain direction, the carrying out or the failure to carry out the direction did not in any way affect the right or interest of a third party, and it is because of this that the Privy Council came to the conclusion that the provisions of this section were directory and not mandatory.

14. Reliance was also placed on the decision of *J. K. Gas Plant & Co. Ltd. v. Emperor* 49 Bom LR 591: AIR 1947 FC 88, and the question that the Federal Court in that case had to consider was the manner and form in which an order of the Governor-General-in-Council should be expressly given, and for that purpose Section 40(1) of the Government of India Act was considered and it was held that the provisions of that section were not mandatory. Now Sub-s. (2) dealt with the business of the Governor-General-in-Council and obviously the section was procedural in character and did not deal with any substantive rights. But what has been relied upon by the Advocate General is the observation of the learned Chief Justice Spens at p. 596 (of Bom LR): (at p. 43 of AIR), where the learned Chief Justice says:

"That this is the right view is in our judgment strongly reinforced by a consideration of Sub-s. (2) of the same section which is clearly not a mandatory provision. In such context it would be surprising to find one independent mandatory provision."

The Advocate General says that just as the Federal Court in construing Sub-s. (1) of 3. 40 considered whether Sub-section (2) was mandatory or directory, so also we should consider the various Sub-clauses of Article 320(3) in order to determine whether Sub-Clause (c) is mandatory or directory in its nature. Now, what the Advocate General overlooks is that the federal Court first held Section 40(1) to be directory after considering the language used by Parliament and the subject matter of that Sub-section. It is only after deciding it that for the purpose of further reinforcing this conclusion they considered the provisions of Sub-s. (2). The Advocate General wants us to reverse that process and wants us to consider the provisions of Article 320(3)(a), (b), (d) and (e), in order to determine whether the provisions of Clause (3) (c) are mandatory or directory in nature.

15. Having given our very careful consideration to all the contentions put forward by the Advocate General, we are of opinion that the provisions of Article 320(3) (c) are mandatory in their character and their non-observance must vitiate any order passed by Government imposing a penalty upon a public servant. In fairness to Government we must point out that Government itself has never taken the view that it is not obligatory upon it to refer matters to the Public Service Commission in cases to which Article 320(3) applies and which, have not been withdrawn from the purview of the Public Service Commission by reason of the regulations made under the proviso. In this case also Government would have referred the case of the petitioner to the Public Service Commission, but it took the view that inasmuch as the petitioner was appointed by the Commissioner of Police and also at the relevant date the appointment of

Inspectors was by the Commissioner of Police, the Government was not bound to refer the case of the petitioner by reason of the regulation made by it.

16. The next question that we have to consider is as to whether on the facts of this case it was necessary for Government to refer the case of the petitioner to the Public Service Commission. What is urged by the Advocate General is that the relevant date for this purpose was some time before the 8-12-1954, when the order of dismissal was passed. He says that the show cause notice was issued on the 8-10-1954, the reply of the petitioner was submitted on the 30-1-1954 and it was only after the reply was submitted that the Government could consult the Public Service Commission and place all the materials before it. Therefore, on that date, as Section 12-A was already in force, having come into force on 12th April 1954, the petitioner belonged to a service, appointment to which was made by the Commissioner of Police, an authority subordinate to Government, therefore the case of the petitioner need not be referred to the Public Service Commission. Now, in this case the disciplinary inquiry against the petitioner started on 2nd November 1953. The order of dismissal passed on 8th December 1954 was the culmination of these proceedings. When the proceedings started, in view of what we have already held, the petitioner was entitled to the safeguard of having his case referred to the Public Service Commission under Article 320(3)(c). If this safeguard can be looked upon as a substantive right, then that substantive right cannot be taken away from the petitioner by any subsequent legislation which changed the nature of the service to the detriment and prejudice of the petitioner.

17. Now, if we are right in the conclusion to which we have come with regard to the provisions of Article 320(3)(c) being mandatory, then it is clear that the safeguard with regard to consultation with the Public Service Commission afforded by the Constitution is not procedural in character but is a matter of substance, and if it is a matter of substance then a right with regard to that matter accrued to the petitioner as soon as the inquiry started on 2nd November 1953 and the petitioner cannot be divested of that right by any subsequent alteration in the law unless the Legislature expressly makes the legislation retrospective so as to deprive a person of his vested right. It is not suggested that Section 12-A is retrospective in that sense. Therefore, unless the safeguard to which the petitioner was entitled on 2nd November 1953 is purely procedural in character, the provisions of S. 12-A cannot deprive him of that safeguard. The Advocate General says that notwithstanding the inquiry Government might have taken no action and it is only when the show cause notice was issued on 8th October 1954 or at the latest when the reply was received on 3rd November 1954 that Government made up its mind to pass the order of dismissal, and according to the Advocate General it was only then that it could be said that the petitioner had the right to have his matter referred to the Public Service Commission. In our opinion, that is an erroneous way of looking at the matter. The question is not what order ultimately could have been passed by Government. Government might have passed the order of dismissal or might

have held that the petitioner was not guilty of misconduct and might have taken no action against him. But the relevant question is whether the final order, whatever its nature, is part and parcel of the inquiry which started on 2nd November 1953 and constitutes its ultimate determination. If that be the true position, then the safeguard with regard to the consultation of the Public Service Commission was vouchsafed to the petitioner at the moment of time when the inquiry started- It could not be said that he became entitled to that safeguard at any intermediate stage between the commencement of the inquiry and the order of dismissal. Therefore, in our opinion, the relevant date to consider for this discussion is 2nd November 1953. Did the petitioner at that date belong to a service, the appointment to which was being made by Government. If he did belong to such service, then his case had to be referred under Article 320(3)(c) to the Public Service Commission, and if Government did not refer his case to the Public Service Commission then any order it passed to his prejudice could be successfully challenged. As the petitioner admittedly on 2nd November 1953 belonged to a service where appointment was to be made by Government and as admittedly his case was not referred to the Public Service Commission, in our opinion, the petition must succeed to the extent that the petitioner has challenged the order of dismissal on the ground that it is vitiated by non-compliance with the provisions of Article 320(3)(c).

18. Mr. Jhavery has also urged certain other points on this petition and we must briefly deal with them and dispose of them. In our opinion there is no substance in any of the other contentions put forward by Mr. Jhavery. The first contention is that the petitioner has not had a fair trial at the hands of the inquiry officer Rane, and the rather curious suggestion is made that because Rane moved the Commissioner of Police, who in his turn moved the Government to order an inquiry, Rane was disqualified from acting as inquiry officer. Now, it is not seriously suggested that Rane had any interest in giving a finding against the petitioner, nor is it suggested that Rane was to benefit in any way by a finding that the petitioner was guilty of misconduct, nor is it urged or can be urged that Rane had already made up his mind that the petitioner was guilty of the charges which were framed against him. The mere fact that an officer holds a preliminary inquiry and comes to a prima facie conclusion does not disqualify him from acting as an inquiry officer, so long as he conducts the inquiry in a judicial manner. On the question of the fair trial it has been strongly urged that Rane held the petitioner guilty on the third charge merely because he accepted the word of his superior Deputy Commissioner Pant against all the other evidence in the case. On this point the facts briefly are that there was a raid on the residence of the petitioner on 16th July 1952 by Deputy Commissioner Pant. Deputy Commissioner Pant was accompanied by Inspector Ballantine and they both asked the petitioner to blow out his breath and they came to the conclusion that he was smelling of alcohol. The case of the petitioner was not that he was not smelling of alcohol, but that he had taken medical preparations under the directions of a medical practitioner. It was the case of Government that the

petitioner had confessed to Deputy Commissioner Pant that he had taken brandy on that day and Pant gave evidence with regard to this confession before the inquiry officer, and the whole of Mr. Jhavery's contention is that Rane overlooked all the other factors in the case and convicted the petitioner merely on the alleged confession made by him to Pant, and the reason why Rane accepted the evidence of Pant, as already pointed out, was that he was a superior officer. Now, there is no rule of evidence which we are aware of which compels a tribunal to disbelieve a superior officer if that superior officer comes to give evidence before it, and Rane cannot be convicted of partiality merely because he preferred the testimony of Pant to the other circumstances on which the petitioner relied. The case ultimately turned on the appreciation of the evidence, and as we have so often pointed out in these matters we are exercising a limited jurisdiction and it is not for us to say whether Assistant Commissioner Rane was right in accepting the testimony of Deputy Commissioner Pant with regard to the petitioner's confession or not.

19. It is then said that with regard to the second charge which referred to slackness in supervision, the inquiry officer came to a conclusion against the petitioner, again for the reason that Pant was involved in the matter, and what is pointed out is that there was a raid by the Anti-Corruption Branch on certain premises suspected of gaming and it was because of this and because Pant's attention was drawn to this raid that a charge was trumped up against the petitioner that he had been slack in his duty in raiding places where gaming was going on, and Mr. Jhavery has relied on a passage in the finding of the inquiry officer of the following effect:

"I am sure if he had earnestly concentrated on the places mentioned at item No. 1 in Ex. H with all these resources, the Anti-Corruption Branch would not have been able to carry out the raid on that place and he would not have been required to face this charge."

It is entirely misreading this passage to suggest that the only reason for the conviction of the petitioner on this charge was this raid by the Anti-Corruption Branch. What the inquiry officer points out is that it is this raid which brought to light the slackness and inefficiency of the petitioner. Whether he was right or wrong in that conclusion is another matter, with which we are not concerned.

20. An argument was also advanced before us that the inquiry officer was not competent to try the first charge which dealt with the contracting of a debt by the petitioner and contravening the provisions of R. 23 of the Rules made by the Commissioner of Police. It is said that this charge could only be tried by the Commissioner of Police under the rules framed under the Police Act and the petitioner could not be tried under the Civil Service Rules on this charge. It is said that contracting a debt is not constituted a misconduct under the Civil Service Rules, and therefore if the inquiry was under the Civil Service Rules, the fact of contracting a debt cannot constitute misconduct. Now, if contracting a debt under the circumstances mentioned in the charge constitutes a contravention of

a Police Order, then clearly it is misconduct. The Civil Service Rules do not enumerate all cases of misconduct, and it is difficult for us to accept the contention that when there is a violation of an order passed by the Commissioner of Police which applies to the Police Force, such a violation would not constitute misconduct which would entitle Government to hold an inquiry under the Civil Service Rules. Now, the position with regard to Rule 23 is that this rule is framed u/s 12 (a) of the old Act and that rule says :

"Any member of the Police Force who gets himself involved in any debts or pecuniary embarrassment which he cannot discharge within two years from the date on which they may be contracted, will be deemed liable to punishment u/s 7 of the Police Act 4 of 1952".

Under Section 25 of the present Act power is conferred upon the Commissioner of Police, among others, to punish any member of the subordinate ranks and this includes an Inspector, and therefore what is urged is that if there was a violation of this rule by the petitioner, he could have been punished by the Commissioner of Police. Now, Rule 23 does not apply merely to members of the subordinate ranks including Inspectors. Rule 23 is general in its application and therefore it would be misconduct on the part of any member of the Police Force to contravene Rule 23, and if the authority appointed under the Civil Service Rules was competent to try the petitioner for the other charges framed against mm, it was equally competent to try him with respect to this charge.

21. It is then said that there was no evidence to hold that a debt had been contracted by the petitioner within the meaning of this rule. Mr. Jhavery says that all that the petitioner did according to the Government was that he failed to get certain watches entrusted to him by Rebello sold and that according to Mr. Jhavery this does not constitute contracting a debt. Now, there is no magic about the expression "contracting a debt". The petitioner himself has admitted that these watches were entrusted to him for sale and the inquiry officer finds that the value of these watches was Rs. 2,610/- and the petitioner paid to Rebello only a sum of Rs. 1,400/-. If this is so, with regard to the balance he became liable to Rebello and in that sense did contract a debt.

22. In our opinion, therefore, the inquiry against the petitioner has been held properly, he has been given a reasonable opportunity to defend himself, the inquiry officer was competent to hold the inquiry, and there is no infirmity that attaches to any part of this inquiry. We are upholding the contentions of the petitioner merely on the ground that the Government failed to comply with the provisions of Article 320(3)(c).

23. The result therefore is that the petition must succeed. The appeal will be allowed and the order of dismissal will be quashed.

24. With regard to costs, the fair order of costs would be that the appellant must get the costs of the appeal. With regard to the petition, as the petition" was challenged on many other grounds besides the ground on which the petitioner

has ultimately succeeded, he should get half the costs of the petition. The petitioner will also be entitled to the costs of Appeal No. 27 of 1955. This appeal was preferred by the petitioner when Mr. Justice Desai summarily dismissed the petition. We set aside that order of dismissal and directed that the petition should be heard on merits and we made the costs of the appeal costs in the petition. The petitioner is entitled to these costs. Liberty to the appellant's attorneys to withdraw the sum of Rs. 500 deposited in Court.

25. Appeal allowed.