

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No.663 of 2016**

Pramod Shukla S/o Hetram Shukla, Aged About 58 Years R/o Village
Saliyapara, Police Station, Post & Tahsil Pali, Civil And Revenue District
Korba Chhattisgarh

---- Petitioner**Versus**

1. State Of Chhattisgarh Through Secretary, Department Of Urban
Administration And Development, Mahanadi Bhawan Mantralaya, Capital
Complex, Naya Raipur, District Raipur Chhattisgarh
2. Joint Secretary, Department Of Urban Administration And Development
Mahanadi Bhawan, Mantralaya, Capital Complex, Naya Raipur, District
Raipur Chhattisgarh
3. Director, Urban Administration And Development, Raipur District Raipur
Chhattisgarh
4. Collector, Raigarh, District Raigarh Chhattisgarh
5. Deputy Collector, Raigarh, District Raigarh Chhattisgarh

---- Respondent

For Petitioner: Shri Manoj Paranjpe with Shri Sudeep Agrawal, Advocates
For Respondent/State: Shri Ramakant Mishra, Dy.AG

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****07/04/2016**

Heard.

2. A short issue arising for consideration in this petition as to whether the
impugned order constitutes deputation and secondly whether it could be done
without the consent of the petitioner.

3. Quintessential facts, necessary for determination of controversy involved
in the petition, are that the petitioner is an officer borne in the cadre of Chief

Municipal Officer (Executive) constituted under Section 86 of the Chhattisgarh Municipality Act, 1961 (In short “the Act of 1961”). The terms and conditions of appointment, recruitment and other details of State Municipal Services (Executive) are governed by the provisions contained in Chhattisgarh Municipal Services (Executive) Rules, 1973. The petitioner substantively belongs to the cadre of State Municipal Services (Executive) and there is no quarrel on this factual aspect between the parties.

4. While continuing as Chief Municipal Officer at Municipality, Mahasamund, the petitioner was sent on deputation to the post of Commissioner, Municipal Corporation, Raigarh, vide order dated 14-07-2011, passed by the State Government. It is not in dispute that the petitioner was sent on deputation with his consent.

However, the aforesaid order was sought to be amended by the State Government vide another order dated 19-08-2014 which was challenged by the petitioner by filing Writ Petition No.4360/2014. In that petition, notices were issued and interim protection was granted in favour of the petitioner on 25-08-2014. In course of time, the State expressed that it was no longer willing to execute the order dated 19-08-2014, the petition was disposed off vide order dated 18-09-2015.

5. However, another order was passed by the State Government on 15-10-2015, by which, the petitioner was again transferred to the Municipal Council, Kirandul. This order was again challenged by the petitioner by filing W.P.(S)No.3867/2015. The effect and operation of order dated 15-10-2015 was stayed by this Court vide order dated 30-10-2015. Later on, order dated 15-10-2015 was cancelled by the State Government vide order dated 30-12-2015. This eventuality led to final disposal of the second writ petition also.

6. The State appearing to be determined to change the posting of the petitioner from Raigarh to elsewhere, issued the impugned order dated 12-02-2016, sending the petitioner on deputation to the post of Joint Director, Urban Administration and Development in the Directorate, Urban Administration at Raipur. Aggrieved by this order also, the petitioner has filed this petition.

7. The sole and pointed submission of learned counsel for the petitioner is that the present exercise of sending the petitioner on deputation to another different assignment as Joint Director, Urban Administration and Development in the Directorate, Urban Administration at Raipur, also amounts to deputation in the eye of law, therefore, it could not be done without obtaining consent of the petitioner. Learned counsel for the petitioner places reliance on the decision of this Court in the case of **S. S. Kanwar v. State of Chhattisgarh and others, 2011 (2) CGLRW 58.**

8. On the other hand, learned State counsel submits that even though, the word “deputation” has been used in the impugned order, but it is not a deputation in the eye of law in as much as the department of the petitioner i.e. Urban Administration and Development has not changed. Learned State counsel argued that the employer of the petitioner continues to remain the same i.e. the State Government. The department of Urban Administration and Development is the Controlling Department of the Cadre of Chief Municipal Officer Grade-A as also of the post of Joint Director, Urban Administration. Therefore, no consent would be necessary in view of the provision contained in Rule 110 of the Fundamental Rules. Learned State counsel further submits that the shifting of the petitioner from one place to another has become absolutely necessary on administrative exigency. Looking to the past experience and seniority enjoyed by the petitioner, he has been posted as Joint Director, which is a post of higher responsibility as compared to that of Commissioner,

Municipal Corporation. He submits that this is a matter of administrative exigency, due to which, the petitioner was to be shifted from one place to another on deputation. It is lastly submitted that the order does not result in any loss of pay, perks or any facilities, which the petitioner was enjoying in his own substantive cadre of Chief Municipal Officer in the State Municipal Services(Executive Grade), therefore, the petition is liable to be dismissed.

9. There is no dispute that the petitioner is borne in the cadre of State Municipal Officer (Executive) constituted under Section 86 of the Chhattisgarh Municipalities Act, 1961. The relevant provision is set out hereinbelow:-

“Section 86 - Constitution of State Municipal Service:---(1) The State Government may, for the purpose of providing officers to the Council under Section 87 or 88, constitute in the prescribed manner, the following Municipal Services for the State to be called--

- (a) State Municipal Service (Executive);
- (b) State Municipal Service (Health); and
- (c) State Municipal Service (Engineering).

[Substituted by M.P. Act No. 32 of 1967.] [(2) The State Government may make rules in respect of recruitment, qualification, appointment, promotion, leave, scale of pay, all allowances by whatever name called, loans, pension, gratuity, annuity, compassionate fund, provident fund, dismissal, removal, conduct, departmental punishment, appeals and other service conditions of the members of the State Municipal Service.

(3) The salary, allowances, gratuity, annuity, pension and other payments required to be made to the members of the State Municipal Service in accordance with the conditions of their service shall be a charge on the Municipal Fund:

Provided that in the event of transfer of a member of the State Municipal Service from one Council to another, the Councils concerned shall be liable to contribute towards the aforesaid payments in such proportion as the State Government may, by rules, prescribe.

(4) The State Government may transfer any member of the State Municipal Service from one Council to another Council.]

(5) If, at a special meeting convened for the purpose, the Council passes a resolution by a majority of more than [Substituted by C.G. Act No. 17 of 2012, w.e.f. 9-8-2012 for the words "one-half".] [two-third] of the [Substituted by M.P. Act No. 12 of 1995.] [elected Councillors] constituting the Council for the time being requiring the transfer of a member of the State Municipal Service, the State Government may transfer such member.”

10. The aforesaid provision provides for constitution of various services for

local body i.e. municipality constituted under the Act of 1961 and one of the cadre is that of the Municipal Services (Executive).

The averments made in the petition that the petitioner was substantively appointed as Chief Municipal Officer in State Municipal Services, is replied by the State Government in their return, in the manner, that the petitioner is working and posted as Adhoc Chief Municipal Officer, Grade-A.

It is thus clear that the petitioner belongs to State Municipal Services (Executive). It is not the case of the State Government that the petitioner was originally appointed in any other cadre and has been temporarily sent to State Municipal Services (Executive Cadre). In service jurisprudence, the deputation is different and distinct from transfer. While transfer is an incident of service where a person can be shifted from one place to another post in the same cadre of services, to which, he is substantively appointed, change being only the place of posting, deputation involves a *tri parte* agreement involving the lending department, borrowing department and the employer itself.

11. The concept of deputation was considered by this Court in the case of **S. S. Kanwar** (supra), referring to authoritative pronouncement of the Supreme Court in the case of **Umapati Choudhary vs. State of Bihar and another, (1999) 4 SCC 659, State of Punjab and others vs. Inder Singh and others, (1997) 8 SCC 372 and Prasar Bharti and others vs. Amarjeet Singh and others, (2007) 9 SCC 539**, as below:-

12. In the case of **State of Punjab and others v. Inder Singh and others, (1997) 8 SCC 372**, the Supreme Court has dealt with the concept of deputation and it has been held as under:

“18. The concept of “deputation” is well understood in service law and has a recognized meaning. “Deputation” has a different connotation in service law and the dictionary meaning of the word

“deputation” is of no help. In simple words “deputation” means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be.

13. In the case of ***Umapati Choudhary vs. State of Bihar and another, (1999) 4 SCC 659***, the Supreme Court explained the meaning of the word “deputation” in following words:-

“8. Deputation can be aptly described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organization (commonly referred to as the parent department or lending authority) to another department or cadre or organization (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interest to meet the exigencies of public service. The concept of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer. It also involves the consent of the employee to go on deputation or not.”.....

14. It is thus seen that where a person is sent outside his cadre to which he substantively belongs, to another post which is outside his cadre, it would amount to deputation. It has been clearly held by the Supreme Court in the aforesaid decisions that the deputation involves consent of the borrowing and lending department, as also the employee who is sought to be sent on deputation. The distinction between transfer and deputation was explained by the Supreme Court in the case of *Prasar Bharti* (supra) in following words:-

“13 There exists a distinction between “transfer” and “deputation”. “Deputation” connotes service outside the cadre or outside the parent department in which an employee is serving. “Transfer”, however, is limited to equivalent post in the same cadre and in the

same department. Whereas deputation would be a temporary phenomenon, transfer being antithesis must exhibit the opposite indications.”

12. The submission of learned State counsel that by application of Rule 110 of the Fundamental Rules, the State Government is competent to transfer the petitioner by way of deputation from the post of Commissioner, Municipal Corporation, Raigarh to the post of Assistant Joint Director, Urban Administration, Directorate of Urban Administration and Development, has to be repelled in view of what has been held by this Court in the aforesaid decision, as below:-

15. The submission of learned counsel for the respondents that as the Sangh is wholly owned and controlled by the Government, the consent of the petitioner would not be necessary in view of the provision contained in proviso to F.R.110(a), requires consideration. The said provision is reproduced as under:-

“F.R.110. Authorities competent to transfer a Government Servant to foreign service:(a) No Government servant may be transferred to foreign service as against his will:

Provided that this sub-rule shall not apply to the transfer of a Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government.

[Proviso added by F.D. Notification No.1503-R-149-IV-R-I, dated 18-06-1960.]

16. A perusal of the aforesaid provision shows that the proviso has been added by Finance Department Notification No.1503-R-149-IV-R-I, dated 18-06-1960.

Fundamental Rules having been made in exercise of statutory powers under Section 96 B of the Government of India Act, 1919 has statutory force. Article 313 of the Constitution of India being relevant in order to deal with the status of Fundamental Rules as above is reproduced as below:---

“313. Transitional provision.--- Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

Under the Constitution, the Union and the State legislature have

power to make laws to regulate respective services under the Union and the State Government. What Article 313 provides is that until such laws are made, the existing law relating to service shall continue to be in force, provided they are not inconsistent with the provisions of the Constitution. The words “until other provision is made” refer either to an Act or the Rules framed by the Governor in exercise of power conferred under proviso to Article 309 of the Constitution of India. Therefore, in view of provision contained in Article 313 of the Constitution of India, “laws in force” includes the Rules framed under statutory powers, including Rules framed under Section 96 (B) of the Government of India Act, 1919 continuing to remain in force by virtue of Section 276 of the Government of India Act, 1935. The aforesaid conclusion are drawn by this Court relying upon the decision in the case of *Shyamlal v. State of Uttar Pradesh and another*, AIR 1954 SC 369, *Pradyat Kumar Bose v. The Hon'ble Chief Justice of Calcutta High Court*, AIR 1956 SC 285 and also decision of the High Court of Orissa in the case of *Baishnab Patnaik and others v, The State*, AIR 1952 Orissa 60.

17. However, reading of the aforesaid provision of F.R.110(a) shows that the proviso to clause (a) has been added by Finance Department Notification No.1503-R-149-IV-R-I, dated 18-06-1960. Thus, the addition of proviso is neither by a legislative enactment nor in exercise of power conferred under proviso to Article 309 of the Constitution of India by the Governor. In the absence of any other material placed before this Court by respondents, that the inclusion of provision was in exercise of powers under statutory enactment or Constitution, the proviso seems to have been added in purported exercise of executive powers under Article 162 of the Constitution of India. Therefore, what transpires from the examination of aforesaid legal and factual position is that though clause (a) of F.R.110 has statutory force, the proviso added by way of executive instructions by Finance Department Notification dated 18-06-1960 is merely executive in nature and does not have the force of law.

18. There is no material placed on record by the respondents to demonstrate that there exists any provision under any legislative enactment of the State or in the statutory rules framed by the Governor in exercise of powers conferred under proviso to Article 309 of the Constitution of India to come to the conclusion that no consent of the Government servant would be necessary in case of deputation to foreign service.

Though the executive power of a State is co-extensive with the legislative power of the State to make laws, such powers could be exercised only for filling the gaps where the rules are silent, but not contrary to the provision of any law for the time being in force including statutory rules. The proviso is in direct conflict with and wholly inconsistent with the provision contained in clause (a) of F.R.110. It is clearly contrary to the provision that no Government servant can be transferred to foreign service against his will.

19. Until a contrary provision is made by any legislative enactment or under proviso to Article 309 of the Constitution of India or Fundamental Rules itself are amended in exercise of such power, the provision contained in clause(a) of F.R. 110 continue to remain in force and are not limited or restricted by the proviso which is merely an executive

instruction.”

13. The submission of learned State counsel that as the department has not changed and the State continues to be the appointing authority, should it amount to deputation, cannot be accepted, because mere change of cadre, even though, the employer has not changed, amounts to deputation. Once it is held to be a case of deputation, in the absence of there being any contrary provision contained in the statutory service rules governing terms and conditions of employer or contract of service, the employee cannot be sent on deputation without his consent.

14. As an upshot of above discussion, I have no hesitation to hold that the impugned order which seeks to send the petitioner on deputation from one post to another post outside the cadre of the petitioner, could not be passed without the petitioner's consent. Resultantly, the impugned order is to be held illegal and without the authority of law. The impugned order is accordingly set aside.

15. Accordingly, the petition is allowed.

Sd/-
Manindra Mohan Shrivastava
Judge