

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No.5494 of 2016**

- R. P. Sahu S/o Late Shri R.K. Sahu, Aged About 61 Years R/o Deputy Conservator Of Forest South Koriya Forest Division, District Koriya Chhattisgarh

---- Petitioner**Versus**

- State Of Chhattisgarh Thorough The Secretary, Forest Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, Distirct Raipur Chhattisgarh

---- Respondent

For Petitioner	:	Shri Anup Majumdar, Advocate
For Respondent/State	:	Shri D. R. Minz, Dy.GA

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****16/02/2017**

Heard.

2. The petitioner has challenged the legality and validity of order dated 27-09-2016, by which, the petitioner has been transferred as Deputy Managing Director of District Union of Chhattisgarh State Minor Forest Produce Federation.

3. The petitioner has assailed correctness and validity of the impugned order firstly on the ground that the petitioner has been sent to Federation, which is outside his cadre, therefore, it amounts to deputation and as there is no consent of the petitioner, impugned order is illegal. Other two grounds raised by learned counsel for the petitioner are that he substantively holds the post of Deputy Conservator of Forest and he has been posted against the post, which is lower in rank, on the post of Deputy Managing Director, which is equivalent to

Assistant Conservator of Forest, which is lower in rank to the post of Deputy Conservator of Forest. The third ground of challenge is that the petitioner is going to retire within a period of less than one year, therefore, in view of the government's policy dated 11-06-2016, the petitioner ought to be considered for posting either in his home district or at his option, subject to administrative exigency. Reliance has been placed on a decision of this Court in the case of **S. S. Kanwar vs. State of Chhattisgarh and others**¹ and order dated 07-04-2016 passed by this Court in the case of **Pramod Shukla vs. State of CG and others** in W.P.(S)No.663 of 2016.

4. On the other hand, learned State counsel opposed the prayer on the submission that the petitioner is a government servant and he is being transferred to Federation, which is a body controlled by the Forest Department and therefore, even if the petitioner is transferred from his cadre i.e. Deputy Conservator of Forest to work under the Federation, the Controlling authority would not be changed and thus, it is not a case of deputation within the meaning of F.R.110 of Fundamental Rules, therefore, it cannot be said to be foreign service. It is also submitted that the petitioner is being transferred only within the district as per co-ordination procedure, therefore, in any case, transfer order does not prejudice the petitioner as he is not being sent to a distant place at the fag end of his retirement. It is further submitted that in the event of transfer of a government servant, who is going to retire within a period of one year, would be either posted in the home district or at his option to any other place of his choice, would not be applicable, because it is a case of transfer within the district and not outside the district. Learned State counsel further added that the Chhattisgarh State Minor Forest Produce Federation is an instrumentality of the Forest Department and the Divisional Forest Officer of the

1 2011 (2) CGLRW 58

Division works as Ex-officio Managing Director of the Chhattisgarh State Minor Forest Produce Federation.

5. After hearing learned counsel for the parties, I am of the opinion that the petition deserves to be allowed on the ground that the transfer order is illegal.

6. There is no dispute that the petitioner substantively holds the post of Deputy Conservator of Forest in the Forest Department. This constitutes a cadre of Officer under the services of Forest Department. The petitioner, by the impugned order, is being sent outside the cadre to work under the Federation in the capacity as Deputy Managing Director. None of the parties have pleaded regarding legal status of the Federation but all that has been stated that it is a body engaged in carrying out certain activities under the control of the Forest Department.

7. Be that as it may, the Federation certainly is not a part and parcel of department of Forest but the government has created an agency for carrying out specified activity in connection with forest and forest produce. Nevertheless, transfer of the petitioner outside his cadre would certainly amount to deputation, in view of what has been held by this Court in the case of **S. S. Kanwar** (supra).

8. The service jurisprudential concept of the deputation, as judicially evolved by the authoritative pronouncement of the Supreme Court in a catena of decisions was taken into consideration by this Court in the case of **S. S. Kanwar** (supra) and it was explained 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 above referred 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.”

9. Applying the aforesaid well settled judicial principles explaining the concept of deputation, even shifting of an employee outside the cadre may be under the same employer, would also amount to deputation. Unless the law otherwise provides, an employee could not be sent outside his cadre without his consent.

10. The argument of learned State counsel based on reading of Rule 110 of Fundamental Rules is also liable to be rejected. This aspect was also considered by this Court in the case of **S. S. Kanwar** (supra) and it was held:

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.”

Attempt made to support the impugned transfer order on the submission that the Divisional Forest Officer of the Division happens to be an Ex-officio Managing Director of the Chhattisgarh State Minor Forest Produce Federation, does not help nor does legalize the impugned transfer order. Even if it is accepted that the Divisional Forest Officer has been made as Ex-officio Managing Director of the Chhattisgarh State Minor Forest Produce Federation, sending the petitioner outside his cadre to the Federation, would certainly amount to deputation. The controlling authority of the Federation being a Cadre Officer of the Forest Department in the Cadre of Divisional Forest Officer does not mean that an Officer in the cadre of Deputy Conservator of Forest could be sent outside his cadre without his consent.

11. In view of above, it is clear that the impugned transfer order is illegal. Other two grounds which have been raised by learned counsel for the petitioner, in these circumstances, need not be answered.

12. In the result, the petition is allowed and the impugned transfer is hereby set aside.

SD/-
(**Manindra Mohan Shrivastava**)
Judge