
Ghulam Haqqani Khan Vs State of Uttar Pradesh and Others

Special Appeal No. 114 of 1958

Court: Allahabad High Court

Date of Decision: Nov. 14, 1961

Acts Referred:

Constitution of India, 1950 – Article 311

Citation: AIR 1962 All 413

Hon'ble Judges: S.C. Manchanda, J; B. Mukerji, J

Bench: Division Bench

Advocate: G.N. Kunzru, S.C. Khare and N.D. Ojha, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

Mukerji, J.

I have had the advantage of reading my brother's opinion and I may, with respect, say that I am in general agreement with his opinion. I agree that this appeal must fail and that the parties should bear their own costs of the appeal.

2. Since the appeal raised some interesting questions for determination I thought it desirable to, very briefly, indicate my own views on some of

the questions falling for determination.

3. The facts and the important controversies arising on those facts have been fully set out in my learned, brothers' judgment and hence I content

myself with dealing specifically with only two questions; first, whether the Board of High School and Intermediate Education which was established

by the Intermediate Education, Act, 1921 (U. P. Act II of 1921) was a corporate body with all the privileges and liabilities of such a body, or

whether the Board of High. School and Intermediate Education was merely a statutory body with no different existence from being a department of

Government; and secondly, whether the appellant, even if he could be treated as an employee of a body which had been created under a statute

necessarily, lost the character of a servant of the State Government when he, in fact, had been appointed by an officer who was invested, with

powers under rules, made for guidance of officers of a Department of the State.

4. In order to be able to pronounce with an amount of certainty on the legal questions formulated above, it would be helpful to know the

background in which the Intermediate Education Act of 1921 came into existence. It was as a result of the recommendations contained in the

Saddler Commission's Report that Government of this State, which then functioned as a "Diarchy", appears to have conceived the idea of

separating the Intermediate Education from the University and adding it to the School Education. One of the main arguments which was put out at

the time to sustain the idea of separation was that the stage of "School Leaving", as it obtained up to the year 1919-20 was not a sufficiently -

advanced stage in the education of a young man to make him fitted for starting on a career with much confidence.

5. It was the belief of some of the educationists of the time that the School Education should be divided into three clear-cut stages:

(1) the primary stage, (2) the Secondary stage, and (3) the Higher Secondary stage.

6. I mentioned earlier that at the time the idea of separating the Intermediate Education, from the University was taken up by Government, there

was, what was called, a "Diarchy" in action and "Education" was one of the "transferred subjects" as those "responsibilities" of the State in respect

of which Ministers acted were referred to.

7. The object of the Intermediate Act (to be referred to later as the Act) has been stated in the Act thus:

Whereas it is expedient to establish a Board to take the place of the Allahabad University in regulating and supervising the system of High School

and "Intermediate Education in Uttar Pradesh and to prescribe courses thereof.

By looking at the object of the Act, quoted above, it would be fairly clear that the Board was created for the sole purpose of taking over the

supervision of the system of High School and Intermediate Education--the latter having been taken out of the purview of the Allahabad University.

Under the Act the Board was not given the status of a "Corporate Body", having a perpetual succession, a common seal, a right to sue and be

sued in its own name, etc. It is interesting in this connection to note that the status of a "body corporate" was conferred on the University while it

was apparently denied to the Board even though both the Acts were of the year 1921 and passed in quick succession.

8. Section 3 of the Act only says "the Board shall be established". The section does not speak of the Board being "incorporated". In contrast, this

is what Section 3 (2) of the University Act says:

The University shall have perpetual succession and a Common Seal and shall sue and be issued by the said name.

9. Section 7 of the Act lays down the "powers of the Board". There is nothing in any of the sub-sections or the clauses of any of the subsections

whereby any power was conferred on the Board to make appointments of any staff, to make arrangements for the payment of their salaries, etc.

Mr. Gopi Nath Kunzru, counsel for the appellant, who argued this case with great ability and thoroughness, relied on Sub-section (12) of Section

7 for his contention that under this sub-section the Board could make appointments of servants, etc. I am not impressed by this contention: this

sub-section conferred powers to do.

all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising

High School and Intermediate Education.

The unstated powers visualised by Sub-section (12) had to directly relate to the functions of "regulation" and "supervision" of High School and

Intermediate Education. Appointment of a staff and exercising powers of control in respect of such staff could not, in my view, legitimately fall

under the words ""other acts and things"" of Sub-section (12) of Section 7.

10. It was not shown to us that the Board was ever treated as a Corporation or a body incorporated or it exercised any privileges peculiar to such

bodies. I could think of no law, and none was shown to us, on which it could be contended that simply because a certain body was created by

statute that body could not function as a Department of Government so as to be outside the scope of the executive power of the Governor under

Article 154 of the Constitution. Clause (2) (b) of this Article conferred powers on Parliament and the State Legislature under which either could

confer by law functions on any authority subordinate to the Governor but because of the provisions of Clause (2) (a) the Governor could not

exercise "Executive power" where such functions had been, conferred on any other authority by any existing law.

There was no existing law, not certainly the Intermediate Act, that conferred on "any other authority" the "functions" contemplated by Article

154(2)(b). The powers conferred by section 9 of the Act, to my mind, clearly indicated that the ""Provincial Government"" continued to exercise a

very large amount of control over even those, special spheres of responsibility which had, by statute been placed on the Board constituted under

the Act.

11. The appointment of the appellant was admittedly made by Government. The appellant was paid his salary in the same manner in, which any

other servant in the State's employ was paid. Indeed, we found on the scrutiny of the Budget statements that all money taken as examination fees,

etc., under the regulations framed under the Act was credited to Government Account and all money spent on the Board's business, so to speak,

was spent out of the "Funds" spent by the State under the head ""Education"". I am conscious of the fact that merely because a person was paid his

salary from out of the funds of the State he did not thereby necessarily come under the civil employ of the State, but as their Lordships of the

Supreme Court pointed out in the case of M. Ramappa Vs. Sangappa and Others, .

An office has to be held under some one for it is impossible to conceive of an office held under no one.

As I read M. Ramappa's decision I read it to emphasise the circumstance of the appointment by the State. I attach particular significance to the

following observation of their Lordships at page 1173 (of SCR) : (at p. 939 of AIR):-

The appointment being by Government, the office to which it is made must be held under it, for there is no one else under whom it can be held.

The position in the instant case was the same: the appointment was made by an officer of Government under powers invested in him under rules.

The Board had under the Act no power to make appointments or to have any person or persons under its employ. So that on the authority of the

aforementioned decision the appellant's appointment could not but be under the State. Indeed, the appellant himself never contended that he was

not a Government servant. His contention and this too at a fairly late stage--was that he could not be transferred from the office of the Board and

so any remissness on his part to comply with the order of transfer could not be visited with the penalty with which it had been so visited.

12. There could, in my view, be no doubt, on the object and the scheme of the enactment, that all that was done by the Legislature by passing the

Intermediate Act was to confer certain powers on a "Statutory body", powers which were exercisable on a limited field to attain a limited object.

13. As I have shown above, the Act did not confer on the Board the "status" of a corporation. The appellant could be said to have worked under

the direction and the "administrative control" of the Secretary of the Board.

14. Under the Act the Secretary of the Board was appointed by the "Provincial Government" upon such conditions and for such period as the

Provincial Government thought fit. The Secretary was no doubt removable from the office (of the Secretary)

by the votes of not less than three-fourths of the numbers present at a special meeting of the Board at which not less than one-half of the total

number of members are present"" ,

but then what has to be noticed is that the Secretary could not be "removed" from service; as indeed he could not be, for the Board was not an

authority which had anything to do with his appointment.

15. The schema of the Act, to my mind, clearly indicated that the Legislature only intended and hence provided for a "statutory body" which could

operate within a specified field. When aid for furthering its activities was required then, such aid came from the State in the shape of men, money

and other means. In Chapter II of the Education Code, among other matters, provision, had been made whereby the power to appoint, promote,

punish (including removal and dismissal) etc., were conferred on certain officers, who were officers of the State. The Secretary of the Board was

empowered under para 14, item 8, of Chapter II.

to appoint, promote, punish (including removal and dismissal) and grant leave admissible under the rules to (among others) clerks (other than the

Head Clerk and the clerks of the confidential section) in his own office.

The Secretary, it may be noted, was given no power "to transfer" any of the employees, even though appointed by him, to any other institution

connected with education. The Director of Education had under item 1 (vi) of para 14 of the Education Code ""Full power to transfer"" an

Assistant Secretary of the Board and clerks of the "confidential department of the Intermediate board"s office". The Code does not appear ""to

invest the Director of Education with the power of transferring clerks other than those mentioned above. Therefore, we had to find out as to where

the power of transfer was vested.

16. There was no controversy in this case that the order of transfer was made by the Governor and conveyed to the appellant in accordance with

the procedure prescribed. Under Article 309 of the Constitution the Governor of a State was competent

to make rules regulating the recruitment, and the conditions of service of persons appointed to such service, and posts until provision in that behalf

is made by or under an Act of the appropriate Legislature"".

I referred earlier to the rules contained in the ""Education Code"": the apparent authority for these rules would be what was provided for in Article

309, the relevant portion of which I have quoted above. The rules, contained in the Education Code did not invest either the Secretary of the

Board or the Director of Education with the power of transferring clerks other than ""clerks of the confidential section of the Intermediate Board"s

office"". The act of transferring a servant from one place of employment to another was obviously an, exercise of ""executive power"". Article 154 of

the Constitution vests ""the executive power"" of the State in the Governor and such power could be exercised by him either directly or through

officers subordinate to him. The position, therefore, was that the appellant, who according to what I have already said, was an employee of the

State, and therefore whether there was any specific rule providing for his transfer or not, he could be transferred by and under the orders of the

Governor.

17. The appellant was removed by the order of the Governor dated the 4th of January, 1956, from ""service. This order of the removal by the

Governor was communicated to the appellant in due course under an endorsement dated the 25th of January, 1956. The reason why the appellant

was removed from service was that he refused to obey, in spite of several requests, an order of transfer. His refusal to obey the order was taken

as indiscipline and willful absence from ""duty. The order of removal, in my opinion, did not suffer from any of the infirmities on which such an order

could be set aside by this Court while exercising powers under Article 226 of the Constitution.

18. For the reasons indicated above, I, in agreement with my brother, would dismiss this appeal. I also agree with my brother that in the

circumstances of this case the parties should bear their own costs of this appeal.

Manchanda, J.

19. This is a special appeal against the order of a learned single Judge dismissing the petitioner's petitions under Article 226 of the Constitution,

and refusing to quash the order of Transfer dated 2-5-1961 by Sri I. R. Khan Director of Education U. P. from the post of permanent Assistant

Clerk in the office of the Secretary Board of High School and Intermediate Education (hereinafter referred to as the Board) as noted and drafter to

the, office of the District Inspector of School, Bahraich and the order of suspension by the Director of Education (hereinafter referred to as the

Director) dated 16-3-1954 and the order of removal with effect from the 16th March 1954 (the date of his suspension) by an order of the

Additional Director dated the 4th January, 1956.

20. The material facts giving rise to this appeal may be stated: According to paragraph 3 of the petition under Article 226 the appellant was

appointed on 8-4-1938 as a clerk in the temporary leave vacancy in the office of the Board by the Secretary of the aforesaid Board, in exercise of

the authority vested in him by paragraph 7 Chapter II of the Education, Code; that by the order of the Secretary of the Board dated the 5th April,

1943, the petitioner was appointed substantively as a Lower Division Assistant in the office of the Board with effect from the 1st April, 1943, in

the scale of 30-24-50. On the 2nd September, 1946, he was appointed by the, Secretary of the Board temporarily in the higher scale of Rs. 65-

3-80 with effect from the 1st of September, 1946. With effect from the 1st April, 1948, the appellant was promoted substantively to the post in

the scale of Rs. 80-6-110EB-10-140 by an order of the Deputy Secretary of the Board dated 14th September, 1948. This was the Substantive

post which the appellant continued to hold till the date of the order of the aforesaid transfer.

With effect from the 1st March, 1949, the appellant was appointed to a temporary post in the higher scale of Rs. 80-240. He received two

increments one in March, 1950 and the other in March, 1951. By an order dated the 2nd May 1951 (Annexure A) of Sri I. R. Khan, Director of

Education the appellant was transferred as noter and drafter to the Office of the District Inspector of Schools Bahraich. This transfer carried with it

only the appellant's substantive scale of pay as Assistant Clerk in the scale of Rs. 80 to 140/- A copy of the order referred to above was

forwarded to the Secretary of the Board requesting him to relieve the appellant from his post as a clerk in the Board's Office and to direct him to

take over charge of his new post. It was further provided therein that Sarva Sri. Swayambar Lal and Ghulam Haqqani Khan, on transfer, shall

continue to draw pay in the scale of Rs. 80-140 which will be personal to them, vide G. O. No. B655/XV-28(1)/1951. This G. O. is Annexure B

to the counter affidavit (at page 94 of the paper book).

The relevant portion of this annexure B reads as follows :-

With reference to your letter No. DDII 282/XXVII-16 dated January, Nil, 1951, I am directed to say that in the circumstances stated therein, the

Governor has been pleased to allow you as a special case to transfer Sarva Sri Swayambar Lal and Ghulam Haqqani Khan" permanent clerk, in

the scale of Rs. 80-6-110-EB-6-140 from the office of the Secretary to the Board of High School and Intermediate Education, Uttar Pradesh, to

any office of the Regional Deputy Director of Education or District Inspector of Schools in the State but outside Allahabad and to fill up vacancies

in the Board's office by transferring two clerks in the scale of Rs. 80-5-100-6-130 from any of the above offices. These clerks transferred from

the office of the Board of High School and Intermediate Education, U. P. to the office of some Regional Deputy Director of Education or District

Inspector of schools will continue to draw pay in their existing scale of pay of Rs. 80-140 which will be personal to them."" (Underlining (here in "

") mine).

21. It will thus be seen that there was an actual order of the Governor sanctioning the said transfer of the appellant from the Office of the Board to

Office of the District Inspector of Schools. The necessity for obtaining the Governor's order will be adverted to later after all the facts have been

set out. On the 3rd July, 1951, the appellant filed an appeal to the Secretary to Government Education Department through the Secretary of the

Board. The Secretary of the Board relieved the appellant of his duties as an Assistant Clerk in the Board on the 5th July, 1951. Various

applications for leave and representations to the Director of Education were made but no reply was received till the communication dated the 14th

December, 1953, from the Deputy Director of Education dated the 10th December, 1953, asking the appellant to submit his leave in the

prescribed form was received (Annexure P page 58). The appellant submitted his application for leave in the prescribed form on December 20,

1953. A reminder was issued by him dated the 15th March, 1954, but no order or reply was received.

On the 16th March, 1954, the appellant was served with a charge sheet. (Annexure Q page 59) by the Deputy Director requiring him to put in his

written statement within a fortnight. The main charge was that though he had been relieved from the Secretary's office he did not join, his new post

at Bahraich and thereby he disregarded the order of the Director of Education directing him to take over as an Assistant clerk in the Office of the

Inspector of Schools Bahraich, and the appellant furnished his explanation in April, 1954, (Annexure S page 61) denying the charges made against

him, challenging the order of transfer as being void and illegal.

22. By an office memo dated July 14, 1954, (Ex. U page 73) from the Additional Director of Education, the appellant was furnished with a report

of the Inquiring Officer which prima facie, showed the appellant to be guilty of disobedience of orders implying gross indiscipline and willful

absence from duty. A notice was, therefore, issued to show cause why he should not be removed from the service of the Government on the

charges already communicated to him. To this a reply was sent by the appellant on the 26th July, 1954. (Annexure B page 74). On the 27th of

September, 1954, the Additional Director of Education (Annexure W page 79) passed an order ""dismissing the appellant "from the service of

Uttar Pradesh Government with effect from March 16, 1954" the date of his suspension. Against the aforesaid order of dismissal of the 28th

October, 1954, the appellant filed an appeal to the Government. (Underlining there in single quotation marks--Ed.) is mine).

23. Thereafter, the Additional Director of Education substituted the order of dismissal dated 27-10-1954 by an order of removal on December 2,

1954, (Annexure C page 41) and asked the appellant to resubmit his appeal after such modifications as he might care to make. The appellant

thereafter re-submitted his appeal on the 14th December, 1954, without making any alterations, to the Government of Uttar Pradesh.

24. The appellant was thereafter informed on the 1st February, 1956, by means of a copy of G. O. dated January 4, 1956 endorsed to the

appellant by an endorsement dated January 25, 1956, by the Additional Director of Education, The relevant portion of the said G. O. which is

(Annexure D page 42) reads as follows:-

With reference to the correspondence ending with your letter dated October 11, 1955 on the subject noted above, I am directed to say that after

examining the case carefully, "the Governor has ordered that Sri Ghulam Haqqani Khan be removed from the service" of this State with effect from

March, 16, 1954, the date on which he was suspended by you"".

2. I am also to say that the Governor has further ordered that the appeal of Sri Haqqani Khan dated October 28, 1954, supplemented by his

further appeal dated December 14, 1954, be rejected. Sri Ghulam Haqqani Khan should be informed accordingly."" (underlining (Here in single

quotation marks--Ed.) mine).

25. Being aggrieved by the orders of the Governor of transfer, Suspension and removal from the post of the Assistant Clerk the appellant filed the

writ petition under Article 226 of the Constitution on October 26, 1956, praying for the issue of a writ of certiorari to quash the aforesaid orders

and for a mandamus to the Government to reinstate him in the temporary post which was within a higher scale than the substantive post in the office

of the Board.

26. On a reading of the writ petition it appears that the appellant claimed his appointment in the Board's office made on April 8, 1938, to have

been made

by the Secretary of the aforesaid Board in exercise of the authority vested in him under para 7 Chapter II of the Education Code.

It was alleged that the effect of the order of transfer was to reduce the rank of the petitioner; that the petitioner was never given any opportunity to

show cause against such reduction and as such the order of transfer was in violation of Article 311 of the Constitution. In para 15 it was alleged

that the order of transfer was ultra vires inasmuch as the services of the ministerial staff of the office of the Board were non-transferable. A G. O.

dated April 13, 1951, Annexure K (page 50) was appended wherein it was observed:

Particularly as the office of the Board of High School and Intermediate Education is separate from that of Director of Education and appointment

to higher clerical posts in any one of those offices are to be confined to the clerks of that office only.

In paragraph 34, it was stated that on the appellants protesting to the Additional Director of Education that the latter had no power to determine

his appeal the papers were forwarded to the Governor of U. p. by the Additional Director. In paragraph 38 it was stated that there had been no

delay in the filing of the writ petition as the final orders of the Government were received on the 1st of February, 1956, and on the 5th of February,

1956, he had consulted his counsel who wanted time to examine the legal aspects of the case. This advice was given in the third week of March

1956, and the petition was filed on the 26th of April 1956.

27. The findings of the learned Judge who dismissed the writ petition are-

(1) That the reliefs in respect of the transfer order dated May 2, 1951 and suspension order dated March 16, 1954, could not be granted to the

appellant because of laches as the petition had not been filed till the 26th April, 1956.

(2) That the only ground that survived was that of wrongful removal from service: that the tenure of service of the appellant was at the pleasure of

the Governor and in view of the Division Bench rulings of our court in the case of Jagannath Prasad Vs. State of U.P. and Others, and Raj Kishore

Vs. State of Uttar Pradesh and Another, , the removal order by the Governor could only be challenged on one or the other grounds contained in

Article 310 or 311 of the Constitution and inasmuch as the orders of the Governor were not challenged on any such ground contained in Article

310 or 311, but on the ground that the transfer order itself was illegal and void the order of the Governor removing the appellant was unassailable.

(3) That it was unnecessary to investigate whether the order passed by the Additional Director of Education was illegal Or not because even if that

order is set aside the order of the Governor would still stand.

(4) That the order of transfer was valid, but even assuming that it was invalid the appellant was bound to have obeyed it.

28. The grounds of appeal taken against the aforesaid order of the learned single Judge were: that the transfer order dated the 2nd of May, 1951,

amounted to a reduction in rank and it had imposed humiliating conditions without an opportunity being afforded to the appellant and in violation of

the provisions of Article 311 of the Constitution and there had been a clear breach of the provisions contained in para 7, Clause (3) of the U. P.

Education, Code which has the effect of a Rule regulating the conditions of service made by an Act of the appropriate legislature under Article 309

of the Constitution. The Director of Education, U. P. had no power under the said rule to transfer or to suspend or dismiss or remove the petitioner

from service in the office of the Board which is a separate statutory body established by the Act of 1921 and whose administrative officer is the

Secretary of the Board.

The rule in the said paragraph of the Education Code continues to be in force under Article 313 of the Constitution; that there is no delay or laches

in the filing of the petition; that the order of the Governor was not an independent order but only an order dismissing the appellant's petition of

appeal; that even if the removal was by the Governor at his pleasure there had been an obvious infringement of the provisions of Articles 310 and

311 of the Constitution, as by implication even under Articles 310 and 311 of the Constitution an opportunity must be given by the Governor to the

appellant to defend himself.

29. From a reading of the petition and grounds of appeal it is clear that the appellant does not dispute that he is a civil servant under the State to

whom Articles 310 and 311 of the Constitution apply and also that the U. P. Education Code was applicable but under para 7, Clause (3) thereof

the only authority which could have transferred, suspended or removed: him from service was the Secretary of the Board to whom the powers had

been delegated under the said section by the Director who is appointed the head of the department u/s 4 of the said Code.

30. If the order of suspension, removal, etc., had been made by the Secretary of the Board the appellant could have had no grievance. The

transfer order from the Board to the office of the Inspector of Schools Bahraich by the Additional Director of Education and the suspension order

dated 16th March, 1954 by the Director of Education and the order of removal dated the 4th January, vide order of the Government contained in

the memorandum dated the 4th January, 1956, are however objected to.

31. Mr. Gopi Nath Kunzru, the learned counsel for the appellant has raised two main contentions-

32. Firstly that the Board was a statutory authority created under the Intermediate Education Act 1921 (Act II of 1921) (Hereinafter called the

Act) and it is not and could not be a department of the Government and as such the appellant was not a civil servant who could be said to hold

office at the pleasure of the Governor within the meaning of Article 310 of the Constitution. The Act was a self-contained Act and as such a

reference to the Education Code could not be made but even if a reference could be made the only authority that could transfer suspend or remove

the appellant from the office of the Assistant Clerk in the office of the Board was the Secretary who was the only authority who had been

delegated those powers and therefore the orders passed by any other authority were invalid and unenforceable. Reliance was placed On the

unreported decision in State of U. P. v. Sangam Lal in Special Appeal No. 306 of 1956 decided by Mootham, C. J., and Srivastava, J., on the

23-12-1960 (All). Reference was also made to the provisions of Section 7 (Sub-clause 12) Section 9, Section 11, Section 12 and Section 16 of

Act II of 1921 in order to show that the powers of the provincial Government and the powers of the Board to make regulations were specified

and therefore it was not possible to travel beyond the ambit of the provisions contained therein.

33. Secondly, it was contended that there was no laches in the filing of the writ petition.

33a. The real questions which arise for consideration are-

(1) Whether the Board is a statutory authority, and if so, whether it is possible to create a statutory body as a department of Government?

(2) If the Legislature under Act II of 1921; has fixed the ambit and scope of the powers to be exercised by such statutory body can any one else

interfere therewith or enlarge their scope?

34. On the part of the first question posed there cannot be the slightest doubt that the Board was constituted under an Act of the State Legislature

and that as such it is a statutory body. This Act received the assent of the Governor on, the 30th September, 1921. It was however not declared

to be a body corporate with a seal of its own and with the right of perpetual succession. It is not without significance that the same Legislature

when enacting the Allahabad University Act (received assent of the Governor on the 3rd December, 1921), by virtue of Section 3 the University

was declared (sic) as a body corporate with perpetual succession. Municipalities are as a rule given the status of a body corporate. The District

Board Act also confers the status of a body corporate on the District Board. So does Section 4 of the U. P. Antarim Zila Parishad Act of 1958.

From the absence of such status given to the Board under the Act it does not necessarily follow that the Legislature intended to create the Board

as one of its departments of government. A careful study of the scheme of the Act, however, leads to the only reasonable conclusion that the

Legislature intended the Board to be independent only in certain respects subject to the overriding fiscal and general administrative control of the

Government. The correct status and position of the Board is probably as set out in the G. O. dated the 13th April 1951, by the Secretary to

Government Annexure K (page 50) where it is observed that the office of the Board of High School is separate from that of the Director of

Education and the appointments to higher clerical posts in any one of those offices are to be confined to the clerics of that office only. This only

means that for certain purposes the Board is treated as separate from the Education Department and that normally higher clerical posts are not

interchangeable. The appellant was certainly not in a higher clerical post. His substantive appointment was only that of an assistant clerk. The office

of the Board may be separate from the Education Department but that would not necessarily prevent it from being a department of the

Government.

35. The object of the Act as set out in the preamble is to establish a Board to take the place in regulating and supervising the system of High

School and Intermediate Education and to prescribe courses therefore u/s 3 the Director of the Education was to be the Ex-Office Chairman. The

other Members of the Board are also specified thereunder. Section 7 enumerates and specifies the powers of the Board which are (1) to prescribe

courses of instructions (2) to grant diplomas or certificates (3) to conduct examination, (4) to recognise institutions (5) to admit candidates (6) to

admit and receive such fees as may be prescribed in the Regulations, (7) to publish the results of examination (8) to submit to the provincial

Government its views on any matter with which it is concerned. Sub-clause (12) is the residuary clause which empowers the Board to do such

other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising the High

School and Intermediate Education. This residuary clause must, on the principle of ejusdem generis be confined to the powers of the Board which

are analogous to those given in the eleven clauses which precede it. It cannot, as claimed by learned counsel for the appellant, be interpreted to

enlarge the powers of the Board to the extent of giving it the power to appoint, suspend, transfer and dismiss its employees, as admittedly no such

Regulations have been framed by the Board.

Of course, it can well be argued, on the basis of the observations of their Lordships of the Supreme Court in the case of Matajog Dobey Vs. H.C.

Bhari, that if the Board is required to perform certain duties specified u/s 7 of the Act it can only do so by employing the necessary staff, and if

there is nothing in the Act which permits it to employ such staff nor is there any prohibition in regard to the matter contained in that Act, then the

original power on which certain duties are cast on the Board must be presumed to clothe the Board with the necessary powers. It would be

possible to place such an interpretation on. Section 7 (12) provided the Legislature intended to make the Act a self-contained one. The specific

provisions made in Chapter II of the Education Code of the Uttar Pradesh in which Sections 4, and 7(3) fall, the latter being the one on which the

appellant himself relied on, shows that the Government intended to treat the Board as one of its departments though independent in respect of the

powers specifically given to it. u/s 7(3) of the Code, the powers to appoint, promote, punish (including removal and dismissal) and grant leave

admissible under the Rules were specifically delegated to the Secretary of the Board. No such provision could have been made in the Code, if

Government was not treating the Board as one of its departments. u/s 4 of the Code the Director of Education was specifically nominated as the

Head of the Department.

Section 9 of the Act on which great reliance is placed by learned counsel for the appellant does not show that the Provincial Government had

completely abdicated its powers in favour of the Board. It only shows that the Board was completely independent in respect of the powers

enumerated to Section 7 of the Act. Even on those specific powers the Government had reserved a right to itself to address the Board with

reference to any of the work conducted or done by the Board and to communicate to the Board its views on any matter with which the Board is

concerned. Under Sub-clause (2) of Section 9 an obligation is also cast on the Board not to ignore the communication, of the Government on the

plea that it is an independent body in regard to the powers so conferred on it and the Board is obligated to report to the Provincial Government

such action, if any, as it proposes to take on the Government communication. Sub-clause (3) enables the Government, in ""the event of the Board

not furnishing a reply, to issue such directions consistent with the Act as it may think fit and the Board shall comply with such directions. In an

emergency, under Clause (4) the Government may even act without previous consultation with the Board.

36. There, is, as far as I can, see, no inherent impossibility in a statutory authority being at the same time a department of Government unless the

Act itself, which creates the authority, gives it a separate legal status i.e. provides it with the right of perpetual succession, a common seal and the

right to sue and be sued in its own name. Such a body as the Board, cannot have a separate legal existence for all purposes. It must, necessarily, in

the matter of administration and fiscal control, be under the authority of some one else. The Legislature, which passed the Allahabad University Act

III of 1921 in the same year, gave it the status of a body Corporate by Section 6 of that Act, but in respect of Act II of 1921 under which the

Board was constituted the status of a body Corporate was denied to it, or at least not specifically given. This clearly indicates that the Legislature

intended the Board to be independent only in certain respects in the matter of the powers given to the Board u/s 7 of the Act, and not for all

purposes.

It is true that the Act itself nowhere says that it shall be a department of Government but when the historical background is taken into consideration

the appointments of the staff from the very inception of the Board were made by the Government, salaries to the ministerial staff were paid by the

Government; the appointments, transfers, suspension and removal were always by the Government--the budget provisions for the Board were

made by the State Government--shows that the Board was always treated as a department of Government for all purposes other than those

powers which the Act itself had specifically conferred and made the Board autonomous to that extent.

37. That apart, the appellant himself had no doubt either at the time when he filed his appeal to the Governor against his suspension and removal or

at the time when he filed the writ petition under Article 226 of the Constitution or even at the time when the case was argued before the learned

single Judge that he was a civil servant in the service of the State and that in any event he held a civil post in the State- He relied, as already noticed

herein, above specifically on Article 311 of the Constitution which he could not have done if he was not a Civil servant within, the meaning of

Article 310 of the Constitution. He also specifically relied on para 7 (3) of the U. P. Education Code, which according to him, was a Code validly

enacted by the appropriate Legislature under Article 309 of the Constitution. It is, therefore, a little late in the day for Mr. Gopi Nath Kunzru to

raise the contention that the appellant was not a civil servant but was in the service of a Corporate authority and therefore not liable to dismissal or

removal by any one but by the Secretary of the Board.

38. The question as to whether the appellant was a civil servant at all not having been made one of the grounds upon which the relief was asked for

in the petition as it was a, question of fact, in our opinion it cannot be allowed to be agitated now. Even assuming that the point could be agitated

the answer would have to be given against the appellant as on his own admissions in the petition he had held himself and considered himself to be a

servant of the State.

39. In the Full Bench decision reported in Mohammad Ahmad Kidwai Vs. Chairman, Improvement Trust, Lucknow, , where one of us was a

member, tests were laid down for determining as to who was a member of a civil service or held a civil post under the Union or the State. It was

there laid down that the question had primarily to be determined in relation to the functions which were performed, if the duties relate to activities

which fall directly within the sphere of the Union or the State and the services were under the direction and control, as also the appointment was by

either the Union or the State then such a person would fall within the services contemplated either by Section 240 of the Government of India Act

or by Section 311 of the Constitution, but if the sphere of activities of the employee fell within the, sphere of activity of a local authority constituted

under some statute having a separate legal existence then the position of that employee even though the State or the Union controlled some of his

activities and gave him directions in the discharge of his functions fell outside the scope of either Section 240 of the Government of India Act or

Article 311 of the Constitution. In that case the U. P. Town Improvement Act had given the Improvement Trust an independent legal status by

giving it perpetual succession and a seal of its own. On the facts of that case and applying the tests aforesaid it was held that an employee of the

Trust was not in the service of the State or holding a civil post under the, State. In the instant case as already observed no independent legal status

had been given to the Board.

40. In the case of Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others, it was held that the office of village Munsif

appointed under the. Madras Hereditary Village Offices Act 1895 was an office under the State within the meaning of that term in Article 16(1)

and (2) of the Constitution of India.

41. In AIR 1937 31 (Privy Council) affirmed that under the Government of India Act 1935 servants of the Crown hold their offices during the

pleasure of the Crown, not by virtue of any special prerogative of the Crown but because such are the terms of their engagement as is well

understood throughout the public service.

42. In the case of Pirthwinath Chowdhry Vs. State of Uttar Pradesh, a Division Bench of this Court held that an Assistant Advocate General was a

State servant holding a civil post within the meaning of Article 311 of the Constitution, although the advocate was free to pursue his practice and

was not a servant of the State as such.

43. Once it is conceded, as it has been in the petition in this case, that Article 310 of the Constitution and para 7 (3) of the Education Code apply

then the only question which can arise is whether the transfer and removal was made by an authority which was subordinate to the appointing

authority.

44. In substance and reality the main grievance of the appellant only was that his transfer to the Office of the District Inspector of Schools,

Behraich amounted to a reduction in rank. Rule 15 of the Fundamental Rules makes it clear that a Government servant shall not be transferable

substantively to a post carrying less pay than the pay of the permanent post on which he holds as lien. As against the temporary scale of pay of Rs.

80-240, which he was drawing in an officiating capacity in the office of the Board he was on transfer to be reduced to his substantive scale of Rs.

80-140. It is manifest that the transfer as such did not involve any reduction in rank as no one can claim to have a lien or right to an officiating

temporary post. The appellant's right was only to his substantive scale of pay and that by the order of transfer was in no way affected. The main

grievance of the appellant, therefore was without any substance at all.

45. As regards the other question as to whether the transfer and suspension was by an authority subordinate to the appointing authority does not

really arise in this case. It has been amply established on the record that the Governor had specifically sanctioned the transfer by annexure B (at

page 94) as well as the removal of the appellant from the service of the State with effect from the 16th March 1953 vide Annexure D (at page

42). All civil servants of a State hold office at the pleasure of the Governor. As the aforesaid orders were passed by him, it is idle for the appellant

to contend, that the transfer or suspension could only have been made by the Secretary of the Board and by no one else.

In this respect the sheet anchor of Mr. Gopi Nath Kunzru's argument was the aforesaid judgment in Sangam Lal's case Spl. Appeal No. 308 of

1956, D/- 23-12-1960 (All). This, however, can be of little or no assistance to him in the instant case. It is true, that in that case also it was a clerk

in the Board who was officiating in the scale of Rs. 80/- to Rs. 240/- who was transferred by the Director of Education as a clerk in the

Government Intermediate College, Allahabad in the substantive scale of 85-130 and he had contended that the transfer by the Director of

Education was invalid as it amounted to a reduction in rank. The learned single Judge Mehrotra, J. had accepted these contentions holding that the

Director of Education; had no power to transfer a clerk from the Board to any other office. On appeal the learned Chief Justice who delivered the

judgment of the Division Bench, when considering rule 15 of the Fundamental Rules, as in force in 1955, found that a local Government had the

right to transfer a Government servant from one post to another provided that power had been delegated to any of its officers, in that case,

however, he found that the Director of Education had not been delegated any powers by the Government to transfer clerks from the office of the

Board, and admittedly there was no provision in the Board for the engagement of an office staff. It was also conceded that the clerks in the

Board's office (other than head clerks) are appointed by the Secretary of the Board and their terms and conditions of service are admittedly the

same as those of clerks directly appointed in the Education Department; that their salaries are not paid By the Board but out of the funds of the

department and that the clerks of the Board are under the Director of Education as the Head of the Department of Education.

Notwithstanding all this, the learned Chief Justice held that as the Governor had not, under the provisions of Rule 6 of the U. P. Fundamental

Rules, delegated his powers to the Director of Education to employ or remove clerks and the Director of Education was not an authority

mentioned in para 7 (3) of the Education Code, the order of transfer of a clerk from the Board's office by the Director was without authority.

46. In the instant case, as already stated, the orders transferring and removing the appellant from service were passed by the Governor himself and

as such the ruling in Sangam Lal case can be of no avail to the appellant. It is incontrovertible that all executive power vests and flows from the

Governor and if the transfer and removal is by him then, such orders are no longer open to challenge.

47. In the circumstances I see no good and sufficient reason to differ from the view taken by the learned single Judge in this refusal to issue the

writs of certiorari or mandamus prayed for by the appellant.

48. In this view of the matter it is unnecessary to consider the question, of laches in the filing of the petition which had been raised by the opposite

party and was acceded to by the learned single Judge. If it were necessary to give a decision thereon I would be inclined to hold that in the instant

case there was no such delay in the filing of the petition as would merit its dismissal on the ground of laches. From the facts set out hereinabove it is

manifest that after the final orders removing the appellant from service were communicated, to him he had acted with promptitude and due

diligence in filing the writ petition.

49. For the reasons aforesaid the appeal is dismissed. In the circumstances of the case I would direct that the parties bear their own costs.

50. BY THE COURT: For the reasons given in our respective judgments this appeal must fail and it is hereby dismissed. The parties would bear

their own costs of the appeal.